VOLUME 24

COLLECTION LATINE

Simon Bezat

The concept of authority in the arbitral paradigm

The legal philosophy of international arbitration, its crisis of authority and the hermeneutical path forward

Helbing Lichtenhahn

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COLLECTION LATINE

fondée par Marco Borghi et Nicolas Queloz, professeurs émérites
de la Faculté de droit de l'Université de Fribourg

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Helbing Lichtenhahn

Pour cette thèse, rédigée sous la co-direction de la Professeure Eva Lein et et du Professeur Alain Papaux, l'auteur a reçu le titre de Docteur en droit de l'Université de Lausanne avec la mention *summa cum laude*.

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À Jeanne d'Arc Forest Powell
À tous les étudiants de mon groupe
de méthodologie
À tous les docteurs et doctorants questionnant
les fondements du droit

Il faut que celui qui s'adonne au travail du droit sache d'où vient le nom de droit. Il a été formé à partir de justice, car comme le dit finement Celsus, le droit est l'art du bon et de l'équitable.

Ulpien, Digeste 1. 1. 1. pr.

"Ecrivez filosofie ou philosophie, comme il vous plaira; mais convenez que dès qu'elle paraît elle est persécutée. Les chiens à qui vous présentez un aliment pour lequel ils n'ont pas de goût vous mordent".

Voltaire, entrée "Philosophie" du dictionnaire philosophique

Luffy: *"Tu connais pas le dicton? 'Quand on a faim, il faut manger!'"*
Usopp: *"Arrête d'inventer des citations quand ça t'arrange!"*

尾田栄一郎, One Piece, tome 19, chapitre 162

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Ainsi fait à Prangins, Lausanne et Genève, mai 2023

Simon Bezat

Table of abbreviations

AAA	American Arbitration Association
AAF	American Arbitration Foundation
ANC	African National Congress
Art.	article(s)
ASA	Arbitration Society of America
ASA	Association suisse d'arbitrage
ATF	arrêt du Tribunal federal suisse
BC	Before Christ
BP	British Petroleum
c.	considérant
CAM	Camera Arbitrale di Milano
CAS	Court of Arbitration for Sport
CC	code civil
cf.	confer
chap.	chapter
CHF	Swiss franc
CO	code des obligations
Co.	company
Corp.	corporation
Covid-19	Coronavirus disease of 2019
CPC	Code de procédure civile
ECHR	European Court of Human Rights

e.g.	exempli gratia; for example
et al.	et alii
etc.	et cetera
EU	European Union
EWHC	England and Wales High Court
FAA	Federal Arbitration Act
fasc.	fascicule
FIFA	Fédération Internationale de Football Amateur
FINMA	Finanzmarktaufsicht
FTA	Federal Tribunal Act
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
i.e.	id est
Inc.	incorporated
IPCC	Intergovernmental Panel on Climate Change
LCIA	London Court of International Arbitration
let.	letter
LLC; L.L.C.	Limited liability company
Ltd.	limited
no.	number
p.	page
pp.	pages
PAC	Pan Africanist Congress
para.	paragraph(s)
PhD; PhDs	Philosophiae Doctor
PILA	Private International Law Act
RS	Recueil systématique
s	and the following page
ss	and the following pages
S.A.	Société anonyme

Sàrl	Société à responsabilité limitée
SASO	South African Students' Organization
SCAI	Swiss Chambers' Arbitration Institution
SCC	Supreme Court of Canada
sect.	section
St	saint
TBP	to be published
U.K.	the United Kingdom; from the United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	the United States of America; American
USD	United States dollar
v.; vs.	versus
vol.	volume
WTO	World Trade Organization
§	paragraph
§§	paragraphs

Table of content

Acknowledgements IX

Table of abbreviations XIII

Bibliography XXIII

General introduction 1

The peak of legal esoterism 3

Methodology, limits and interdisciplinarity 4

Theory and practice 7

Sources of inspiration 9

The way forward 10

Part 1: A tentative genealogy of arbitration. Understanding the upcoming developments on international arbitration 13

Introduction 15

I. Arbitration in ancient Greece 19

1. Mesopotamian introduction 19

2. Ancient Greece 21
   A. Legendary beginnings 21
   B. Private and public arbitration 23
   C. Intercommunal arbitration 26
      a. A chronology 26
      b. Procedural aspects 31

3. The Greek conclusion 35

II. International and internal arbitration in ancient Rome 39

1. International arbitration 39

2. Internal arbitration 42
   A. Some incursions in Roman Law 43
      a. Before *bona fides* 43
         (i) Arbitration by *iudex* 43
         (ii) Arbitration by *bonus vir* or by *dominus* 45
      b. *Bona fides* 48
         (i) *Actio arbitrariae* 48
         (ii) *Arbitria bonae fidei* 49
      c. The main influence on modern arbitration: the *arbitrium ex compromisso* 50
         (i) The *compromissum* 51
         (ii) The *receptum arbitri* 53
   B. Procedural and less procedural aspects 54
      a. The publicity of the award 54
      b. An introduction to equity 56
      c. Appeals 64
      d. Comparative Law regarding appeals against awards 65

3. Roman conclusion 67

III. Arbitration in the Middle Ages 75

1. A quick introduction 75

2. In general 76

3. The causes of the blurring between state and private matters 77
   A. The use of arbitration by the Roman Catholic Church 77
   B. The use of arbitration by newly formed communities 80
   C. The use of arbitration in feudal societies 84
   D. Personal addendum 86

4. The types of arbitration 87
   A. Papal arbitrations 88
   B. Arbitrations involving partly sovereign public entities 91
   C. Arbitrations involving sovereign public entities 93
   D. Private arbitration 95

5. The rapprochement between arbitration and mediation 97

6. Oaths 100

7. Conclusion to the Middle Ages 101

IV. Arbitration in the early modern period 107

1. In general 107

2. In France 108

3. In England 111
A. Elizabeth I of England 111
B. James VI of Scotland (1567 to 1625), James I King of England and Ireland (1603 to 1625) and his descendants 114

4. In the United States of America 115

V. The late modern period 119

1. A few general observations regarding the 19th century and the events which laid the groundwork for the arbitration trends of the 20th century 119

2. The professionalization of arbitration, towards technocratization 125

3. Arbitration institutions, the telling case of the ICC 130
A. The beginnings 130
B. The ICC through the Great Depression and World War II and a glimpse of arbitration in the latter half of the 20th century 133

VI. Historical conclusion. Legal and political fluctuations, philosophical consistency and lessons drawn from history 137

Part 2: The concept of authority 143

Introduction to authority 145

I. Etymology 149

1. A plea for etymology 149

2. The etymology of authority 151
A. *Augeo*, to augment 151
B. *Augur*, the religious *auctor* 151
C. *Auctor* and *auctoritas*, author and authority 153
D. *Sacer* 155
E. Etymological conclusion 156
F. Authoritarian and authoritative 156

II. Rome and the opposition between *auctoritas* and *potestas* 159

1. Introduction 159

2. Concerning Augustus 161

3. *Auspicium*, the sacred aspect of power and authority 165

4. The secular *auctoritas* 171

5. *Imperium* and *potestas* 177
A. *Imperium* 178
B. *Patria potestas* 182

6. Conclusion to the Roman genealogy 186

III. The fall of authority during Modernity and the contemporary questioning of the modern conception of authority 191

1. Introduction 191

2. Modernity's error 200

3. Ramifications of those modern misgivings 215

4. Hannah Arendt, the first open critic of Modernity's authority and the partial comeback of the Roman *auctoritas* 228
A. Introduction 228
B. The Arendtian presentation 229
a. In general 229
b. The modern confusion leading to the crisis of authority and excesses of power 234
C. The defects of the Arendtian vision 238
D. The Arendtian conclusion 248

IV. A concrete case of authority: the dread of South African apartheid and Nelson Mandela 251

1. An Afrikaner point of reference: Daniel Malan 251

2. The sharp contrast of Nelson Mandela 253

3. South African conclusion 258

V. Authority in legal philosophy 261

1. Before the concept of authority: a quick introduction to the concept of common good 261

2. The legitimacy, validity and effectivity of authority in light of the three-dimension theory of Law 268
A. General aspects of Miguel Reale's three-dimension theory; the central concepts 268
B. The validity pole 272
C. The effectivity pole 275
D. The legitimacy pole 280
E. The interactions between the three poles: what place for the concept of authority in the three-dimension theory of Law? 285

3. A brief analytical take on authority 292
A. General disclaimer and a word of caution 292

B. Building and discarding analytical thoughts on authority 294
a. The intellectual matrix 296
b. Other elements 298

4. In general 308

5. The case of arbitration 313
A. A historically comparative overview of the contemporary situation of arbitration 313
B. The most recent developments in the genealogy of international arbitration: towards technocratization and away from authority 318
a. The general context after World War II 318
b. The post-World War II actors 320
c. North America joins the fray 324
d. The era of technocratization 328
e. The latest addendum to the technocratic era? 337
C. The crisis of authority in international arbitration 339
a. In general 339
b. Distinctions between the common good and certain notions linked to international arbitration 353
c. Commutative and distributive justice 356
(i) The basics 356
(ii) In the arbitral paradigm 367
d. The authority of the arbitral interpreter: distributive justice through equity 374

VI. General conclusion on authority and hermeneutical transition 385

Part 3: The hermeneutical sketch of possible solutions 389

Introduction 391

I. Arbitral authority: a restoration through hermeneutics and equity? 393

1. The general problem 393

2. A quick overview of hermeneutics 396
A. General disclaimer and some of the unfeatured problems and concepts . . 396
a. The genealogy of hermeneutics and comparative hermeneutics 396
b. Hermeneutical controversies 397
c. Methods of interpretation 398
d. Interdisciplinarity, semiotics in particular 399
B. Selected useful definitions 400
a. Normative hermeneutics 400
b. Vorverständnisse 403
c. Philosophical hermeneutics 418
d. Analogical reasoning and abduction 426
e. Intertwinement 429

II. Hermeneutics and equity: exiting legal positivism to restore arbitral authority 437

1. Introduction 437

2. The myth of the flexibility of contractual positivism: equality is not justice, merely the substrate of commutative justice, itself a seldom occurrence of distributive justice 438

3. Arbitration's paradoxical lack of flexibility, both legal and philosophical, and a potential way forward 467

4. Philosophical hermeneutics to understand the common good, equity to reach it 477

5. Gathering thoughts on the relevance of philosophical hermeneutics 486

6. The argument from authority, where do we stand on hermeneutics and authority's crossroads? 489

III. Hermeneutical conclusion 501

Conclusion 507

Synthesis 509

Paradigm shift: the impact of atomization and the collective human *ergon*. What way forward? 521

Bibliography

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General introduction

The peak of legal esoterism

The beginning of this doctoral journey is not something we could easily pinpoint, for it is the consequence of many discussions, courses, travels and interactions in general. The moment when, probably, we felt the first blossoms of a doctoral project start blooming, was during our Master's course on international arbitration from 2015, where we do not entirely remember how many times we politely and respectfully asked ourselves the following question: "what the hell?".

Arbitration was not once mentioned during our Bachelor's degree, and the little we knew about it was related to sports, in particular the infamous moment when Uruguayan striker Luis Suarez bit Italian defender Giorgio Chiellini at the 2014 FIFA World Cup, which ended in front of the *Tribunal arbitral du sport* in Lausanne. After asking a few questions around to professors and attorneys, we realized how esoteric arbitration really was and that the only way to penetrate the field was to do so via people who were already on the inside, our own professor of international arbitration in our case.

The first shocking revelation came under the guise of an arbitrator's fees, paid for directly by the parties whose very fate was in their hands. Thanks to our training in legal philosophy, we knew full well that notions such as impartiality and objectivity were overinflated and often false, but this reached a stage we were not expecting.

The most surprising aspect of international arbitration, however, was the extent to which parties could pick and choose the applicable Law, selecting parts of international conventions and mixing them up with a national Law with no ties to any of the parties. This is when we learned how often Swiss Law was used for

cases involving the transportation of fossil fuels between multiple countries and companies, none of which were Swiss. This went against what the most flexible internal legal field in Switzerland, private international law, taught us, especially through the notions of *Binnenbeziehung* and the prohibition of forum shopping. Further along, we read certain doctrine authors who advocated that international arbitration should be able to dismiss international *jus cogens* as the parties and arbitrators saw fit, which remains perhaps the most incomprehensible reasoning we have read in the field, especially for people like us who have lived their entire lives in an extremely international and diverse environment.

This chain of events led us to become more intrigued than we had ever been regarding a legal field (with the notable exception of legal philosophy), and despite our success at the final exam, we were left with more questions than answers after an entire semester's worth of study. As international arbitration started twisting and turning inside our head, the aforementioned notable exception would provide us with a very welcome intellectual relief to help us start making sense of international arbitration. Unsurprisingly given the title of this dissertation, legal philosophy was and remains the most intriguing legal field we have come in contact with, and it has provided us with an entire intellectual apparatus to apprehend the nebulosity of international arbitration.

Summarily, this dissertation is divided into three parts. Part 1 lays out a tentative genealogy of arbitration, looking at its evolution over the course of the centuries, mainly in Europe, but also in North America. This arbitral genealogy will not, however, be completed in part 1 but in part 2, where the notions introduced regarding the concept of authority will prove decisive in our understanding of the trajectory of arbitration since World War II. Part 2 thus consists of a second genealogy, that of the concept of authority, before operating the junction between both genealogies and analysing the state of authority in present-day arbitration. Finally, part 3 will attempt to lay out what we consider to be our best shot at making it out of arbitration's authority crisis i.e., hermeneutics, the science of interpretation.

Methodology, limits and interdisciplinarity

In this context, the field of legal philosophy we have chosen to set the pace and methodology of our dissertation is philosophical hermeneutics. As we will see at length in part 3 *infra*, philosophical hermeneutics, among many other things,

consists in the comprehension of the context. In our case, we are talking about the contexts of both arbitration and authority, the latter being the main concept used to shine a light on the former.

To comprehend these contexts implies a history, a genealogy of arbitration and authority: to understand the present, we must understand the past. To grasp whether there really is a predicament with arbitration and the way it is currently construed, we must imperatively take these steps or risk floating in an ether of in-betweens for lack of both knowledge and context. In other words, part 1 of this dissertation will trace the historical steps of arbitration and lay down the axis and factual elements around which the rest of the dissertation will revolve.

Studying the history of arbitration is a clear necessity if we are to understand the arbitral paradigm. Limiting ourselves to the present, the current state of said paradigm, makes us an easy prey to the present dominant doctrines and points of view; essentially *un manque de recul*.

To be clear, this is not a work of legal history and it has no pretension to exhaustivity on this front. What interests us is not to draw a list of every technical change in occidental arbitration for the past 2'500 years, but to understand the general evolution of arbitration in order to grasp the current state of affairs in the arbitral paradigm. How and why did we end up with this incredibly discreet behemoth? What axiological change did this evolution bring about, if any?

In typical doctoral dissertation fashion, the steps taken will not be linear, but circular, going back and forth between concepts and notions, between the three parts of the dissertation. Certain aspects of the genealogy of arbitration will thus feature in the concept of authority (part 2), given that these aspects need to be analysed through the prism of authority. Such is especially the case with the post-World War II era, an era during which the concept of authority became legally, philosophically, epistemologically and politically essential to grasp the issues currently plaguing the arbitral paradigm.

Consequently, the genealogy of arbitration laid out in part 1 shall be "amputated" of its last 60-70 years, which will thus feature in part 2 and analysed in tandem with a fleshed out concept of authority. Although this may indeed disrupt the fluidity of part 1, we are vehemently convinced that the post-World War II era of arbitration requires a thorough understanding of authority, if only because it is the single most important concept to apprehend the past, present and future of arbitration.

This implies that conclusions and hypotheses are emitted little by little, through the course of this two-fold genealogy, adding more ideas and notions as the plot moves along.

These developments and hypotheses, like arbitration, are neither static nor monolithic, hence why their apprehension in legal philosophy cannot be done through rigid concepts, in particular if we are to avoid superficially browsing through a catalogue of technical notions. This is precisely why the concept of authority was retained for the present analysis. This need for flexibility also justifies the use of interdisciplinarity to answer certain questions where pure legal knowledge would be insufficient. Our own conception of interdisciplinarity, however, precludes us from abusing it, because in order to conduct a complete interdisciplinary study, one needs a minimal degree of mastery of all fields involved and invoked.

The lack of expertise in areas outside of Law (and philosophy to a smaller extent) has been both a curse and a blessing. The curse is obvious: we sincerely wish we could have developed such matters further still, through an accrued use of sociology, anthropology, ancient Greek and Roman cultures, comparative hermeneutics, etc. The blessing is more sibylline and is directly related to the essence of the PhD. A PhD firstly consists in augmenting an academic discipline through intensive research, and hopefully helping, even a little, in the pluri-millennial construction of giant intellectual edifices. To do so requires, among other capacities, the ability to synthesize, and even more overarchingly, to decide, often through more or less agile uses of Ockham's razor. This is where the blessing aspect comes into play: by putting the PhD candidate in front of very tangible limits, interdisciplinarity forces them to renounce certain themes which may have otherwise beaten the razor. This is admittedly not a very pleasant blessing, but a useful one nonetheless, especially to accentuate one's modesty and point out where one can better themselves.

Consequently, and over the course of the dissertation, we will regularly point out aspects or ramifications of the field purposely left out and explain why we chose to do so. What usually guides our choices is the degree of usefulness with regard to the thesis developed hereafter, for its comprehension. For instance, and although it would insert itself very well in the chapter, the developments on authority during the Middle Ages are somewhat occulted for the reason that they are not necessary to understand why authority has been a victim of the twist that saw it evolve from

one of occidental society's most important virtues to one of its most reviled. These medieval developments do not "advance the plot", so to speak, although their study would have unquestionably been fascinating.

Theory and practice

Mainly focused on legal philosophy, this dissertation is obviously more concerned with fundamental theoretical reasonings than the pure practice of international arbitration, although references to it are clearly necessary. Our purpose is not to be a convenient guide for practitioners, but to question the institution of international arbitration, in addition to rehabilitating the notion of authority and further confirm the importance of philosophical hermeneutics.

This distinction between theory and practice stems from a personal conception of the PhD in Law, which is, in our view, not supposed to be a compilation of data, court decisions and legal texts. These are obviously used over the course of a PhD, but simply as a means to an end, never the end itself. Data is never neutral nor objective, merely representing one side of a story, frequently hiding more than it is showing, intentionally or not. Furthermore, PhDs whose profound purpose is to serve practitioners are, in actuality, manuals or handbooks, not PhDs, and fulfil less stringent intellectual requirements. The time when a PhD is being written is the best moment for scholars to question certain dogmas, some of which guide the entire train of thought of practitioners.

In the case of many jurists, this is illustrated by a strong subservience to positivism, its shape notwithstanding, from the insurance jurist to the elite of academia. Questioning this subservience, and more broadly, the positivist doctrine, requires criticism and meta-criticism of the field, to prove and disprove notions and concepts via extra and meta-legal research.

All in all, the purpose of a PhD is academic, not practical, which is why replacing academic research with practical and useful research does not augment academia. A PhD which could have just as well been written under the form of a long article or a student memoire should not be representative of the highest level of academia. By firmly rooting this dissertation in fundamental legal theory, we openly and consciously chose to go beyond what could be of service to the practitioner. We have yet to practice international arbitration and would therefore have but a very limited credibility to address their queries directly.

What we can do, however, is develop a meta-view of international arbitration, one practitioners often struggle to grasp given their proximity to the concrete problems of arbitration. To be clear, we are absolutely not denigrating practitioners, merely underlining that our purposes differ from one another: this work is academic and aims at augmenting arbitration, differently and complementarily to their work.

The current literature on international arbitration as seen through the lens of legal philosophy is close to non-existent. The closest essay on the matter is Gaillard's, which contains but a minuscule fragment of philosophy, mostly misunderstood[1].

In order to avoid falling into the same trap as him, our developments on philosophy exceed those on international arbitration, for the simple reason that the central concept of this dissertation belongs to legal philosophy: authority, which is both undervalued and widely misunderstood, even in its most basic conception, by many jurists and philosophers alike. Given that any legal-philosophical comprehension of international arbitration necessitates philosophical concepts, most of the energy spent hereafter shall thus be directed at legal-philosophical concepts rather than pure arbitral technique.

For instance, the notion of common good is one to which we will frequently allude. Extremely hard to define and seldom seen in legal technique, we will attempt to circumscribe it in what is perhaps the most "free-floating" of all fields of Law (international arbitration). In these circumstances, this concept would be nearly impossible to outline without resorting to a fundamentally theoretical approach, especially given how hard it is to pinpoint, to "locate" the arbitral common good.

This approach, which resolutely embraces a theoretical mindset, will undoubtedly disorient those used to traditional writings in arbitration. However, we firmly believe that doing so is necessary for this dissertation, just as this undertaking is beneficial for international arbitration.

Analysing international arbitration through those means is our best bet to grasp the heart of arbitration, whose sphere of influence would surprise many seasoned jurists. Obviously, the apprehension of the entire phenomenon is not doable in a single dissertation, but doing so through legal philosophy will undoubtedly provide new answers to certain questions which have remained obscure, even unasked.

[1] Cf. *infra* part 2, V.

Sources of inspiration

Conducting this work was never going to be the task of a single person, and as part 3 of this dissertation concerning hermeneutics explains, we are simply the latest – and smallest – addition to the list of Aristotle's inheritors. Other than those from whom inspiration was directly drawn, and whose work and intelligence will be saluted throughout the following pages, there never was any particular intent to insert ourselves in a specific current of legal philosophy.

More than the Aristotelian current, our main source was Aristotle himself, whose vision of legal philosophy has remained relevant for millennia due to its dynamism, flexibility and adaptability. His pragmatism can truly be considered a philosophy i.e., a prism through which we can view every aspect of life, drawing and applying a wisdom whose value goes well beyond knowledge, although the latter is the bedrock of the former according to some of the greatest minds in western culture, his master Plato included. The problem with Aristotelian pragmatism is that it is very complex, to the point where formulating general rules becomes exceedingly difficult, strongly highlighting how small our intellectual existences and capacities are. Flexible to the extreme, it often appears daunting to neo-cartesian minds with a fondness for rigorous rules of the "black or white" variety.

The methodology of this dissertation is Aristotelian in mindset in the sense that it accepts and runs with the idea that contingency is prevalent in Law, and even more so in international arbitration. This means that among all practical legal fields, the weight of axiology is heaviest in international arbitration, which is why authority is used as the main criterion of analysis: it gives us a shot at measuring this axiology.

Additionally, we will frequently refer ourselves to Gadamerian hermeneutics. The driving force behind part 3, the philosophical hermeneutics developed by Hans-Georg Gadamer consisted in the heavy usage and comprehension of the context. Very Aristotelian in his approach of language and just as aware as the Stagirite of the contingency inherent to human life, Gadamer created – or discovered – an evolutive structure capable of apprehending immense numbers of situations. Accordingly, the apprehension of a situation requires the comprehension of its context. In our case, this means understanding the context of arbitration and authority through their genealogies.

Establishing this dual genealogy allows us to proceed with more ease and better seize the various articulations linking them to other less central problems and

concepts used throughout this dissertation such as positivism, individualism, hermeneutics, commutative justice, the common good, etc. The heavy use of history in a dissertation on legal philosophy may seem like yet another attempt to dilute the field, but far from being the case, it is necessary to see how intricate and legion the links between all aforementioned concepts are, especially when their analysis has often been done separately. Philosophy is closely knit to knowledge, but its final cause and foundation are wisdom, and it would, in our opinion, be wise to draw knowledge from various sources rather than overfocusing on specialized ones.

From a more personal perspective, we owe much to the Brussels school of legal philosophy, whether true citizens or temporary guests of the Belgian capital. This school's first well-known representative was Chaïm Perelman, who was succeeded by a score of great scholars such as Ost, Frydman, Papaux or van de Kerchove. Without digging just yet into what they brought to legal philosophy in general, their insistence on the importance of language in Law was crucial to our personal legal education, in addition to helping us comprehend some of the foundational defects of contemporary Law and legal philosophy.

Their re-evaluation of the link between language and Law largely draws inspiration from ancient Greek legal philosophy and their own understanding of the place of language and rhetoric in Law. More importantly, the Brussels current furthers the mindset of ancient Greek philosophers, which always viewed Law under the prism of interdisciplinarity. Plato, Aristotle et al. were indeed very conscious of the transversality of Law, that isolating Law to analyse it from a purely technical standpoint made no sense, for it would render absolute an intrinsically relative discipline, forcing us to juxtapose concepts rather than articulate them.

The way forward

This doctoral dissertation will be divided into three parts. Part 1 is the genealogy of occidental arbitration, whose purpose is to understand what is arbitration and how it became what it is today. It will feature both aspects of international and internal arbitration. The lessons drawn from the history of arbitration are put to use throughout the remainder of the dissertation. In particular, we will see that contemporary arbitration is a historical anomaly for multiple reasons, some attributable to it and others related to the societies wherein it is currently anchored.

In any case, going through the history, the genealogy of arbitration will constitute the basis of the following legal-philosophical developments and musings.

However, this genealogy will not be completed in this first part, and the reason is that the analysis of the last decades of international arbitration shall be conducted under a prism more representative of the heart of this dissertation. As such, the end of the arbitral genealogy will be detailed at the end of part 2 on the concept of authority, after said concept has been fully explained, through its own genealogy and our own evolutive interpretation.

We will then connect parts 1 and 2 in order to illustrate the current problems of authority in international arbitration. It is at this point that the genealogy of arbitration shall be clinched, with the juncture of both themes finally laying out the central problematic of this dissertation i.e., the present and unauthoritative state of international arbitration.

This "authority" we are referring to has little to do with the "competent authority" we typically think of in Law. It is somewhat more related to the "professorial authority" we sometimes hear in various fields of academia. The authority we will be mentioning throughout this dissertation is not quite the same as this epistemic authority for reasons mentioned in part 2. Authority, that of arbitrators in particular, has a strong moral and societal dimension to it. Ultimately, this is what we consider arbitrators to be thoroughly lacking in, as we will demonstrate in the latter half of part 2.

This will lead us to our third and final part, which scrutinises interpretation, hermeneutics in particular, displaying what we consider to be the main path to solving the aforementioned problematic, raising a few other issues in the process.

Hermeneutics is the art (or science) of interpretation, whose usage has seen a revival over the course of the 20th century. Part 3 of this dissertation focuses on the Gadamerian current of hermeneutics, philosophical hermeneutics, in order to solve the impending crisis of authority in international arbitration.

This final part is unquestionably where we grapple with the highest number of limits of all sorts: time, space, knowledge, language deficiencies, etc., which has proven both very instructive and very frustrating. In other words, a very "PhD-ish" feeling …

Part 1: A tentative genealogy of arbitration. Understanding the upcoming developments on international arbitration

Introduction

Before starting, we would like to issue a word of caution. The core of this work is not the history of arbitration. We have therefore no pretence to any kind of historical exhaustivity, and we have no doubt that other scholars could do it better justice.

The objective of this historical part is to provide a canvas, an entry point to a bigger, wider hermeneutical circle whose most important aspects shall be developed in parts 2 (the concept of authority) and 3 (the hermeneutical sketch of possible solutions) *infra*. Our reason for doing so is quite in line with Gadamer's philosophical hermeneutics, which implies acknowledging one's own *Vorverständnisse* (pre-knowledge, prejudices[2]) on a matter in order to craft the best possible interpretation of said matter. More broadly, philosophical hermeneutics implies the genealogical comprehension of the concepts we use, to know from where they come in order to know what they are now and, with a bit of abductive reasoning[3], see where they might be going, hopefully.

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[2] Throughout the entirety of this dissertation, our use of the term "prejudice" will directly refer to the concept of *Vorverständniss*, which reflects all the knowledge that influences us in our interpretation (cf. *infra*, part 3, II, 2, B, *b* for a complete definition). Unless specifically stated, the term "prejudice" will not refer to the prejudice (damage) suffered for instance in a car accident that must be financially compensated. It will also not refer to the commonly accepted idea that prejudices are discriminatory (cf. *infra* part 3, II, 2, B, *b* where we give a full explanation on the matter, especially on the difference between bias and prejudice).

[3] The abductive reasoning or abduction, is a type of logical reasoning (similarly to deductions for example) which consists in testing a hypothesis by using clues. For instance, this is how police inspectors generally function: they emit a hypothesis (XYZ is the murderer) and they test it through clues (footprints, alibis, motives, etc.). As such, when using the verb "to abduct", we will be referring ourselves to this logical reasoning

In our case, this means understanding one legal institution and one legal-philosophical concept: arbitration and authority, which will be the focus of parts 1 and 2 respectively. Arbitration is the target of an increasingly critical literature, with scholarly opinions widely diverging depending on each person's sensitivity to the field. Given the current circumstances, it is all the more important to have a historical vision of what arbitration has been in occidental countries. This approach will also be critical, but rather than falling prey to our own prejudices on arbitration and authority, whether good or bad, it seems preferable to know the context in which we are trying to insert ourselves.

Two such genealogies are immense and each could easily fill a single doctoral dissertation on their own. However, our aim is to establish what arbitration and authority are, sufficiently that we can manipulate both and establish links by looking at the overarching implications. We are therefore not going to begin their genealogies under the pretence of exhaustivity, which will ever remain elusive for it implies a perfection we are inherently incapable of. Instead, we will be making choices throughout this dissertation, sometimes axiological, sometimes logical, to discard certain elements whose analysis, without being pointless, is not necessary to understand the general matter. These choices have frankly been painful at times, for they imply making a distinction between what is necessary and what is important in order to discard the latter.

Concerning this first part on arbitration, our analysis will focus on general trends rather than the specific evolution of legal texts and technical details, which would not be the most adequate for a legal-philosophical analysis. We are firmly convinced that history of Law is not limited to the analysis of the changes a text of law sustains over time, but explains the evolution of entire fields of Law and their links to other parts of society. This requires an accrued usage of our own interpretative prism rather than simply observing semantical changes in legal texts and drawing strictly technical conclusions from them.

Consequently, we will not focus on internal or international arbitration, on commercial or investment arbitration. Instead, we shall try to draw the overall narrative of the arbitral institution as a whole. Cutting the field into pieces, especially one so varied and shapeshifting as arbitration, implies thinking that the

and not to the idea of kidnapping someone or something. Cf. *infra* part 3, II, 2, B, *d* where we analyse this concept in more details.

evolution of arbitration has been neatly done, that the wide variety of arbitral domains are juxtaposed.

The best example justifying this approach is ancient Rome. So powerful was she that the use of international arbitration was drastically reduced during her heydays, and for a simple reason: what she wanted, she only needed to conquer by force, without compromise. However, arbitration thrived internally, an arbitration which heavily influenced the field and is still largely used to this day on the international scene. This is a prime example of internal arbitration influencing international arbitration, and a good proof that limiting ourselves to rigid categories and genealogies of the field may not be the best way forward.

In lieu of a monochrome painting, internal and international arbitration have influenced one another, ever since we have been able to find traces of them, drawing a vibrant picture of a field whose dynamism needs to be acknowledged and saluted. This is why, instead of focusing solely on one or the other aspect of arbitration, the objective of our analysis is to exhume the most helpful facts, not only to an overall historical comprehension of the institution, but also of its philosophical underpinnings, something which would have been impossible had we conducted a strictly positivist historical analysis of arbitration, placing its various elements in separate boxes and limiting ourselves to textual evolutions.

Although this methodology might confuse the more rigid legal historians, it allows us to build bridges between legal history and legal philosophy. This latest element is important to keep in mind when judging the weight and value of our historical work, especially considering the increased difficulty of the task vis-à-vis the analysis of the evolution of legal texts, which is the dominant methodology in legal history nowadays, judging by all our readings over the course of these past five years.

While there are signs that arbitration existed in ancient Mesopotamia and Egypt, they are quite uncommon: arbitration only really took off in Greece and was then further expanded by the Romans. Despite the fact that ancient Greece and Rome were composed of a variety of people, the way they practiced arbitration renders the analysis a little more straightforward than after the fall of the Roman Empire.

During the Middle Ages, it becomes difficult to analyse the rich and fragmented body of Laws and customs without losing sight of the purpose of this historical analysis. The scarcity of surviving written sources as well as the overwhelming importance of medieval oral customs are also obstacles. However, the biggest difference between medieval and ancient Greek and Roman arbitration is variety:

legal traditions, people, languages, etc. Moreover, ever-moving boundaries and endless wars rendered the peaceful settlement of disputes during the early Middle Ages even more chaotic. We will therefore not make a country-by-country analysis of arbitration in the Middle Ages in Europe, nor will we portray it with the utmost minutia for each century as a lifetime would prove insufficient.

The legal-philosophical consequences drawn from this historical analysis are important for this work as they will allow us to answer certain fundamental questions: why was a parallel justice system created? Around which concepts does arbitration revolve? Have said concepts evolved during the course of history or did they remain the same, but under different shapes? Using historical data and a legal-philosophical prism, will we be able to understand what arbitration holds for us in the future?

Regarding languages, we try to present as honest an account of what arbitration implied during the various periods we survey. Likewise in parts 2 (The concept of authority) and 3 (The hermeneutical sketch of possible solutions) which are resolutely more focused on legal philosophy than part 1 (A tentative genealogy of arbitration), we will try to be as thorough as possible regarding technical terms and the linguistic differences between their denominations, especially in French and English. Regarding arbitration, it is crucial to keep in mind that it was not always what we consider it to be nowadays, which is certainly one of the many interesting aspects of a historical analysis. Even today, there is no unanimous doctrine in terms of the definition given to international arbitration, in particular what it implies or should imply from a legal, political or sociological standpoint. As Javolenus Priscus said, *"Omnis definitio in iure civile periculosa est; rarum est enim ut non subverti potest."*[4]

[4] Javolenus, Digest 50.17.202. Free translation: "Any general definition in Law is perilous; rare are the ones which cannot be subverted."

I. Arbitration in ancient Greece

1. Mesopotamian introduction

Contrary to what early 20th century specialists thought, arbitration did not originate in ancient Greece but in Mesopotamia[5]. However, the difficulty of accurately tracing Mesopotamian arbitration means that little is known on the matter: peremptory statements are thus even harder to make than for other eras of the history of arbitration. Described by only a few tablets, the main historical influence on contemporary arbitration remains the Greco-Roman arbitration processes.

Territorial conflicts were usually not arbitrated but judged by a ruler of a country more powerful than that of the litigants. Given that relationships between states were ruled by bilateral treaties, boundaries were often set therein by the more powerful ruler of the signatory states[6].

There are however cases in which judge-instating bilateral treaties did not exist, which could indicate the use of arbitration. The most famous case, thought by some to be the oldest arbitration case ever recorded, involved Umma and Lagash (4000 BC, 3200-3100 BC or 2500-2350 BC depending on the source, though the most recent dates are more plausible[7]) who, for 150 years, went to war against each other for a water source situated in Umma. Lagash was victorious but the boundaries between Umma and Lagash were drawn by Mesalim, King of Kish. Of course, Lagash's win on the battlefield was reflected on the new map, but the intervention of the king of Kish was a request which emanated from both parties. Many factors made Mesalim the best choice to be the arbitrator: he was the authoritative ruler of a culturally and politically important city, which gave him

5 Lafont p. 557; *contra* de Taube pp. 12-13; Politis p. 24; Tod p. 170.
6 Lafont pp. 564-565.
7 De Taube p. 17; Lafont p. 565; Tod p. 170.

the required power, experience and authority to render a fair-enough award in the eyes of both litigants, an acceptable award[8]. According to the surviving documents, Mesalim rendered his award by basing himself on a prior agreement between Umma and Lagash which was said to have been dictated by Kadi, Goddess of Law, who was also dictating Mesalim's award. Lagash and Umma probably had very similar divine beliefs and for Mesalim, having a divine backdrop made his award all the more acceptable by the parties. The first ever arbitration case was therefore a case anchored in divine faith[9].

At the end of the 3rd millennium BC, successive waves of Amorites moved to Mesopotamia, eclipsing Sumerians in numbers. Mesopotamia was thus composed of multiple states with complex ties. The recourse to an overlord to settle inter-state conflicts as a judge was very frequent, but there were cases where a third-party state was chosen to arbitrate. More precisely, the mighty country of Elam was often called upon to act as arbitrator as it enjoyed undeniable military and economic advantages over its neighbours, as well as being the dominant cultural hub of the area. Illustrating the importance of Elam, a conflict between the kingdoms of Larsa and Eshnunna involved a dam built by Eshnunna that prevented Larsa from using its ships for trade. Rim-Sin I King of Larsa threatened his Eshnunna counterpart (Dadusha) to formally reach out to the great king of Elam in order to solve the dispute. The relevant tablet also mentions the well-established procedure of invoking the river God to solve their dispute, which means that reaching out to the king of Elam was not the ordinary way to obtain justice in such instances, but an alternative one akin to arbitration[10].

[8] Lafont pp. 565-568. *Auctoritas* (Latin for authority) is a core concept of this work and is the focus of part 2 *infra*. For the time being, and in order to have a minimal definition in mind, *auctoritas* is the authority wielded by a person or a group of persons not because they are more powerful or superior in hierarchy, but because they are acknowledged as having a high degree of competence and understanding in certain domains. For example, a professor who has taught tax law for 35 years at a prestigious university will have a certain amount of *auctoritas* in the field of tax law because people acknowledge this person to be an expert in their field. *Auctoritas* is traditionally opposed to *potestas* (Latin for power), which is wielded by those relying on strength and power. For instance, a tyrannical dictator controlling powerful armed forces and terrorizing his people will enjoy a great degree of *potestas*, but not of *auctoritas*. Those two concepts are currently regrouped under the sole denomination of authority (falsely as detailed *infra* part 2, II), and usually cohabit with one another but rarely in equal proportions.

[9] De Taube pp. 17-18.

[10] Lafont pp. 571-572.

There are other types of arbitrations which would correspond to contemporary private international law such as arbitrations between merchants of different countries regarding contracts law. Other legal domains like inheritance law or real estate law could also be subject to arbitration, which underscores the broad nature of the institution, particularly its conciliatory nature as it was used to solve disputes before they reached the stage of a full-blown legal conflict[11].

In conclusion, it seems that arbitration was used in private international law, but more frequently in public international law. Mentions of arbitration in Mesopotamian tablets are not manifest and scholars often have to abduct their conclusions. There is no definitive proof that the Mesopotamian and their descendants transmitted this invention to the Greeks. What is clear however, is that traces of Mesopotamian arbitration are scant, which could either indicate that it was not frequently used, that the stone tablets were mostly destroyed or that arbitration's secretive nature was already established, and thus not engraved for all to read. In the end, Mesopotamia may have been the place of birth of arbitration, but it was not the place where it thrived, which is why many experts consider Greece to be the "real" birthplace of arbitration[12].

2. Ancient Greece

A. Legendary beginnings

Similarly to Mesopotamia, the historical sources regarding the archaic period in Greece are scant and historians thus often rely on sources whose accuracy and reliability vary, in particular when using myths and legends, which usually only tell a fragment of what was at the time. According to Homer, arbitration was already a strong-rooted institution by the time the legendary storyteller began his work (8th century BC)[13]. There are many stories in the Iliad and the Odyssey describing elements of arbitration, and even though they are not the most precise, they still carry more than an ounce of veracity. Far from being a pure fantasy storyteller, Homer's depiction of Greece was heavily influenced by what he saw daily in society, and his works provide many examples of arbitration, proof that the institution not only existed but was well alive.

11 Lafont pp. 578, 590.

12 Raeder pp. 1-2; de Taube pp. 12-13; Politis p. 24; Tod pp. 170-171; Westermann p. 198.

13 Velissaropoulos-Karakostas pp. 11-12.

A well-known passage from the Iliad, the description of the shield forged by Hephaestus for Achilles depicts a trial conducted by a *histôr* ("the one who knows") who was very probably an arbitrator. Supporting the *histôr* in his task, the society's elders discuss the case, each giving their opinion and analysis. In front of them, two gold talents, to be given to the elder with the fairest solution to the conflict[14].

A myriad of interpretations has been made of this scene and according to some authors, the gold talents were attributed by the *histôr*, meaning that the arbitrator could not only decide the case, but also had the authority to select the elder with the best solution. Interestingly, the presence of the crowd signifies that neither the *histôr* nor the elders could go against society's best interests, that any type of judgement should be made for the good of the entire city[15].

Even more legendary was the dispute between Hermes and Apollo. While still a child, Hermes had duped Apollo and stolen some of his cattle. After investigating, Apollo discovered the identity of the culprit and brought him to Olympus in front of their father, Zeus King of Gods, to seek justice. Zeus did not play a role other than ensuring that justice would be served as Hermes and Apollo settled their dispute by trading favours and presents without their father's active intervention[16]. If we were to "adapt" this myth to our contemporary society, Zeus effectively acted not as a judge, but as an arbitrator who took his sons' agreement and imbued it with legal existence[17]. Arbitration in ancient Greece aimed to solve disputes, not declare winners and losers. Peace and harmony in the city were always what was most important, there were no conflicts wherein the general well-being was not taken into account[18]. Arbitration therefore included what has now been separated from it: mediation.

Arbitration was a way to maintain social cohesion: arbitrators did not decide a case by basing themselves on rigid texts of law, but by using equity *ex aequo et bono*[19].

14 Homer, Iliad pp. 386-390.

15 Velissaropoulos-Karakostas p. 13; Roebuck, Ancient Greek arbitration pp. 58-61.

16 Graves pp. 96-101.

17 Roebuck, Ancient Greek arbitration p. 92.

18 Velissaropoulos-Karakostas p. 24.

19 Please note that the various definitions of equity are the topic of a specific section *infra* (part 1, II, 2, B, *b)*, wherein we explain more precisely our three definitions of equity. Velissaropoulos-Karakostas makes the mistake of writing that equity did not apply to arbitration and then differentiates equity from solutions leading to equal losses and benefits for both parties (pp. 15-16). She later partially corrects herself through an incomplete

The myth of Achilles' shield also shows us that collegiality already existed. Considered as one of the fathers of Athenian democracy, Solon himself served as arbitrator during the strife opposing the Athenian aristocracy to the rest of society. After arguing for and against each party, he was able to settle the conflict by increasing the prerogatives of the Athenian popular class in politics, going so far as to publicly scold his fellow aristocrats for their greed[20]. Once Solon was granted autocratic power in Athens, he was able to initiate the transition from oligarchy to the historic Athenian democracy through his reforms which included the random draw of judges[21]. Those reforms were the harbinger of the classical period, even though it only formally debuted less than a hundred years later.

Arbitration was not opposed to state justice but a complement to it as both revolved around a cardinal concept of legal philosophy: authority[22], which was considered the authority to take decisions as opposed to the authority to impose decisions. In archaic ancient Greece, arbitration's main objective was to solve conflicts by ensuring that both parties came out of the arbitral process as satisfied as possible, which was done through equity *ex aequo et bono*[23]. Furthering a concept already well established in the archaic period, arbitration in classical Greece has more sources, which allows for a clearer picture of the process.

B. Private and public arbitration

In ancient Greece already, but less so than in ancient Rome[24], arbitration between citizens was secret in nature, the final award included[25]. Given this secretive nature, traces of private settlements are hard to come by, contrary to intercommunal arbitral

definition of general equity given by Aristotle: finding an equitable solution through an award affecting both parties more or less equally (p. 24). There can be no doubt that equity was used in arbitration (Aristotle, Rhetoric no. 1374b), but a concept leading to justice cannot be accurately depicted without mentioning the various types of justices: distributive and commutative. In this case, Velissaropoulos-Karakostas limits herself to commutative justice, which is quite an error given that equity is founded upon distributive justice and that commutative justice is but a mere substrate of distributive justice (cf. *infra* part 2, V, 5, C and part 3, III for more on equity, distributive and commutative justices).

20 Poursat pp. 146 ss.

21 Aristotle, Athenian Constitution 5-8.

22 Cf. *infra* part 2.

23 Velissaropoulos-Karakostas p. 24.

24 Cf. *infra* part 1, II.

25 Arbitration in ancient Greece could either be held in private or in public depending on the will of the parties. Most were done in private, whereby awards were often kept secret (cf. E. Harris).

awards (cf. *infra*). Their importance however leaves no doubt. Plato considered arbitral tribunals to be the most rooted in Law as arbitrators were chosen by both parties, not only meaning that they would be impartial, but also that they would already know of the state of the conflict, implying that they would not waste time getting up to date with the facts[26]. Any conflict resulting from a private convention was subject to arbitration[27]. Going further than contemporary arbitration, Plato was of the mind that even disputes pertaining to family law ought to be settled by the couple's kin in the form of a private trial, similar to an arbitral procedure[28]. Plato also recognized that in case of an unsatisfactory decision by private judges, an appeal to the guardians of the Law had to be possible, but he does not specify whether in front of a state tribunal or a public arbitration court[29].

At the end of the Laws, the Athenian stranger details by whom justice should be rendered: the lower court should be made of people chosen by the parties and its appeal court be composed of judges of tribes and villages[30]. Plato bequeathed us a partial description of Greek arbitration in addition to his own vision of a justice system. He makes it quite clear that private justice through arbitration was well entrenched in Greece, and that he heavily favoured it.

Following Plato, Aristotle gave his own account on arbitration, particularly in his works regarding the Athenian Constitution and rhetoric. Still revolving around authority, arbitrators had to be at least 59 years old[31] because Athenians considered that it was only at this age that one could have the experience and authority to bring conflicting parties together and render an arbitral award, or at least to choose people worthy of the task to whom they could delegate the capacity to decide[32]. In the end, Athenians trusted them to select the proper path to justice no matter the modalities, through equity[33]. Later picked up by the Romans with the same purpose, equity was as important a concept as ever in arbitration. Defined as an institution dealing with acts depending on equity[34] or a lack thereof, arbitration did not make use of

26 Plato, Laws 766d-e, 767a-b.
27 Plato, Laws 920d.
28 Plato, Laws 878d-e.
29 Plato, Laws 766e, 767a-b, 878d-e, 958a-d.
30 Plato, Laws 956c-d.
31 Aristotle, Athenian Constitution 53, 4.
32 Aristotle, Athenian Constitution 53, 5.
33 Cf. *infra* part 1, II, 2, B, *b* regarding the definitions of equity.
34 The term "honesty" is sometimes used in English translations, which is in our opinion a good term to describe part of what constitutes equity.

technical legal concepts, which were the prerogative of state courts. In other words, arbitration's legal foundation was equity, not laws[35].

Greek citizens had full control over the scope of the arbitral trial, which they strictly delimited and their community/city controlled the enforcement of the agreement. Arbitration could never be forced upon citizens who were therefore free to choose between litigation or arbitration. An interesting aspect of this era's arbitration was the binding effect of arbitral awards, a characteristic still found in many contemporary national laws and that resulted in the fact that parties could not file a complaint which had already been solved through arbitration[36].

Contractual disputes and matters of property were common subjects of arbitration, but the number of matters that could be subjected to arbitration was unusually wide historically speaking. Indeed, in one of his most famous legal discourses, Demosthenes argued against Meidias to demonstrate how the latter had acted in bad faith on various occasions, as matters of criminal law could be subject to arbitration in public when the litigation value was higher than 10 drachmae[37]. Ancient Greeks thus allowed crimes reaching a certain threshold to be submitted to arbitration in public instead of criminal courts, which was not shocking given that the criteria to become a public arbitrator were harder to meet than those to become a judge, meaning that there technically was no downgrade regarding the person deciding the case. As seen in the section *supra*, judges were randomly drawn among people of age 30 or more since Solon's reform, whereas arbitrators had to be at least 59 years old in order to have both experience and authority when doing justice through equity[38]. What more, the role of arbitrators was so important that they could be condemned and stripped of their civil rights for giving an unjust decision or for failing to heed the call to act as arbitrator[39].

Other elements of Greek arbitration are reflected in contemporary arbitration. For example, if a party failed to appear in court, the ruling arbitrator had the choice between moving forward with the proceedings or postponing the trial. If the other

35 Aristotle, Rhetoric 1374b; Plato, Protagoras 337e, 338a-b. Cf. *infra* part 1, II, 2, B, *b* regarding a more in-depth analysis of the concept of equity. At this point, it is important to understand that equity is not based on written laws but is part of Law in general.

36 Velissaropoulos-Karakostas pp. 24-25.

37 MacDowell *in* Demosthenes pp. 302 ss. Estimations vary, but 10 drachmae in ancient Greece are considered to be worth roughly CHF 500 nowadays.

38 Aristotle, Athenian Constitution 53, 3-4; Papaux, Introduction p. 62; Cordell p. 26. Cf. *infra* part 1, II, 2, B, *b* regarding the three definitions of equity.

39 Aristotle, Athenian Constitution 53, 4-5; Cordell p. 27.

litigant was present, it seems as though he was consulted in order to determine which option to choose[40]. Another element was the possibility to negotiate a settlement during the arbitral proceedings, which is what happened between Meidias and Demosthenes[41]. The various works and speeches of Demosthenes have allowed historians to abduct three main paths to solving legal problems in ancient Greece: arbitration in private (the most secretive sort where litigants had the most freedom), arbitration in public (with public arbitrators officiating within less rigid boundaries than in civil or criminal litigation) and state litigation tribunals (which picked up many elements of public arbitration, but whose purpose was to do justice by upholding the laws)[42].

Ancient Greeks considered their existence as intimately linked with that of their city, meaning that they viewed themselves as citizens and generally did not act or think as individuals: what they did was for the general good rather than one's own individual benefit[43]. Arbitration was therefore used to maintain harmony in a city, which is most certainly why mediation was a part of it. The idea was not to render a decision which one or both parties would find hard to accept, but to make sure that justice was served to the furthest extent possible for the parties, and more importantly, for the city. This explains why in some cases, arbitrators rendered awards benefiting both litigants, with the "winner" determined as the one reaping the most benefits[44]. According to us, this vision of justice is a very coherent and logical one, particularly when we consider that justice was the idea that allowed a city to live in harmony, which in turn was necessary to reach the Platonic supreme idea, the idea of good[45].

C. Intercommunal arbitration

a. A chronology

Greek city-states often used intercommunal arbitration, but never allowed it with foreign nations. The historical basis of international arbitration thus lies in intercommunal problems between Greek cities and their citizens[46]. It is both

40 Demosthenes 83-85, p. 139.

41 Roebuck, Ancient Greek arbitration p. 235.

42 Roebuck, Ancient Greek arbitration p. 241.

43 Cf. *infra*, as we will revert to this idea a few times still.

44 Roebuck, Ancient Greek arbitration pp. 358-359. The idea of doing justice by striving for a community's harmony rather than by finding individual winners and losers carried well into the Middle Ages (cf. Jacob pp. 69, 188-189).

45 Plato, Republic 519e-520a. Cf. *infra* part 2, V, 5, C, c, *d* concerning the types of justices found in contemporary arbitration.

46 Politis p. 24; Raeder pp. 3-4.

important and interesting to note that there was no single body of Law common to all citizens of ancient Greece as each city had its own Law. There were, however, rules regarding the interactions between Greeks of different cities, and said rules were mostly based on common general principles and ended up being applicable to all Greek citizens, effectively making them the equivalent of our private international law as it ruled relationships between private citizens of different origins[47].

It was this private intercommunal law, the first private international law known to us, which served as the basis for the various intercommunal arbitrations happening throughout Greece[48]. It seems that ancient Greeks eased into international arbitration as a necessity given ancient Greece's composition: tens of sovereign city-states with moving borders and their own armies spread on a hundred square miles of territory that included tens of islands. Most importantly, all of those city-states had their eyes on each other's borders and territory. Hence, peaceful cohabitation was strenuous at best[49].

Given how ancient Greece was fragmented in multiple city-states of comparable military power[50], exchanges of all sorts flourished between cities, be it on a political, economic, philosophical or personal level[51]. Those exchanges were so frequent and the laws put in place to manage them so intricate that their complexity remained unmatched for centuries[52]. According to Max Huber[53], "*Gleichartiges Kultur und gleichartiges Recht, die leichten Seeverbindungen und die Tendenz der Seestaaten zur Anknüpfung von Handelsverbindungen brachten die internationale Rechtsordnung auf eine Stufe, welche* […] *von den westeuropäischen Völkern*

47 De Taube p. 31; Politis p. 24.

48 De Taube pp. 31, 36.

49 Bérard p. 433.

50 Politis p. 25.

51 Those exchanges are best illustrated by philosophers, who used to move not only between Greek cities, but throughout the Mediterranean area. Both Plato and Aristotle are good examples: after Socrates' execution, Plato and other former disciples of Socrates embarked on a journey that would take them all the way to Egypt. Decades later, after coming back to Athens and founding his academy, Plato embarked on another journey to what would later be known as Italy, where he would experience the political life of Syracuse. Aristotle on the other hand travelled throughout the Greek peninsula for his work in the fields of biology or medicine, and after the death of Plato and being passed over to become the next head of the academy, he went back to Macedonia to tutor the man later known as Alexander the Great (Brisson p. 46; Berti pp. 47-48).

52 De Taube p. 30.

53 Huber p. 26.

frühestens wieder im XII. Jahrhundert in Italien und im Norden im XIV. oder XV. Jahrhundert erreicht wurde." It is against this backdrop that ancient Greece's intercommunal arbitration was developed, both in the private and public spheres.

As mentioned above, Greek city-states always had their eyes on each other's boundaries, so intercommunal arbitration existed mainly for border problems between city-states such as the possession of the islands in the Greek seas[54] and issues arising between citizens of different origins (i.e. issues of private international law). But it also existed for pecuniary issues[55] and the peaceful adjudication of international disputes. For instance, in Solon's era, five Spartans were chosen to arbitrate a dispute between the Athenians and the Megarians regarding the possession of the island of Salamis[56]. Among other examples is the one concerning the inhabitants of Lebedos which were forced to migrate to Teos under the rule of Antigonus the One-eyed. Once in Teos, conflicts arose between the old and new inhabitants, so in order to settle some of their quarrels, Antigonus appointed the city of Mytilene to act as an arbitrator[57].

The first recorded proposal of an international (intercommunal) arbitration in Greece can be dated to circa 750 BC. In a dispute with the Lacedemonians, the Messenians suggested the dispute be settled through a third party, the Argives. The Lacedemonians however, refused to submit themselves to an arbitration and quickly proceeded to raze Messenia to the ground in three successive wars. On the side of Law but without any comparable military force and after centuries of asking help to the rest of Greece, the Roman senate acquiesced the Messenians' request circa 140 BC and forced Sparta into an arbitration[58]. The first effective case of international arbitration took place circa 650 BC in a dispute involving the cities of Andros and Chalcis regarding the control of the city of Akanthos, which had been deserted by its previous inhabitants. Both Andros and Chalcis sent scouts in order to verify that Akanthos had indeed been deserted. After confirming it, the two scouts raced to the doors of Akanthos to claim it for their respective cities. The Chalcidian was faster,

54 Fraser pp. 185-186; Bérard p. 428; de Taube p. 42; Tod pp. 53-54.

55 Tod pp. 57-58. For instance, following a war between the Eleans and the Lepreates, Elis agreed to give back half of the conquered territory in exchange for an annual sum of money. Following the outbreak of the Peloponnesian War, the Lepreates ceased their payment which led to a dispute ultimately settled by Sparta.

56 Mérignhac p. 19 citing the Life of Solon by Plutarch.

57 Mérignhac pp. 19-20.

58 Westermann p. 199; Bérard p. 429. Tod argues that the reason for which Sparta was so adamant in refusing the arbitral process was because the disputed territory was home to a sanctuary devoted to Artemis (p. 56).

so the Andrian threw his javelin against the city doors to thwart him, which resulted in a dispute as to who was the first to claim the empty Akanthos. The arbitral tribunal comprised Parians, Samians and Erythraeans and decided that the Andrian had arrived before the Chalcidian, and so Andros was deemed the conqueror of Akanthos despite the fact that its original inhabitants had fled in the face of prior invaders[59].

During the 7th and 6th centuries BC, the usage of arbitration increased due to closer interstate relations, overlapping foreign military policies and a certain equilibrium in terms of military strength[60]. As in Mesopotamia and ancient Rome[61], it was essential for all parties involved to be on a similar level strength-wise. Indeed, if one of the parties was that much more dominant from a military or economic standpoint, it simply imposed its will without looking to settle anything. This trend is observable no matter the period in history, which is a logical outcome given that the very nature of arbitration implies compromising. If a party is powerful enough, usually from a military standpoint, they will most often impose their will, generally without caring about what the consequences could be for the weaker party. In the end, arbitration is heavily influenced by the parties, and if a party is powerful enough to coerce the other while only agreeing to an arbitration clause for window dressing, the agreed-upon arbitration shall never be anything but an empty shell[62].

During the 5th century BC, Greek city-states regrouped themselves under the umbrella of the most powerful ones: Athens and Sparta. It was then that clauses regarding the pledge of peaceful settlements for future disputes started to feature in international/intercommunal treaties[63]. The first significant one was in the Thirty Years' Peace entered into by Athens and Sparta in 445 BC.[64] While those clauses may not have been efficient in preventing war (i.e., the Peloponnesian War, 431 to 404 BC)[65], the idea of such clauses did not disappear[66].

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59 Fraser p. 186; Raeder pp. 16-17.

60 Westermann citing Meyer p. 200; Fraser p. 186.

61 Cf. *infra* part 1, II.

62 Cf. *infra* part 2, V, 5, B, *a, b* regarding very recent examples involving oil-rich former colonies.

63 Bérard pp. 430-431; Fraser p. 186.

64 Westermann p. 200.

65 "The Spartans may have felt that the questions at issue were too large and important to be left to the decision of an arbitral court, that they were questions "involving matters of vital interest or the independence or honour" of some of their allies at least, if not of their own state" (Tod p. 176).

66 Fraser p. 186.

For instance, an alliance treaty between Argos and Lacedaemon contained a clause stipulating that in the event of a conflict between them, a third city was to arbitrate this conflict. Said city had to be deemed impartial by both parties[67]. Another example was the convention between the cities of Priansos and Hyerapytna: not only did it stipulate that future conflicts be settled by way of arbitration, but also past ones. Each past conflict would thus be subject to the cosmos[68], the highest-ranking judicial officials in Crete.

During the 4th century BC, with Athens and Sparta decimated in the wake of the Peloponnesian War, the Greek states returned to the equilibrium that was theirs before they regrouped behind Athens and Sparta. During the decades following the Peloponnesian War and during the 3rd century BC, arbitration became more frequent, in particular under the reigns of Philip II of Macedon (359-336 BC), his son Alexander the Great (336-323 BC) and their successors. Those conquerors and rulers were often called upon to serve as arbitrators, mostly for the Achaean, Aetolian, Thessalian and Boeotian Leagues in order to preserve peace[69]. Philip in particular went to great lengths to promote arbitral settlements to avoid wars. In the years prior to the battle of Chaeronea (338 BC), he did his utmost to convince the Athenians to enter into an arbitration to settle their differences. He was unfortunately countered by powerful Athenian politicians such as Demosthenes who used the argument of Philip's nationality to claim he acted in bad faith in his pursuit of a peaceful settlement[70]. After winning the war, the Macedonian king proceeded to regulate internal Greek matters through arbitral tribunals, but he had the wisdom to set up mixed Athenian-Macedonian tribunals to avoid further conflicts with his new Greek subjects[71]. To do so, Philip often compelled parties to enter into an arbitration all the while being reluctant to act as an arbitrator himself in order to make these arbitral awards as acceptable as possible for the litigants and Athens as a whole, which further illustrates the fact that arbitration and mediation were two faces of the same coin for ancient Greeks. For instance, he compelled Spartans and Messenians to settle their dispute in front of an arbitral tribunal and did not appoint himself as arbitrator, but set up a tribunal where all arbitrators were Greek[72].

67 Mérignhac pp. 21-22.
68 The word is κόσμος in ancient Greek and from it descended the word cosmos.
69 Fraser p. 187; Tod p. 179.
70 Tod p. 179.
71 Tod p. 180.
72 Tod quoting Polybius p. 89.

His son Alexander the Great was less prone to this kind of delegation and preferred to settle matters himself. Indeed, he considered that an arbitrator's qualities "could not be combined in one of humbler station", which is the very demonstration that Alexander the Great considered that arbitral awards should be rendered by someone of great stature, with great authority[73].

The 2nd and 1st centuries BC were marked by Rome's growing influence. This influence essentially implied less arbitration as no city in Greece could stand up to the might of Rome in matters of territories[74]. Indeed, given that Rome could impose her will through sheer military strength, she did not need to settle disputes in front of an arbitral tribunal. According to Fraser, "it was far from easy always to determine the voluntary or non-voluntary nature or arbitrations where Rome was interested. […] The form may exist but not the spirit."[75] Contrary to Philip II of Macedon, Rome had enough military might to smash any power balance or opposition and impose her will through pure power, which made using a process as dependent on power structures as arbitration all the more complicated.

b. Procedural aspects

The basis of every arbitral procedure was the arbitral clause which was (and still is) conventional (i.e., based on the consent of both parties) and gave the arbitrator the necessary powers to settle the dispute[76]. The arbitral clause could be oral or written, even though the latter became more frequent as Roman influence grew[77]. Concerning the choice of the arbitrator, the most common method was for the party seizing the initiative to approach the other with a list of potential arbitrators for them to pick from[78]. Such was the case when Athens proposed to Sparta to submit their disagreements to the city-state of Megara around 390 BC, some 14 years after Sparta's victory the Peloponnesian War. This proposition was rejected by Agesipolis I King of Spartans on the grounds that Sparta could not allow a "lesser" city-state to pass judgement on what was at the time arguably the mightiest city-state in Greece[79].

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73 Tod pp. 89-92. Tod states that the very fact that a king acted as an arbitrator implied that, given his station in life, he would be the person most pressured to emit a just and fair award with all eyes on him.

74 Cf. *infra* part 1, II, 1.

75 Fraser p. 188.

76 Plato, Laws 920d; de Taube p. 41; Raeder p. 268; Tod p. 70.

77 Raeder p. 269.

78 Raeder p. 262.

79 Raeder p. 46.

Arbitrators were, generally, a committee rather than a single person and most often, said committee hailed from a rather powerful city with the means to impose the arbitral award[80]. Choosing arbitrators was a distinctive sign of the Greeks[81]. The choice of the arbitrator was essential to the proceedings, which is why the chosen ones had, among the ancient Greeks, a degree of authority, comparable to that of the nobles and the powerful in other societies[82]. For instance, Pyttalus, an Olympic games winner, served as an arbitrator between the Sleans and the Arcadians. In another matter, the poet Simonides of Ceos was able to prevent an imminent war between Hiero I of Syracuse and Theron of Acragas. Arbitrators could also be kings, tyrants, simple citizens, the Delphic oracle or even an assembly of 600 Milesians selected to settle a claim between Sparta and Mycene[83]. The best illustration features in a text from Polybius, an Achaean, quoted by Tod (p. 87), which states that "the Thebans and Lacedaemonians referred the matters in dispute to the arbitration of the Achaeans, and to them alone among the Greeks, not in consideration of their power, for at that time they ranked almost lowest of the Greeks in that respect, but rather of their good faith and their moral excellence in general. For beyond question this is the opinion of them which was held at that time by the whole world." This statement is highly relevant as it does more than simply mention the reason for which the Achaeans were chosen as arbitrator. Indeed, the reason for which the Achaeans were chosen is none other than the authority they had, which allowed them to hold sway on two much more powerful city-states, one of them being arguably the strongest in Greece at the time. It is also very interesting to note that, at least in this particular case, wisdom was considered more important than strength of arms to ensure that an arbitral award was properly applied.

So important was the honour of being selected[84] that arbitrators always had to take an oath whose form depended on the origin of the arbitrator and the place of the

[80] Westermann p. 203; Bérard p. 440. When a state was designated as an arbitrator, it always tasked a committee, a delegation which would act as the effective arbitrator of the conflict in the name of the city-state. The state would however set the parameters according to which the delegation would operate as well as its composition (Tod pp. 98-100).

[81] Laurent, Grèce p. 131; Mérignhac p. 21.

[82] Laurent, Grèce p. 131.

[83] Mérignhac p. 21; Tod pp. 92, 102; Bérard p. 440; Westermann p. 204; de Taube p. 43; Raeder p. 287; Ralston p. 159.

[84] "The fact is that the position of arbitrator was one of considerable honour and influence, so that no state or individual would lightly refuse the distinction when offered." (Tod p. 86)

proceedings. This oath was of vital importance to ancient Greeks[85]. Mention is made of a case between Sparta and Megalopolis, in Megalopolis, where the award not only contained the entire oath, but also the names of all the Spartan envoys who witnessed said oath[86]. Once the arbitrator was chosen, the applicable procedural rules varied from case to case and depended mainly on the choice of the arbitrator. The applicable procedural rules were usually that of the arbitrator's home city-state, or at least rules with which he was familiar[87].

As mentioned, the composition of the tribunal was very important as its members often used procedural means with which they were familiar. For example, when the Delphic Amphictyony was chosen to arbitrate conflicts, the expectation was that it would use the same procedure as it did in discharging its daily responsibilities, at least for the main aspects of the arbitral procedure[88]. When cities were named to settle an arbitral claim, they often chose some of their own citizens to represent them and did not intervene in the arbitral proceedings after that, at least until the very end of said proceedings, when the settlement was to be announced[89]. Having a city organize the arbitral tribunal was the most common way of proceeding[90].

The arbitrator listened to the parties' arguments, heard witnesses, redacted two copies of the award and usually left them in temples or other public places. The reasons for which temples were used was probably to ensure that people would come across the award. Displaying an award in a temple may have also ensured that none of the parties would try to destroy it by fear of divine or popular vindication, all the while using the vector of divine authority to make the award both more acceptable and more respected. Temples were used to store archives of various arbitral awards and are the reason why so many traces of Greek arbitrations remain[91]. For example, when Knossos acted as arbitrator for disputes between Latos

85 Agamben, Language p. 12.

86 Raeder pp. 295-296; Tod pp. 115-116.

87 Tod pp. 79, 108-109, 112, 115. Local inspections were a favorite of arbitrators, especially for border problems. There are only two cases on record in which a territorial dispute was settled without the arbitrator carrying out a local inspection. The first one is the case between Sparta and Messene arbitrated by an assembly of 600 Milesians in which said assembly remained in their city when arbitrating for obvious logistical reasons. The second case featured a quarrel between Itanus and Hierapytna with citizens of Magnesia as their arbitrator. They remained in their home state to decide the issue by using maps rather than a local inspection.

88 Raeder p. 286.

89 Raeder p. 289.

90 Ralston p. 159.

91 Bérard p. 432; de Taube p. 45.

and Olus, the Cnossians had to record their award on five stelae bearing the inscription of the preliminary agreement. Those stelae were then displayed in two Cnossian sanctuaries as well as in two other sanctuaries in Latos and Olus. The last stela was made public in the temple of Apollo in Delos[92].

The parties usually swore to execute the award[93] and were true to their word to the point where only two instances of states not respecting the tribunal's award are known[94]. One of them was a recurring problem from the time of Alexander the Great to 136 BC: Samos and Priene had a territorial dispute which effectively lasted 200 years and underwent nine trials. Each party submitted to arbitration without any will to end their strife, instead using the respite offered by the proceedings to regenerate their armed forces, establishing new alliances and hiring mercenaries[95]. However, as written by Westermann (p. 209), "we have not lost faith in international agreements of this sort in our own day because a certain percentage of arbitrations have resulted in nothing, or because a number of cases had to be sent to a second tribunal before a successful issue was reached."[96] Moreover, according to Bérard, "[…] *dans tout le monde grec et durant toute l'histoire grecque, il n'est pas de cité ou peuple qui n'ait mis sa confiance en cette procédure*." (p. 432)[97]

Arbitral awards were therefore very respected in ancient Greece and public opinion was used as the strongest guarantee of arbitration's effectivity. According to Westermann (p. 203) "their arbitrations covered questions which were of great importance in their political life." Given that they mostly concerned border issues, one would be hard pressed to claim otherwise. Moreover, knowing the importance of the *polis* in ancient Greece[98], one can quickly see how vital such arbitrations

92 Tod p. 76.

93 Mérignhac pp. 20-21.

94 Fraser p. 189.

95 Westermann p. 208. This is not unlike what would also happen in the Middle Ages, cf. *infra* part 1, III.

96 Confirmed by Tod (p. 188) who considers that arbitration was "in the great majority of cases, so far as we can judge, an immediate and lasting cure."

97 This is confirmed by Raeder (pp. 319-320), Matthaei (p. 248) and de Taube (pp. 46-47).

98 Laurent, Féodalité pp. V, VIII; Plato, Apology of Socrates; Plato, Republic 1567, 1571 and 1572; Plato, Republic Book III. The reason for which Socrates was put on trial was because he criticized the selfishness of the Athenian political leaders rather than the fact that he revered deities other than the Athenian ones. The Greek *polis* and religion were so intricately woven together that disrespecting religion meant disrespecting the *polis*. In the end, Socrates was not sentenced to death because he believed in other deities, but because of the way he acted was tantamount to disrespecting the *polis* (Luc Brisson *in* Plato, Apology of Socrates p. 59). Socrates was given the opportunity to escape from Athens to

could be for the Greeks. We must thus give them credit for recognizing this importance and being fairly successful in making it a reality[99]. According to Bérard, *"l'arbitrage était* […] *le pain quotidien de la vie internationale; les historiens ne s'arrêtent pas à nous dire comment chaque jour Athéniens, Spartiates, Grecs de tout âge et de toute taille mangeaient leur pain noir ou blanc*."[100]

3. The Greek conclusion

In all the above-mentioned intercommunal arbitrations, boundary disputes were the most common, while 21st century international arbitrations often concern the interpretation of agreements and not between sovereign states, bar the rare exception. Indeed, such issues are usually solved by way of diplomacy or in front of a public international court in the most extreme of cases.

It is interesting to note the evolution of international arbitration: originally, it mainly concerned interstate disputes and war-related matters such as boundary settlements or the peaceful prevention/resolution of armed conflicts. While commerce and private matters in general could be subject to international arbitration, they were not its main concern, contrary to contemporary international arbitration. On the other

Thessaly by the tribunal, which he promptly refused, despite acknowledging that living in exile would be synonymous with a beautiful life, one where he would travel from city to city with many people heeding his advice (Plato, Apology of Socrates 87). Indeed, as he explained to his childhood friend Crito, escaping from Athens would have meant bypassing its Law despite the fact that it gave him the opportunity to make that choice during the trial. Such an act would have therefore implied disavowing the Athenian Law, which he could not bring himself to do. For Socrates, running away did not simply mean opposing the laws that condemned him, but the entire Athenian Law, embodiment of the city of Athens. It was thus more important for Socrates to die under Athenian Law than to live in exile under Thessalian Law (or any other Law to whose city he did not belong). This historical event underscores how a Greek's link to their city was constitutive of their *Weltanschauung*: far better to die a citizen than to live as an individual outside of it (Plato, Crito 280-285; Papaux, Introduction pp. 38, 41; Werner p. 14). This is further underlined by the anecdote regarding Achilles' shield forged by Hephaestus, which is described *supra*.

99 Westermann p. 211.

100 Bérard pp. 431-432 with Tod agreeing pp. 71, 174. As Tod notes (p. 84), "for the Greeks did not invariably or even normally commit their public records to stone, but only in those cases in which the desire was felt for special publicity combined with permanence […]." The arbitrations we know of are thus but a fraction of the total number. This "grey number" made of unrecorded arbitrations further underlines the importance of arbitration in ancient Greece as the number of known arbitrations is already quite high.

hand, private arbitration was a mainstay in ancient Greece, and while traces of it are not as numerous as those involving public entities, testimonies of its importance are beyond doubt. The reason we did not dive more deeply into ancient Greek private arbitration is because its Roman counterpart was much more influential on our current general arbitration model, as we will see *infra*, in more detailed fashion this time.

From a legal-philosophical standpoint, authority was already quite evident in the way arbitration was conducted in ancient Greece for the following reasons. Firstly, state court judges were appointed randomly in order to avoid conflicts of interests while arbitrators were individually designated[101]. Given the importance of random draw in ancient Greece[102], it is very telling that arbitrators were not subject to that rule. Their identity was essential, because of the importance of the cases and the responsibilities they were tasked with. Indeed, for ancient Greeks, ensuring that arbitrators were the best possible people for a dispute was more important than following a process foundational of the Greek democracy, the Athenian one in particular[103]. Accordingly, it becomes quite simple to abduct that the legitimacy of an arbitral award depended on the authority the arbitrator had in the eyes of the parties, failing which, they would not be willing to submit themselves to the arbitral process and even less to an arbitral award. As shown in the arbitration attempt between Athens and Sparta, the king of Sparta refused to let his country be judged by the city-state of Megara that it deemed unworthy[104]. Moreover, state judgements were redacted in the name of the city/state to which its court belonged whereas arbitrators wrote their settlements in their own name[105], another sign that in arbitral procedures, a supplement of authority was required. According to an inscription discovered in Corcyra which mentions the existence of an arbitral tribunal which had a president, said president acquired his status not because he outranked his fellow arbitrators in power, but because he outranked them in dignity, another shape of authority[106].

[101] Raeder pp. 287-288. There were some exceptions of course, in particular when arbitrators were legion as such was the case in the arbitration between Sparta and Mycene which was settled by an assembly of 600 Milesians.

[102] Aristotle, Athenian Constitution 43; López-Rabatel p. 38; Macé pp. 82-83, Plato, Laws 757b, c.

[103] López-Rabatel p. 38.

[104] Raeder p. 46.

[105] Raeder p. 288.

[106] Tod p. 105.

The identity of the arbitrator remains a key aspect of international arbitration. As we will see in part 2 *infra*, an arbitrator lacking in authority will have a hard time producing an award which would genuinely be accepted and applied by the parties. The consequence is that in such cases, arbitration starts relying on *potestas* to compensate for the lack of authority, leading to unauthoritative forms of arbitration. One could even go as far as to question whether we are still facing arbitration as, in such unauthoritative instances, power becomes the main vector to concretize arbitral awards, quite the un-arbitral-esque situation…

This authority is quite versatile. In ancient Greece, arbitrators were often religious or political figures such as the Delphic oracle, a king or a city-state not involved in the conflict, but athletes or artists could sometimes also be named arbitrators. In all cases, arbitrators were not selected for their outstanding level of expertise, but because they were people whose authority held sway over the parties, mainly because they excelled in their respective fields and had acquired a certain level of fame[107]. Arbitrators were highly considered in ancient Greek society, which made the parties all the more inclined to respect, accept and therefore apply the arbitral award. If the powerful were sometimes chosen in obvious attempts to flatter them, this was not the general rule. According to Tod, the choice of Alexander the Great to act as the sole arbitrator of a case was because he would not be able to influence other members of the tribunal or blame anyone else for a bad judgement. Moreover, as a king, he would be most interested in keeping the peace, in a fair award acceptable by both parties. The authority of an arbitrator was thus the one criterion on which they were chosen, the only common denominator to all arbitrators in ancient Greece[108].

Authority also transpired from the surroundings of the arbitration: having intercommunal arbitration awards displayed in temples was a very effective way to ensure that they would not only be applied, but that they would not be destroyed in an act of vengeance. By involving divine authority in the process, and in addition to

[107] This is further confirmed by Tod (p. 93) who mentions that when a private citizen was chosen as arbitrator, there was no reason to doubt that it was because of "the name he had won for skill and fairness, and the confidence to which such a reputation gave rise." Tod adds that (p. 96) "the states selected [as arbitrators] were usually those which had considerable standing and prestige in the Greek world […]."

[108] Tod pp. 91-92. Although this is something exposed in more details *infra* part 2, authority essentially consists in increasing the common good. In the case of ancient Greek arbitrators, they were chosen because they were perceived as the most likely to succeed in their endeavour i.e., the augmentation of their city by doing justice.

the oath arbitrators had to take, ancient Greeks were able to give arbitration an authority which rendered it much more effective. Doing something out of volition rather than imposition has always been more effective. The Greeks understood this very well: what could be more compelling for someone to do something than divine intervention? While they never intervened (to the best of our knowledge at least), the Gods' authority was more than sufficient to convince Greeks to comply with justice by giving it a divine dimension[109].

At this stage of our historical analysis of arbitration, it is important to mention that what followed ancient Greece was a decline in the recourse to international arbitration. The balance of power between states all but vanished in the face of the mighty Rome, and international arbitration became close to pointless given her propensity to impose her will through sheer military strength. Indeed, one of the main reasons for which "international" arbitration was able to thrive in Greece, was that a great number of city-states were sufficiently evenly matched in terms of military, cultural and economic power, the only exception being when Sparta and Athens dominated Greece (roughly between the 5th and 4th centuries BC). But even then, the other city-states under their protection were evenly matched, meaning that arbitration still thrived within the Peloponnesian and the Delian Leagues respectively[110]. Nevertheless, arbitration remained a mainstay in internal Roman matters, between inhabitants of Rome, where the power balance was not entirely broken, contrary to any relation involving Rome herself.

[109] Cf. Agamben, Language pp. 9 ss.
[110] Politis pp. 25-26.

II. International and internal arbitration in ancient Rome

Before tackling the core of this section, it is necessary to bear in mind that we will examine arbitration in ancient Rome under both its internal and international forms. As mentioned *supra*, international arbitration took a hit under Roman domination, whereas the mechanisms and characteristics of contemporary international arbitration derive from Rome's internal arbitration. The first of these characteristics is the high level of secrecy enjoyed by those party to internal arbitral procedures that international arbitrations did not benefit from. The second characteristic is the possibility for the parties to craft the procedure under which they wished to be tried, to an extent greater than the Greeks.

1. International arbitration

Based on the analysis we have made of arbitration in ancient Greece, it is quite clear that intercommunal arbitration was far from an unusual way of solving legal issues from the 7th to the 2nd century BC, be it for state matters or private issues. The intricate commercial and social relationships, which were the foundation of ancient Greece and allowed intercommunal arbitration to thrive, decreased steadily the more Rome extended her dominion over Greece.

It does not mean that Rome simply discarded international arbitration in its entirety as she aimed to promote her conquests through the motto "diversity in unity"[111]. Indeed, the Romans, who first came into contact with arbitration through the Italiote Greeks, used international arbitration as a way to settle issues arising

[111] De Taube pp. 48, 53.

between the various Greek city-states, which was quite remarkable as Romans had never used international arbitration before coming into contact with Greece[112]. For example, in 166 BC after the Third Macedonian War, Rome gifted Athens with the island of Delos for its support in the war, which forced the Delians to flee to Achaea where they were admitted in the Achaean League. The Delians then demanded of Athens to benefit from the same commercial advantages extended to the other members of the Achaean League, which was promptly refused by Athens. In response, the Delians, with the consent of the other members of the League, seized Athenian properties as a compensation for the economic losses consecutive to Athens' refusal. In order to settle the matter, Athens and the Achaean League submitted their case to the Roman senate which sided with the Achaeans. This was quite remarkable given that Athens had always been one of Rome's closest allies while the Achaean League was quite hostile to Rome's imperialistic views. This example is proof that Romans were perfectly capable of seeking justice by respecting local instances and traditions[113].

Rome could often act as arbitrator between two other parties, her military strength proving very useful to persuade any party unwilling to comply with the arbitral award. Indeed, from the 3rd century BC onwards, Roman provinces enjoying the *Pax Romana* never considered setting up an arbitral tribunal against their mistress[114]. From the 2nd century BC onwards, the Roman senate often acted as an arbitrator for disputes between Greek states[115]. In fact, Rome used the preference Greece had for intercommunal arbitration to impose her will to the Greek cities in a more "acceptable" way[116]. During this era of conquests, disputes arising between liege states were not settled through Roman arbitration. Rather, Rome dictated to the parties what they could or could not do[117]. In effect, even if the Roman senate was called upon as an arbitrator for international cases, it did not always have the interests of the parties in mind so much as its own.

For instance, Rome would sometimes arbitrate a conflict regarding the boundaries of a certain territory by declaring said territory part of Rome[118]. Such was the case when Rome sent Labeo to serve as an arbitrator in 180 BC for a dispute between

112 Raeder p. 203; Matthaei p. 262.
113 Raeder pp. 100-101.
114 Fraser p. 189.
115 Westermann p. 207; Raeder p. 203.
116 De Taube p. 50.
117 Westermann p. 207.
118 De Taube p. 51; Mérignhac p. 22.

Naples and Nola[119] or when the Roman people were called upon to arbitrate a territorial dispute between Ariccia and Ardea[120]. It is interesting to note that Rome usually sent arbitrators holding a high rank and office in the Roman administration and government to settle disputes[121], which is not particularly surprising considering how important the concept of *auctoritas* (Latin for authority) was for them[122]. Sending someone holding a position of authority usually implied that he was well-born and well-educated. This lent some credibility to the arbitrator as someone respected and knowledgeable, capable of understanding the viewpoints of all parties involved, as well as the consequences of the decision he would take.

Rome did not display much interest in the peaceful adjudication of conflicts when she was involved as a party. Submitting herself to a neutral third party was effectively not compatible with her vision of the world order[123]. The military might of the Roman empire was such that it never needed any kind of international arbitration to settle disputes as it simply conquered those that did not immediately surrender[124]. Moreover, the idea of having states on the same level of power and influence was contrary to Rome's vision of the international political life of the Mediterranean states. Indeed, the *Pax Romana* was not an international peace based on a certain balance of power between various states, but the result of Rome's taste for conquests[125].

Consequently, Romans categorically refused to be arbitrated by other states[126]. For instance, in 280 BC, Pyrrhus King of Epirus offered his services as an arbitrator between Rome and Taranto, but Rome declined the offer outright[127]. According to Nikolaos Politis, former Minister of foreign affairs for Greece, *"Se considérant comme arbitre du monde, elle acceptait d'être juge, non justiciable. On ne connaît pas de cas où elle ait consenti à trancher par jugement de droit ses litiges avec d'autres peuples."*[128]

119 Barbeyrac p. 373.
120 Barbeyrac pp. 113-114.
121 Tod p. 91.
122 Cf. *infra* part 2, I, II.
123 Politis p. 26; Mérignhac p. 22; Matthaei pp. 246, 254.
124 Westermann pp. 206-207; de Taube pp. 50; Mérignhac pp. 22-23.
125 De Taube pp. 49-50; Mérignhac pp. 22-23.
126 De Taube p. 51.
127 Raeder pp. 5-6.
128 Politis p. 27.

Even when selected as an arbitrator, Rome often delegated the competence to arbitrate to a special commission or a neutral third city, usually a neighbouring one[129]. According to Fraser (p. 190), "the republic lost what Greece had gained, and the empire lost the little the republic had won."[130] This decline regarding the use of international arbitration involving Rome stemmed from the overwhelming position of power she had, which allowed her to ignore other parties in case of a divergence in opinions, provided said other parties dared to voice their discontent.

This period of history is a reminder of what can happen when an overwhelmingly powerful party faces a relevant yet proportionally much less powerful one: the latter is usually swept aside by the former. International arbitration mechanisms are then stripped of their usefulness and credibility given that a party, usually the powerful one, will either not apply the award or force the process to bend to its will. As Mérignhac wrote (p. 23), *"La prétention qu'avait Rome d'être au-dessus des autres nations, prétention qui est la négation même de l'idée d'arbitrage, se réalisa complètement lorsqu'elle fut devenue maîtresse du monde."* This is further underscored when comparing Rome to Greece where city-states of equal power meant that the peaceful resolution of conflicts through intercommunal arbitration was both possible and necessary in order to avoid mutual military destruction.

In the end however, arbitration was paradoxically preserved by the Romans who then transmitted it to the Barbarians that destroyed her empire. While international arbitration as understood in Greece was a rare occurrence when Rome was involved, such was not the case for internal arbitration, where the balance of power was much less slanted[131].

2. Internal arbitration

Arbitration was often used in Rome and traces of it can be found dating from the 5th century BC in the XII Tables[132]. At this stage, it is important to remind ourselves that the notion of arbitration as understood in Rome was not always the same as what is understood in the 21st century. Indeed, arbitration could be divided in two categories: those linked to certain state procedures where the will of the parties was restricted by praetors' edicts, and arbitrations based on a compromise,

[129] Fraser p. 190.
[130] Matthaei p. 264.
[131] De Taube p. 55.
[132] De Loynes de Fumichon/Humbert p. 287.

which were closer to arbitration as we know it nowadays, where the parties could determine most of the applicable procedure and where the *arbiter* had more room to do justice, by using equity *ex aequo et bono* in particular[133].

A. Some incursions in Roman Law

a. Before bona fides

(i) Arbitration by *iudex*

Dating from a time before the XII Tables, arbitration by *iudex* lasted well into the imperial era. In essence, this procedure involved a classic state judge *(iudex)* who acted as *arbiter* in certain instances. The main task of the *iudex* depended on the type of legal issue, but more importantly, his role as an *arbiter* was often so limited that he was considered first and foremost a *iudex*, and second an *arbiter.* Indeed, as we will see, arbitration by *iudex* usually involved a praetor during the first phase of the proceedings, and it is only during the second phase that an *arbiter* could be formally called upon, even though said *arbiter* generally doubled up as the *iudex* in the same case.

It is important at this point to mention the lesser role of the judges in Roman Law as compared to their modern occidental counterpart. Indeed, the *iudex*'s role was mainly ceremonial as the trial was not centred around him, but around the praetor, whose edict contained the Law *in concreto* and on which rested the *iudex*'s judgement[134].

Among the various types of arbitration by *iudex*, the most noteworthy were those that rested upon the *legis actiones*. These procedures were extremely formal given

[133] Cf. *infra* part 1, II, 2, B, *b.*

[134] The reality was of course much subtler and more intricate, but the sole notion of praetor's edict would doubtlessly require many years of work to circumscribe it properly. As this is not the subject of this work, we shall not expand on it and limit ourselves to an account sufficient to understand the upcoming developments. Contrary to laws that were applicable in the entire Roman territory, edicts only concerned the magistrate that had rendered it. In effect however, edicts that came from the city of Rome were reproduced throughout the Roman territories. The main difference between laws and edicts was that edicts could not formally create nor abrogate laws. However, they could render the application of certain laws very difficult, suppressing their effectiveness. In theory, edicts were hierarchically inferior to laws but, in reality, only in appearance as edicts contained the interpretation of laws which, as all jurists hopefully know, is the heart of Law. Moreover, while edicts were formally valid for only one year, they were annually renewed most of the time. Even when the person holding the office of the praetor changed, he usually renewed his predecessors' edicts (Girard pp. 45-47).

that they had to be based on an express law (often the XII Tables or a praetor's edict) and forced the various parties and officials involved to use the very words contained in said law under sanction of annulment[135]. It is interesting to note that Romans considered the acceptation of a sum of money or a reward for officiating as *iudex* or *arbiter* to be unacceptable. If any *arbiter* accepted anything from the parties, it was considered tantamount to corruption[136]. This is of course a very far cry from contemporary arbitration, where arbitrators are almost always paid by the parties.

One of the procedures stemming from the *legis actiones* was called the *arbitrium litis aestimandae*[137]. In this procedure, a *iudex* was tasked with his usual duty of applying the Law contained in the praetor's edict, a duty for which he had no margin of appreciation, unlike most contemporary judges. However, in this procedure, he (or a separate person) would also be called upon to act as an *arbiter* and evaluate some of the financial aspects of the current procedure such as a financial compensation for causing a physical injury or a damage onto someone else's property (archaic Law). The *arbiter* intervened most often when the damage was sufficiently serious for the parties to squabble over the final amount owed[138].

The traces of *arbitrium litis aestimandae* can still be found today when, in complex cases, the judge appoints an independent expert to deal with such matters. It is quite clear that a *iudex* doubling as an *arbiter* cannot be considered the equivalent of a modern arbitrator, but as the ancestor of many Roman arbitral institutions, it is important to understand the starting point of Roman internal arbitration[139].

Also introduced by the XII Tables, the *iudicis arbitrive postulatio*[140] held very similar features to the *arbitrium litis aestimandae* and was the second part of the usual state procedure in front of the praetor. Named by the parties but appointed by the praetor, the *arbiter* was a private citizen (contrary to the usual cases of

135 *Nulla legis actio sine lege*. Girard pp. 1029 ss.

136 Roebuck/de Loynes de Fumichon p. 77.

137 "Arbitration of the valuation of the legal action."

138 Table VIII, Roebuck/de Loynes de Fumichon p. 75. We are still talking about archaic Law at this point.

139 According to art. 189 of the Swiss code of civil procedure (RS 272, "Swiss CPC"), the parties can ask an *"arbitre-expert"* to intervene and give a decision regarding the facts on which the parties cannot agree. While this institution is not identical to the Roman *arbiter* of the *litis aestimatio* (the *arbitre-expert* is chosen by the parties while the *arbiter* was designated by the ruling judge), it serves a similar purpose as an aid to the main judge regarding certain technical aspects of the procedure. De Loynes de Fumichon/Humbert p. 300; Stein p. 217; Roebuck/de Loynes de Fumichon p. 75.

140 "Request for a judge or an arbitrator."

arbitration by *iudex*, where the most commonly selected arbitrators were public officials) whose role in the procedure was to render a decision regarding the concrete case. The main difference between the *iudicis arbitrive postulatio* and the *arbitrium litis aestimandae* was that in the latter, the *arbiter* was simply tasked with the evaluation of a pecuniary sanction and/or damage whereas in the former, the parties gave the *iudex* the jurisdiction to render a decision regarding the parties' dispute[141].

The *actio finium regundorum*[142] and the *actio aquae pluviae arcendae*[143] also featured in the XII Tables. In those two cases, the presence of the *arbiter* was legally imposed via official procedures, implying that this procedure was quite removed from modern arbitration, which is based on the mutual consent of the parties[144].

Based on what we have seen regarding arbitration by *iudex*, it is quite clear that the overall mindset of contemporary international arbitration does not directly stem from it. Indeed, certain concepts of international arbitration such as the choice of applicable Law by the parties or the clear separation between arbitration and state procedures happening in front of state courts, all of which are a mainstay of the institution, do not appear in the Roman arbitration by *iudex*[145], contrary to some of the other Roman types of arbitration *infra*.

(ii) Arbitration by *bonus vir* or by *dominus*

In parallel to the arbitration by *iudex*, there are other texts leaning towards the somewhat more contractual approach of contemporary arbitration. Indeed, the arbitral procedures examined above all involved an emanation of state power at some point or another, praetors most often. The following arbitration models were of private nature and had a procedure where the praetor was generally not involved.

141 Roebuck/de Loynes de Fumichon pp. 67-68, 76 ss.

142 "Concerning private boundaries".

143 "Concerning private boundaries modified by rains".

144 De Loynes de Fumichon/Humbert pp. 302-307.

145 While it may be tempting to see a connection between the Roman and the contemporary eras regarding the choice of the arbitrator by the parties, this link is tenuous at best given how the Roman *arbiter* had to be appointed by the praetor. Even though the parties did choose the *arbiter*, their choice then had to be validated by the praetor, effectively making the appointment of an *arbiter* by private citizens conditional to the public magistrate's approval. Furthermore, *arbitri* in arbitrations by *iudex* procedures doubled up as *iudex* very often: if the parties were involved in the designation of the *arbiter*, such was not the case concerning the *iudex*, who was appointed by the sole praetor.

We will focus on two types of arbitrations (*bonus vir* and *dominus*) which have the same legal foundation, as well as similar purposes and ways to reach said purposes. This analysis yields interesting insight on how an arbitration process void of state control worked before good faith came into play.

The first occurrences of arbitration by *bonus vir* and arbitration by *dominus* featured in Cato the Elder's contractual clauses, otherwise known as the *leges Catonianae*, which themselves featured in Cato's general manual on agriculture[146].

While those provisions mainly concerned basic problems such as the usage of ladders, the preservation of grapes or the punishment for stealing olives, they also contained provisions stipulating that certain actions or damages and the intentions of the perpetrator would be evaluated by an arbitrator[147]. Overall, the *leges Catonianae* concerned the regulation of service contracts *(locatio conductio)* between a *locator* (the one making something available, usually for a price, the landowner, the *dominus*) and a *conductor* (the one(s) using what was made available), particularly in the field of agriculture. Worth mentioning is the fact that contrary to their name, the *leges Catonianae* were not laws but mere contractual provisions serving as guidelines for service contracts.

Based on the *leges Catonianae*, the *bonus vir* and the *dominus* arbitrators were tasked with evaluating the material extent of a prejudice between tenants and landlords. However, and as mentioned above, the *leges Catonianae* were not laws but contractual clauses, meaning that the arbitration relation was entered into by the parties and not forced upon them. According to those "laws", an *arbiter* was chosen should a conflict arise between the *locator* and the *conductor*, and said *arbiter* was either a *bonus vir* chosen by the *locator* or the *dominus* (the *locator* himself, meaning he would be both judge and party).

Unsurprisingly, the *leges Catonianae* allowed no small amount of discretion to the *arbiter* who could fine the workers or even confiscate a portion of their salary[148]. They were clearly designed to avoid the office of the praetor, and while the parties

[146] Cato 142-155. Raised outside the city of Rome, Cato did not hail from one of the more prestigious Roman families: no member of his family before him held a public office in Rome. However, long before starting his political career, Cato inherited agricultural lands from his father who had died in the second Punic War. Cato thus grew up marshalling people of all sorts while taking care of his land and was well-versed in all matters related to agriculture.

[147] Cato 144.1-3.

[148] Cato 144.2.

were free to enter into a contractual relation, the resulting arbitral proceedings were anything but a fair consequence of this contract given that the landowner would either be the party to name the *arbiter (bonus vir)*, or be both party and *arbiter (dominus)*. This implies that the arbitral part of the initial contract was controlled through the unilateral will of the *locator*, and was thus not the result of both parties' will[149]. Mentions of the *bonus vir* arbitration are also found in commercial litigation regarding a society's shares' value and what happens in case of the arbitrator's death[150]. Other cases include the setting of a dowry's amount by a bride's soon to be father-in-law[151] or the definition of boundaries[152].

The *bonus vir* and *dominus* arbitrations were deemed unlawful once the requirement of *bona fides* was introduced by praetors, as judges became obligated to control contracts with an arbitration clause under the light of specific equity and the balance of performances[153].

Generally speaking, the arbitration procedures which have been evoked until now were quite different from the ones we are accustomed to nowadays. Indeed, the arbitral procedure either was linked quite strongly to the state with the arbitrator being usually appointed by a praetor, or it was heavily slanted in favour of one party to the clear detriment of the other.

The arbitrations hereafter operated in ways much more similar to contemporary arbitration.

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149 De Loynes de Fumichon/Humbert pp. 310-314. In the 21st century and despite the fact that the parties are given a wide berth regarding the choice of the arbitrator, no credible arbitration would ever feature someone as both a party and the arbitrator, a point which is also valid for state procedures. With that being said, the question of the arbitration featured in general conditions, often unread by the "weaker" party, would deserve more scrutiny in our opinion. Typically, how many users of Amazon, eBay or Uber even have an inkling that any legal matter involving those companies is, technically, to be sorted out in front of an arbitrator chosen by said companies, most likely in a different state? This, still in our opinion, contributed significantly to the downfall of arbitration's authority (cf. *infra* part 2, V, 5), for we are currently recycling modes of arbitration that ignored the very concept of *bona fides*, of good faith, itself based on the legal-philosophical foundation of arbitration, equity.

150 Pomponius, Digest 17.2.6; Celsus, Digest 17.2.75.

151 Celsus, Digest 32.43; Papinianus, Digest 23.3.69.4.

152 Roebuck/de Loynes de Fumichon p. 53.

153 De Loynes de Fumichon/Humbert pp. 316-318. Cf. *infra* part 1, II, 2, B, *b* regarding the notion of specific equity.

b. Bona fides

(i) *Actio arbitrariae*

The formula procedure in Roman Law[154] did not allow *iudex* the possibility to enforce their own judgements[155]. Moreover, *iudex* could only sentence a party to the payment of a certain sum of money and could not grant specific performance to either party. Once he had made his mind regarding the overall outset of the trial, the *iudex* had to follow what was contained in the formula, laid down by the praetor, and could not correct it, even if it contained legal errors[156].

In order to circumvent this problem and open the door to more flexibility, the praetor could set a *clausula arbitraria* in the formula. According to this clause, the defendant would be condemned following the terms of the formula, provided he did not carry out specific performance by fulfilling certain terms outlined by the *iudex* who, for this aspect of the procedure, acted as an *arbiter*.

The terms in question were set out by the *iudex ex aequo et bono*, in other words, in equity *ex aequo et bono*[157]. Coupling the *clausula arbitraria* with the *condemnatio*[158] was therefore "a means to put pressure on the defendant and nudge him towards specific performance" rather than force him to pay the sum of money featured in the *condemnatio*. The *actio arbitrariae* was therefore the possibility, granted by the praetor to the *iudex*, to allow the latter to offer an alternative solution to the conflict as the one comprised in the praetor's edict. It allowed him in particular to elaborate a solution which was not strictly pecuniary[159].

The powers granted to the *iudex* by the *clausula arbitraria* allowed him to judge *ex aequo et bono*, meaning his own sentiment of justice[160]. Acting in equity was considered by some of the most eminent Roman intellectuals[161] as the main difference between a judge and an arbitrator: judges needed to heed the praetor's

154 The typical procedure led by a state judge.

155 The enforcement was guaranteed by the praetors who would produce a separate formula if the previous one was not enforced (*actio iudicata*; Girard pp. 1108-1109).

156 Girard pp. 1099 ss; Gaius *Institutes* III.223-224.

157 Girard pp. 1086-1087; cf. *infra* part 1, II, 2, B, *b.*

158 The *condemnatio* was the part of the formula where the praetor gave the *iudex* the power to condemn or absolve depending on whether the *intentio* of the accused had been proved or not (Girard p. 1083).

159 De Loynes de Fumichon/Humbert pp. 319-320.

160 Girard p. 1087.

161 Cf. *infra*, where Cicero and Seneca the Young describe the *arbiter* as someone who deals in equity, an equity which Seneca the Young considers to be based on "humanity".

edicts and the various laws, whereas arbitrators had to make use of equity in order to settle the case, which meant that they could not rely on anything or anyone but themselves, their experience and their own sense of justice. When facing a *clausula arbitraria*, the *iudex* would endorse the mantel of *arbiter* for the aspects of the conflict that fell under this clause.

It was therefore necessary for the *iudex* to grasp a great diversity of factors upon which the trial rested: the personalities of the parties, their needs and wills, the consequences of his decision, the range of equitable alternatives he could fairly propose, etc. While the consequences of a defendant refusing the *iudex*'s alternative proposal were quite severe (infamy in particular), it was entirely up to the *iudex* to propose an alternative satisfying enough for both parties. The entire *actio arbitrariae* therefore rested upon the *iudex*'s ability to craft those alternatives.

In this context, the *auctoritas*[162] of the *iudex* was key for him to convince the defendant to accept his alternative. Ultimately, enforcing his own view on the matter (and not the one set by the praetor) depended on the fairness of the alternative, the gravity of the praetor's initial sanction and his own *auctoritas*. It is also worth noting that in the eventuality that the defendant did not abide by the *clausula arbitraria*, the *iudex* could not condemn him for it. The only sanction one could suffer was to be condemned according to the terms laid out in the formula by the praetor.

Contrary to the other cases described above, the *iudex* here fully deserves to be compared to the contemporary arbitrator as the *actio arbitrariae* granted him wider-encompassing powers than the ordinary formula procedure. Moreover, contemporary arbitrators are clearly tasked to bridge gaps between parties, to settle differences not by imposing their wills by means of *potestas*, but through dialogue, reason and common sense. Against this backdrop, the *actio arbitrariae* had a less top-down approach than the usual formula procedure and granted the *iudex* a role whose conciliatory aspects were more developed than that of his normal role[163].

(ii) *Arbitria bonae fidei*

The second mention of the notion of *arbiter* linked to *bona fides* was made in the *arbitria bonae fidei*, which came to life between the 2nd and 1st centuries BC, after the *actio arbitrariae*. Like the *actio arbitrariae*, the *arbitria bonae fidei* was the

[162] *Auctoritas* is the Latin word for "authority", cf. *infra* part 2, I, II regarding the concept.
[163] De Loynes de Fumichon/Humbert pp. 319-320.

consequence of the praetor's will[164]. The difference was that the latter allowed more freedom to the *arbiter*, such as the capacity to compensate debts between parties. In the *arbitria bonae fidei*, more importantly, equity *ex aequo et bono* was not merely used to lay down the terms of an alternative choice for the parties, but functioned as a wider-encompassing item the *arbiter* could use throughout the case regarding all of its aspects. In other words, equity *ex aequo et bono* was not used intermittently, as in the *actio arbitrariae*[165].

According to Quintus Scaevola taken up by Cicero, the terms *"ex fide bona"* were the judge's seat of power and the indication that his mandate was at its broadest given that this concept could be construed very widely. Both Scaevola and Cicero were eager to underscore how *bona fides* upgraded the entire Roman *ius civile*. The *arbitria bonae fidei* imbued the *iudex* with full powers, which means that he was freed of the usual procedural constraints and could try the case by basing himself on equity *ex aequo et bono*. According to Scaevola, such procedures "required a judge of great ability to decide the extent of each individual's obligation to the other, especially when counter-claims were admissible in most cases"[166]. Having this degree of leeway hence required the capacity to fully understand often complex cases and the legal issues that they entailed, which implies that *arbitri* needed experience, legal knowledge and a sense of justice.

This procedural freedom was the hallmark of the *arbitrium ex compromisso* which boasted accrued discretionary power. However, this mode of arbitration was not related to the usual state procedure, but was a private procedure and, among all Roman arbitral procedures, the closest to modern arbitration.

c. The main influence on modern arbitration: the arbitrium ex compromisso

Its first sources date from the beginning of the 2nd century BC, although they seem to mention an institution which had already been shaped for some time[167]. The main difference between the *arbitrium ex compromisso* and the *arbitria bonae fidei* was the extent to which the praetor was involved in the procedure. In the *arbitria bonae fidei*, the praetor played an essential role during the entire procedure: given his intervention in the *arbitria bonae fidei*, this procedure was considered a public procedure. This was not the case of the *arbitrium ex compromisso*, which was a private form of arbitration that gave a more central place to the parties. It can thus

164 De Loynes de Fumichon/Humbert pp. 318-321.
165 De Loynes de Fumichon/Humbert p. 322.
166 Cicero III, no. 70.
167 De Loynes de Fumichon/Humbert p. 323.

be seriously considered as the ancestor of contemporary arbitration, international arbitration in particular[168]. Added to the fact that equity was the foundation of the *arbiter*'s authority to arbitrate[169], this filiation becomes even clearer.

Arbitrium ex compromisso was widely adhered to by Romans: all save slaves could resort to it, including women and foreigners[170]. Moreover, *arbitrium ex compromisso* allowed parties to settle their differences in a variety of legal domains, delimited by matters of public order (criminal offences, guardianship, delicts causing *infamia* or involving one's freedom, etc.)[171], which is another aspect of private Roman arbitration directly linked with contemporary international arbitration. The advantages of using this arbitral procedure were, again, very similar to the ones that make it such a frequently used modus to settle disputes nowadays: the procedural and legal flexibility, the possibility to circumvent certain laws and the much valued secrecy of the award.

There are two legal relationships in the *arbitrium ex compromisso*: one between the parties (the *compromissum*) and one between the parties and the arbitrator (the *receptum arbitri*).

(i) The *compromissum*

The *compromissum* was the main contractual basis of this arbitral procedure: it was the contract wherein the parties decided to use the services of an *arbiter* to settle their differences. It laid down the conditions under which a problem could be subject to arbitration, who would serve as arbitrator, what were the procedural rules, etc.

The clauses featuring in a *compromissum* were far-ranging: from a general clause to submit all current disputes to an arbitral process[172] to very specific clauses

168 De Loynes de Fumichon/Humbert p. 318.

169 Cf. *infra* part 1, II, 2, B, *b.*

170 Ulpian, Digest 15.1.1.3 and 15.1.3.8.

171 De Loynes de Fumichon/Humbert p. 327; Stein p. 218.

172 Roman Law excluded the possibility of a *compromissum* concerning future disputes. Indeed, while this type of clause is the most frequent one in the 21st century, Romans considered such a practice to be illegal. Without being entirely certain, the hypothesis we can formulate as to why this was the case was because it was impossible to enter into a contract for uncertain future events, barring a few exceptions, which was linked to the fact that contracts required the contractors to agree. Consequently, entering into a contract featuring an uncertain event would have meant that the parties, before contracting, were already assuming that there would be a conflict between them, hereby meaning that they did not really agree on the contractual clauses. However, such was not the case in Greece where arbitral clauses for

concerning for example the eventuality of a party's death, a clause in case a party acted in bad faith in the performance of a contract or a clause concerning deceit, etc[173]. One of the most important provisions of the *compromissum* was undoubtedly the choice of the arbitrator(s). The parties could elect anyone as long as he was a free man, thus barring the road for both slaves and women to the office of *arbiter*[174]. Besides the choice of the *arbiter*, another important clause featured in this *compromissum* was the financial penalty for failing to obey the arbitral award. This penalty was not set by the Law, but agreed upon by the parties in the *compromissum*. The *arbiter* was bound by the *compromissum* agreed upon by the parties and could therefore not sanction them unless stipulated otherwise in the *compromissum*[175].

The flexibility afforded by this process was clearly seen in the diversity of clauses insertable in the *compromissum*: the scope of the *arbiter*'s powers[176], the penalty for fraud[177], the possibility for the creditor to receive money or a compensation of another nature[178] or even the seldomly seen *actio incerti*[179] whereby parties stipulated that a party victim of fraud could benefit from an action where the *arbiter* was free to dictate the terms of said action[180].

Given the nature of Rome, it is quite clear that the above-mentioned clauses inserted in the *compromissum* were drawn from Roman Law even though the parties could choose its extent and how it applied in the *compromissum*. Moreover, those arbitrations were internal to Rome, so the matter of the applicable Law was not as much of a central question as it is in today's international arbitral world. When at least one party was foreign, the office of the *praetor peregrinus* was the responsible overseer of the trial and would apply the local Law if the defendant was non-Roman (or the *ius civile* if the defendant was a Roman citizen). However, his edicts were very broadly based on those of the *praetor urbanus* (whose jurisdiction was between Roman citizens)[181].

future disputes were found with a certain regularity (Roebuck/de Loynes de Fumichon pp. 113, 201 quoting Cicero, in particular his letters to his brother Quintus and to Atticus).

173 Ulpian, Digest 4.8.15, 4.8.47; Paulus, Digest 4.8.16; Stein p. 220.

174 Paulus, Digest 5.1.12.2; Ulpian, Digest 4.8.7 pr., 4.8.9 pr.-1.

175 Paulus, Digest 4.8.32.15.

176 Paulus, Digest 4.8.32.15.

177 Institutes Iustiniani, 3.15.7.

178 Ulpian, Digest 4.8.11.2-3.

179 Literally, "uncertain action".

180 Ulpian, Digest 4.8.27.7.

181 Roebuck/de Loynes de Fumichon pp. 163-164.

This is why the question of the applicable Law did not pose the same problems we face today due to the multitude of Laws potentially involved in an international arbitration conflict. This is further underscored by the fact that when the praetor was called upon to enforce the arbitral award, he would only condemn the unsuccessful party to pay the agreed-upon penalty if the *compromissum* respected the legal frame set in his edict. Moreover, entering into a binding arbitral agreement did not mean that solving their dispute(s) through the usual channels and the office of the praetor was impossible, thus implying that the applicable Law could shift from one mostly determined by the parties to the usual state Law[182].

If a party wanted to opt out of such an agreement, they could suffer the penalty upon which both parties had agreed beforehand in the *compromissum*[183]. While the praetor avoided interventions, he could still intervene in three different instances with regard to the *compromissum*: when it was void from the outset, when a party claimed something the other refused to give or when a party was alleging that the *compromissum* was not being performed due to certain factors such as death or a subsequent agreement between the parties[184].

(ii) The *receptum arbitri*

The second phase of the *arbitrium ex compromisso* was the *receptum arbitri*, a convention between the parties and the arbitrator. In essence, the arbitrator only needed to join the *compromissum* to become the arbitrator according to the modalities featuring in the *compromissum*, which was done through the *receptum arbitri*. The idea behind the *receptum arbitri* was "to commit the *arbiter* to fulfil all the duties which the *compromissum* required of him"[185]. This included conducting the trial and rendering the award. For instance, the *arbiter* could inflict a financial penalty to a party which did not bring forth witnesses or other means of proof[186]. An *arbiter* could also force the parties to perform a certain act, pay a debt or fulfil a contract[187].

The praetor was not party to the *arbitrium ex compromisso* as his role was purely administrative, not judicial. He could intervene at any point in the procedure to ascertain that the *arbiter* properly performed his duties according to the *receptum*,

182 De Loynes de Fumichon/Humbert pp. 329-330. Cf. *infra*, the parties had to stipulate that they wanted to keep the praetor's channel open.
183 Paulus, Digest 4.8.30.
184 Paulus, Digest 4.8.32.3.
185 Citation from Roebuck/de Loynes de Fumichon p. 143; Stein p. 219.
186 Pomponius, Digest 4.8.39.
187 Paulus, Digest 44.7.3 pr.; Roebuck/de Loynes de Fumichon p. 111.

but as we have seen above, he preferred not to intervene. The underlying idea was to guarantee that the *arbiter* would fulfil his tasks with sufficient diligence and dignity, his rank in society notwithstanding. Doing so when *arbitri* were magistrates of high office (consuls, other praetors, etc.) was admittedly more complex[188].

Should the *arbiter* not act in accordance with the terms of the *compromissum*, the praetor could only force him to properly perform the *compromissum* the *arbiter* had joined. It is only if the *arbiter* repeatedly failed to comply with this initial admonition that he could be fined by the praetor (defaulting repeatedly without a valid excuse)[189]. In the most extreme cases, praetors could make use of their *imperium* and use the state's armed forces to ensure the *arbiter*'s performance of the *receptum*, unless said *arbiter* was of equal or superior office to the praetor[190]. However, the most decisive way the parties could express their contempt and lack of trust in the *arbiter* was to bypass him completely and seek out another one[191].

B. Procedural and less procedural aspects

a. The publicity of the award

Given that the parties had wide latitude to design the procedure, the variations between arbitration procedures were legion. As is very often the case in the 21st century, the parties could define the scope in which the arbitrator was to operate, including how he was to operate, generally in a manner simpler than that of the state courts. The parties could also add clauses to which they would refer themselves in case of default, disagreement, etc[192].

The *arbiter* could act quite freely as long as he remained within the frame set by the parties. In his oration for Quintus Roscius the actor, Cicero laid out many aspects of the procedure taking place in front of the *arbiter*[193]. The first one took the form of a question: why did the parties make a *compromissum* and elect to use an *arbiter*? This question clearly shows that the will of the parties was essential to solving the dispute. Therefore, in order to operate, an *arbiter* had to first understand what were the parties' will and motivation, and once he had done so, he could take them into account when rendering his award.

188 Ulpian, Digest 4.8.3.2-3.
189 Paulus, Digest 4.8.16 pr., 4.8.32.12; De Loynes de Fumichon/Humbert p. 337.
190 Paulus, Digest 4.8.4; Roebuck/de Loynes de Fumichon pp. 147-148.
191 Ulpian and Paulus, Digest 4.8.9.5, 4.8.10, 4.8.11 pr.
192 Milotic p. 10; Roebuck/de Loynes de Fumichon p. 160.
193 Cicero, Pro Quintus Roscius 4, 10-15.

The proceedings and content of the award were never made public, thus allowing the unsuccessful party to maintain their reputation[194]. The importance of arbitral secrecy needs no introduction, and is in our opinion one of the decisive reason for which people elected arbitration as a way to solve disputes, maybe only rivalled by the speed of the proceedings. The main advantage for Romans was that they could avoid infamy and the loss of certain privileges by going through the arbitral channels. Cicero showed how impactful infamy could be in the life of Romans in his second pleading against Verres, a Sicilian praetor who had abused his powers to extort both money and pieces of art from his fellow Sicilians. A particular victim by the name of Heraclius Centuripinus was attacked by Verres by way of *arbitrium ex compromisso*, but the *arbiter* gave an award favourable to Centuripinus. Verres vengefully voided this award, forbade the *arbiter* to attend senate and public meetings and stripped him of his privileges, effectively shaming him publicly, making him infamous[195]. By acting this way, Verres attacked this *arbiter* as publicly as possible, showing that the most virulent way he could exert this vengeance was through infamy, not murder, blackmail or financial sanctions.

While this abuse of power was eventually corrected, it exemplified just how brutal infamy could be in a society where one's reputation was of prime importance. Reputation in the 21st century is probably not as important as it was in ancient Rome, but it remains essential for commercial actors of our time. Facing a public trial is a daunting prospect for many companies, in particular the ones rightfully fearing the impact of public opinion of some of their bottom line. From a technical standpoint, infamy implied the complete or partial forfeiture of three rights: the right to sue, the right to be elected to a public office and electoral rights[196].

Roman arbitration allows us to shed some light on the notion of secrecy, an aspect that has been central in contemporary arbitration, international commercial arbitration in particular. Privacy was not in play in ancient Greece for intercommunal awards. Quite the contrary, while state judgements were signed not by the judge(s) but by the city-state they represented and in whose name they acted,

194 De Loynes de Fumichon/Humbert p. 346.

195 Cicero 84, 66.

196 See Girard pp. 215 ss and Roebuck/de Loynes de Fumichon pp. 173 ss for more details. We will see *infra* in part 2, V, 5 why reputation and *auctoritas* were connected, and thus how arbitration was helpful safeguarding both. *Auctoritas* was indeed an eminently collective notion of ancient Roman society, and given the weight of each person's reputation in the eyes of their co-citizens, a loss of reputation would very probably result in a loss of authority, the very concept supporting the Roman *civitas* and *societas*.

arbitral awards were personally signed by the arbitrators[197]. If international arbitration was less of a factor in Rome than in Greece, the transparency of international arbitral awards in which Rome was involved was probably even higher given her geopolitical importance. In effect, it would have been nearly impossible to maintain any form of secrecy regarding the acquisition of a new territory by Rome, even if she so desired.

b. An introduction to equity

Before diving further into the notion of equity in Roman arbitration, we would like to establish what we understand to be equity, a complex multi-faceted concept often and easily misunderstood. For clarity and brevity's sake, we will focus on what we identify as the most important occurrences of equity. Developments regarding equity will feature more prominently *infra*[198], especially from a legal-philosophical and arbitral perspective. For the time being, we simply wish to lay out definitions around which we will be able to work for the remainder of this dissertation.

Schematically, equity exists under three major shapes. The first one, that we shall call general equity, is the most overarching conception of equity, inherent to any legal decision. Arguably the two most influent philosophers of all time, Plato and Aristotle were aware of the importance of general equity, the latter in particular. He considered general equity necessary for an effective justice as he makes it a key component of his description of proportional justice, otherwise known as the *suum cuique tribuere*[199]. According to Aristotle, general equity is the link between abstract Law and concrete cases, and as jurists know full well, unapplied or inapplicable rights cannot be considered anything but *lettre morte*[200].

[197] Cf. *supra* part 1, I, 2, B.

[198] Part 1, II, 2, B, *b.*

[199] Usually understood as "to each his own", this notion advocates a justice proportional to one's merits. A classic example is the salary of a person being proportional to their responsibilities, merits or the obstacles one has to overcome while working. For instance, a surgeon and a bank clerk have very different levels of income based on the nature of their jobs: the surgeon saves lives and has sacrificed many years to train and reach the necessary level of competence to be a surgeon, whereas the bank clerk's job mainly consists in giving basic banking information to clients, hence the difference in incomes. Aristotle, Nichomachean Ethics 2079-2080; Saint-Arnaud p. 161. Cf. *infra* part 2, V, 5, C, c, *d* for more on distributive and commutative justices.

[200] Literally "dead letter", which is French expression for something that is not applied. We thought that this expression was right on target to describe a text of law that is not applicable, a dead, lifeless text of law. Papaux, Introduction pp. 59-60.

In other words, general equity is the key for Law to be dynamic and incarnate[201], to have a physical manifestation, as it allows one's rights to be effective, concretized. It continuously adapts a very static text of law to a constantly evolving society. Without general equity, there is no link between Law and case, between the abstract and the concrete, meaning that general equity is inherent to any legal decision or application. As such, it is not intrinsically good or bad, it simply is.

Of course, general equity can be more or less well executed, but this is something dependant on each interpreter. This is why hermeneutics (the science of interpretation, cf. *infra* part 3) is key to a good application of general equity, which requires not only an interpretation of the Law, but of the facts as well, both of which being the shores separated by the gap general equity bridges[202].

From a more epistemological perspective, the purpose of general equity is to operate the passage from the general and abstract to the singular and concrete. Given that we are indeed facing two epistemologically different planes (general and abstract vs. particular and concrete), we need something to operate the passage from one to the other, to make them commensurable with one another. Failure from doing so means that facts and Law cannot dialogue, that Law cannot be concretized, remaining still at the purely theoretical level.

Although judges and arbitrators are ultimately responsible for operating this passage, all jurists do it. For instance, attorneys, after having a meeting with their client, look at various legal sources in order to find those best befitting of the defence they are currently building for the client. These attorneys might not be building the bridge themselves as they are not the ones deciding, but they are suggesting an "architectural plan" for the judge, one heavily leaning towards the interests of their client and that they need to convince the judge/arbitrator to adopt. Despite the fact that this attorney lacks the capacity to concretize the passage from the general and abstract to the singular and concrete, their intellectual process still consists in attempting to commensurate Law to the facts.

To be clear, general equity (all types of equity really) requires the capacity to render an applicable justice decision. If not, the discussion will remain purely abstract, which is contrary to the very purpose of general equity i.e., operating the passage from the abstract and general to the concrete and particular. This is why attorneys and prosecutors are ultimately not the main users of general equity, because they

[201] From the Latin *"incarnare"*, in the flesh.
[202] Yntema p. 65.

are not the ones rendering the legal decision (although prosecutors have been known to do so, such is usually not the case). But the way all jurists operate, by making facts and Law dialog, is epistemologically neighbouring of a judge's reasoning, and general equity and the professional qualities it represents are perhaps the pinnacle of this *modus operandi* consisting in crafting and imagining passages between two different intellectual planes. The reason is that only the professional qualities and virtues embodied in this concept are capable of concretizing this "imagination".

Less omnipresent than general equity is a more specific kind that we shall call specific equity hereafter. Specific equity is better known than its general counterpart and is what jurists commonly associate with the idea of an equitable justice. Specific equity is not intrinsic to any and all concretizations of Law as its purpose is not to serve as a neutral bridge between two planes differing on a meta-level, but justice.

This implies that the axiological colouration of specific equity is more pronounced than that of general equity. This colouration will necessarily happen the moment an interpreter is involved in the legal process, but whereas general equity's purpose is simply to concretize Law in the face of a concrete case, that of specific equity is justice, which involves a moral judgement, one whereby the legal interpreter decides whether the behaviour of someone else is fair and honest according to the values promulgated by their society's conception of justice. It is worth noting that neither concepts of equity reflect a "natural justice" towards which we all gravitate. They do not set an objective or a standard judges and arbitrators are supposed to strive for, which would correspond to a *ius naturale*, a natural order established by a superior being.

The notion of specific equity, unlike general equity, is not found in every single case. Rather, in the civil Law tradition at least, it exists when a society's Law allows judges a wider-than-usual margin of interpretation for the sake of correction. The legislator, in the instances where it knows that laws are too rigorous to bring about justice, grants judges the possibility to correct the application of the law within a wider range than usual, albeit always within a frame laid out by laws: *"Une règle de droit devrait même en principe être faite pour régler les cas les plus nombreux; cet objectif de justice est dévoyé lorsque l'on fait une règle de droit pour un petit groupe d'intéressés, que ce soit pour les favoriser ou les stigmatiser. On peut en ce sens opposer le droit à l'équité. L'équité renvoie souvent à l'idée de pallier la rigidité du droit liée à sa généralité.* 'Summum jus, summa injuria*', dit l'adage classique (le droit le plus strict, l'injustice la plus grande). Lorsque l'application*

stricte de la règle de droit conduit à une injustice, l'équité permet d'adapter celle-ci à un cas particulier."[203] Said otherwise, *"C'est ainsi qu'il convient de comprendre les nombreuses références à l'équité, au résultat équitable, etc., dans ce qui est présenté comme l'application d'une règle dont on corrige certains effets jugés trop rigoureux."*[204]

Countries of common Law have enjoyed a different relation with specific equity, especially in England where it was historically the prerogative of the Chancery court and an attempt to solve the procedural and substantial inadequacies of the common Law, which is typically how certain concepts such as unjust enrichment were born in common Law systems[205]. From a historical standpoint, "the doctrines of equity were established, elaborated, and extended by precedent and legislation, equity could be more accurately described as a particular branch of English jurisprudence, comprising a heterogenous assemblage of topics, that grew into grounds of equitable jurisdiction, not as a logical system but in response to historical circumstances."[206]

In spite of a historically more loaded relation, the notion of specific equity in common Law is roughly the same as in civil Law i.e., to compensate lacks of justice due to an excessive rigidity of applicable laws. Mechanisms may differ between these two systems, as Anglo-American Law requires principles of specific equity to be received into general norms, while civil Law countries have often ceased to have separate mechanisms for Law and specific equity[207]. This would be more sound logically, until we realize that much of the civil Law doctrine does not understand this, to the point where doctrine authors[208] often consider specific equity to not be part of Law, not comprehending that it acts as a corrector not only in cases where laws allow it, but in all cases where laws fail to do justice through the "simple" concretization of general equity, whose existence said authors are usually unaware of.

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203 Fabre-Magnan, Introduction p. 18.

204 Alland pp. 52-53.

205 Yntema pp. 83 ss; Newman p. 826.

206 Yntema p. 84.

207 Newman p. 830.

208 Cf. for instance Morin, Equity; Perrin, art. 4 *in* CR CC I; Petit p. 26 (particularly his conception of *équité objective*). This lack of understanding is not limited to civil Law authors; cf. H. Smith for example. Perhaps more troubling, cf. the Report to the Attorney General written by the Office of Legal Policy of the U.S. Department of Justice (Justice without Law: a reconsideration of the "broad equitable powers" of the Federal courts of the 31st of August 1988), which outright describes equity as "discretionary justice […] that ended about 350 years ago." (p. i)

The relation between general and specific equity can be summarized as such: the latter is an occurrence of the former and is guided by the sense of a society's justice. The former, on the other hand, is much less moral and embodies an epistemological necessity in Law, being the sole converter of an abstract and general text to a concrete and individual case. Specific equity is a corrector of laws, while general equity is a converter of Law. The first one helps prevent accidents of justice, while the latter is intrinsic to any legal process.

From our point of view, however, this distinction is not the most pertinent as any use of the concept of equity, general or specific, implies certain fundamental recurrences such as the use of hermeneutics by the legal interpreter, which, as we will see *infra*[209], always involves a person's *Vorverständnisse* which include a person's subjective views, morals, knowledge, axiological preferences, etc. Moreover, the idea that Law is sometimes moral, sometimes not is one we will regularly refute through the course of this dissertation. Indeed, contrary to what legal positivists argue, Law is not objective as we will see *infra* in parts 2 and 3. Given that interpretation is a deeply personal, albeit inter-subjective process, one's *Vorverständnisse* will always influence the legal interpreter. The simplest of examples concerns the Law in which we are trained: no matter how long a French jurist spends in international spheres, said jurist was never trained in common Law, and although they will certainly be influenced by many concepts, the foundation of their legal reasoning is the one in which they were trained i.e., French Law.

Although this first distinction between types of equity was first and foremost for purposes of clarity, the last distinction we would like to make is more meta-legal than the previous. Indeed, the third and last type of equity we will mention is equity *ex aequo et bono*, which in some regards, represents the apex of legal interpretation and incidentally, the main legal-philosophical characteristic of arbitration, as we will see throughout part 1 of this work. Defining equity *ex aequo et bono* at this stage is somewhat of a tricky task because it involves elements discussed at length in parts 2 and 3, and even in this very part 1 *infra*. As such, in order to avoid creating too much confusion this early in the dissertation, we will keep our definition to a minimum upon which we will further elaborate as we go on.

In a bit of a caricatural fashion, equity *ex aequo et bono* could be said to exist between general and specific equity. It is not a necessity, contrary to general equity, but it is much more encompassing than specific equity. Equity *ex aequo et bono* is in

[209] Part 3, II, 2, B, *b.*

essence the capacity to decide a case based on our own judgement alone, without rules, without precedents, without concern for the adequation between Law and case.

The most complete sort of freedom a jurist can enjoy, it is only seldom granted and usually only to those who have displayed a sufficient amount of authority to justify their use of such an interpretative freedom[210]. There are certain limits to this equity as we shall see in part 3 *infra*, meaning that the "most complete sort of freedom" does not mean "absolute freedom" or even "complete freedom" to decide cases. These limits, however, are not legal, for if they were, we would "regress" towards specific equity[211].

All in all, in the "grand scheme of equity", general equity can be considered as what sets the general framework in which the other two types of equity insert themselves, both of which being specific species of the general genre. Indeed, general equity is the most overarching in that it sets the passage from an intellectually abstract reasoning to a concrete situation. Specific equity and equity *ex aequo et bono* then continue this very general idea, albeit in very different contexts.

On one hand, the "filiation" between general and specific equity is quite clear as in both cases, we operate with a legal base in order to solve a concrete case. The main difference resides in the fact that general equity is found in any and every concretization of Law, while specific equity is used when the interpreter needs to compensate a lack of fairness and, well, equity stemming from the legal source used.

On the other hand, the "filiation" between general and *ex aequo et bono* equity is more tenuous because equity *ex aequo et bono* does not use conventional legal sources, it "simply" uses authority[212]. This is why placing equity *ex aequo et bono* as an outlier in the equity scheme would be perfectly justifiable, although this is not the path we have chosen. The reason is that we consider that in both the cases of general and *ex aequo et bono* equity, we operate the passage from abstract to concrete. What differentiates equity *ex aequo et bono* from the others is the lack

[210] As we will see throughout this dissertation, especially part 1, arbitrators are at the forefront of those enjoying the capacity to decide cases *ex aequo et bono*.

[211] To be clear, we will be specifying the type of equity we are analysing at every given opportunity. Should we not specify anything (simply "equity"), this would mean that we are alluding to the general idea of equity, under which all three types are subsumed.

[212] We will see *infra* in part 2, V, 2 why authority is perhaps more of a legal source than any other text of Law with the three-dimension theory, but generally speaking, jurists rarely ever consider it a source of Law, or even something remotely related to it.

of legal source given that it uses the interpreter's authority as its sole foundation. However, because we view authority as a legal source[213], it becomes logical for us to subsume equity *ex aequo et bono* under general equity. Overall, when one makes use of specific or *ex aequo et bono* equity, they necessarily make use of general equity. The reverse, however, is not necessarily true for general equity covers all legal concretizations while the others only cover some legal concretizations.

How then, do we grant someone such a potentially dangerous freedom of interpretation? The answer will be laid out in detail in part 2 *infra*: authority. Not understood in the sense of "the authority deriving from Law" or even "being an authority in the field of Law", being an authority implies the capacity to augment the common good of a society (*"auctoritas"* in Latin). Proving one's worth to society by constantly doing one's utmost to augment it gives birth to the necessary trust to be able to decide cases *ex aequo et bono*, which is the most important reason why there was an inferior age limit to becoming an arbitrator in ancient Greece[214] and why *arbitri* in Rome were people of trust, a trust founded upon each's degree of *auctoritas*[215].

Arbitri were not as rigidly bound to Law as *iudices* who, for the most part under the formula procedure, were completely tied to the praetor's edict, even if said edict was unlawful. In addition, the purpose of arbitration and the *arbitrium ex compromisso* in particular, was to avoid both infamy and the rigidity of the state procedure.

Overall, the role of the Roman *arbiter* was described by Cicero as one whose trade is equity *ex aequo et bono*. Cicero considered that *iudices* dealt with precise technical matters, whereas *arbitri* operated around the concepts of equity *ex aequo et bono* and fairness, implying that *arbitri* needed a good sense of justice more than they needed a good technical understanding of the Law, a high degree of *auctoritas* more than an encyclopaedic knowledge of the texts of Law[216]. This is further confirmed by the fact that *arbitri* were expected to behave like a *bonus vir*[217]: competent or not, *arbitri* had to be fair and render a fair award[218]. Seneca the Young also made the distinction between *iudex* and *arbiter* by declaring

213 Cf. *infra* part 2, V, 2.

214 Cf. *supra* part 1, I, 2, B.

215 Cf. *infra* part 2, II; de Loynes de Fumichon/Humbert p. 299.

216 Cicero, Pro Quintus Roscius 4, 10-13; de Loynes de Fumichon/Humbert pp. 324-325; Roebuck/de Loynes de Fumichon p. 198. Cicero draws on an association between arbitration and equity that was already mentioned by Aristotle, cf. *supra*.

217 Ulpian, Digest 4.8.3.1.

218 Roebuck/de Loynes de Fumichon p. 198.

that *iudices* were bound by laws in their mission to do justice, whereas *arbitri* focused on *humanitas*[219]. Accordingly, there was quite a difference between the strictness of a praetor's edict and the way it was enforced[220].

Those testimonies are quite explicit as to what was expected of an *arbiter*: the capacity to understand all implications of an arbitral procedure, as well as a propensity for fairness, to concretely achieve justice through wisdom rather than technical legal knowledge. In particular, justice could only be achieved with a proper understanding of the society in which he lived, meaning that an *arbiter* needed a decent amount of transversal knowledge and not simply technical, legal knowledge. Acting in an equitable manner thus required no short amount of experience.

Effectively, equity is an immense part of the application of Law, with general equity even being a necessary part of said application. While it is underrated, misunderstood or even wholly forgotten by many jurists in the 21st century[221], both jurists and philosophers of the Antiquity thought differently as we have just seen *supra*.

Comparing ancient to contemporary arbitration may seem somewhat unhelpful, but it is important to do so because contemporary arbitration uses many tools inherited from the Romans, in addition to certain aspects of its overall mentality, although the latter have significantly dwindled over the past decades[222].

Contemporary international arbitration is as much a descendant of ancient international arbitration, which mainly revolved around territorial disputes, as it is a descendant of Roman internal arbitration. Indeed, let us not forget that contemporary international arbitration mostly concerns private economic matters, legal quarrels that used to be the prerogative of Roman internal arbitration, albeit

219 "[…] *que d'un arbitre, qui n'étant retenu d'aucune considération, ni pressé de scrupules quelconques, est libre de suivre ce que bon lui semble et sans se lier à l'observation ni des lois ni de la justice, conforme son jugement au sentiment qu'il a de compassion et d'humanité [humanitas]* […]. *Mais pour le regard des choses que la seule sagesse est capable de connaître, il faut aller ailleurs qu'aux sièges d'une juridiction ordinaire* […]." (Seneca, chapter 3, VII). *Humanitas* can be translated as humanity, respect, generosity. It is quite apparent that *humanitas* implies doing justice as well.

220 Stein p. 220.

221 Cf. H. Smith pp. 1067 ss for instance, who lengthily explains that equity is not part of Law, all the while mentioning neither equity *ex aequo et bono* nor general equity.

222 Cf. *infra* part 2, V, 5.

on a different scale. Furthermore, their legal-philosophical underpinnings remain very similar, as we will see in parts 2 and 3 *infra*.

c. Appeals

Appeals are a fascinating aspect of arbitration law as a whole. They often indicate how liberal a country is regarding arbitration: the more possibilities to appeal against an award, the more a country will usually be wary of the institution. The section *infra* will compare Roman Law to certain contemporary Laws in order to highlight this distinction.

Given the nature of the *arbitrium ex compromisso*, the only penalties allowed were the ones included by the parties in the initial *compromissum*[223]. Unless specified otherwise, parties could not appeal against an arbitral award[224]. By electing arbitration, an alternative path to justice, parties had an immense freedom to choose the modalities of their arbitration, including the procedure, but this also meant that the parties had to bear the consequences for keeping state courts out of their agreements. According to Ulpian[225], "The awards which an *arbiter* renders should be valid whether they are fair or unfair. That is what the parties undertake when they make a *compromissum*. According to Emperor Antoninus Pius, "One should bear with equanimity an award which is less than justifiable"." Ulpian adds that we can only blame ourselves for choosing another path than that of the state courts[226]. The parties could of course stipulate in their *compromissum* that the appeal to a judge against the award was possible[227].

It was yet possible to appeal even if the concept of appeal did not feature in the *compromissum*, but only in certain specific situations, and an annulment of the award was the only outcome allowed. Not unlike certain modern Laws, Roman Law under the principate allowed appeals against arbitral awards in case of a breach of certain fundamental formal rights (cf. the following section). The appeal was limited to those aspects and there could not be any control of the contents of the award, only its formal aspects could be re-examined[228].

223 Papinianus, Digest 49.1.23 pr.
224 Paulus, Digest 4.8.30; Emperor Antoninus Pius, Code 2.55.1.
225 Ulpian, Digest 4.8.27.2.
226 Ulpian, Digest 4.8.27.2.
227 Papinianus, Digest 49.1.23 pr.; Roebuck/de Loynes de Fumichon p. 186.
228 Paulus, Digest 4.8.32.14; Gaius *Institutes* IV.119; Code 2.55.3; de Loynes de Fumichon/ Humbert p. 345.

If the praetor had multiple ways to control an *arbiter* before the arbitral award was rendered[229], such was not the case once the *arbiter* had finished his work. On the other hand, current legal systems exercise a lighter control on the arbitral trial during proceedings, with only a few limited options for parties to contest what arbitrators do. Both in Rome and nowadays, the available options were quite narrow for parties after the award has been rendered.

d. Comparative Law regarding appeals against awards

In Switzerland, where laws regarding international arbitration are known for being very liberal towards arbitration, art. 191 of the private international law act of the 18th of December 1987[230] clearly states that an appeal against an arbitral award can only be made to the highest court in the land, the Federal Tribunal. This implies that only one Swiss court is competent to judge on matters of international arbitration. Moreover, when examining art. 77 of the Federal Tribunal Act of the 17th of June 2005[231], we can see that there are only a few cases where an arbitral award can be appealed against (art. 190 para. 2 of the Swiss PILA). Those cases include only the most basic aspects of a fair trial such as the possibility to appeal against an award in breach of public order (let. e) or against the violation of a party's right to be heard (let. d).

Art. 1518 of the French code of civil procedure[232] limits the appeals against international arbitral awards to the *recours en annulation*, thereby excluding the possibility for state courts to rectify the substantive points of an award. Moreover, art. 1520 of the French CCP also limits the cases in which such an appeal can be made: in case of a breach of the international public order (para. 5), irregular composition of the arbitral tribunal (para. 2), etc.

Art. 44 of the Japanese arbitration law[233] concerning the "setting aside"[234] of arbitral awards is a little more restrictive against arbitration than its European counterparts as it allows more grounds to lodge an appeal against arbitral awards in state courts. Indeed, while it mirrors certain themes (violation of party's right to be heard, no. 4;

229 Cf. *supra*.
230 Swiss PILA, RS 291.
231 Swiss FTA, RS 173.110.
232 French CCP.
233 仲裁法 ("chû sai hô"), act 138 of the 15th year of the Heisei era.
234 According to the terminology chosen by the Arbitration law follow-up research group in March 2004 (‹https://japan.kantei.go.jp/policy/sihou/arbitrationlaw.pdf›, last consulted on the 6th of June 2019).

irregular composition of the arbitral tribunal, no. 6; protection of the national public order, no. 8), it also adds other criteria such as the necessity for the award to remain in the scope of the arbitration agreement (no. 5).

In the U.S., sections 10 and 11 of the U.S. arbitration act[235] detail the grounds on which a party can appeal against an arbitral award, and like the cases we have seen above, they are limited to breaches of the most basic rights: corruption (sect. 10, let. a, no. 1 and 2[236]), denial of one's right to be heard (sect. 10, let. a, no. 3), etc. In Hall Street Associates, L.L.C. v. Mattel, Inc.[237], the U.S. Supreme Court decided that extending an arbitral agreement's judicial scope was not possible according to sections 10 and 11 of the FAA. Delivering the Court's opinion, David Souter states that "sections 10 and 11 [FAA] […] address the egregious departures from the parties' agreed-upon arbitration […]." Justice Souter then adds quite explicitly that "expanding the detailed categories would rub too much against the grain of the [section] 9 language, where provision for judicial confirmation carries no hint of flexibility. On application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else." By prohibiting the extension of an arbitration agreement's judicial scope, the U.S. Supreme Court clearly states that, like Japan, Switzerland or France, appeals against an arbitral award stand on thinner grounds than appeals against judgements emanating from state courts.

This difference between the Roman and contemporary eras regarding the grounds on which one could appeal against arbitral decisions is helpful to understand the role of arbitration in both eras, especially concerning the mindset with which arbitration has been and remains construed.

[235] Signed into law on the 12th of February 1925. More commonly known as the Federal arbitration act, or "FAA". Cf. U.S. Code, Title 9.

[236] No. 2 uses the word "evident", meaning that a certain degree of corruption should be reached in order for it to apply. However, it seems that the interpretation of the word "evident" varies depending on the federal circuit of the courts [Lee I. Introduction].

[237] Hall Street Associates, L.L.C. v. Mattel, Inc. 552 U.S. 576 (2008).

The Roman *arbitri* were viewed by praetors as having the same societal mission as judges: keeping the peace[238]. There were many situations in which the supervisory authority, the praetor, could intervene during the procedure. However, once the award was rendered, the parties had to take responsibility for their choice, hence the limited grounds on which they could lodge an appeal against an arbitral award. On the other hand, asking a state court to intervene in an arbitral procedure or appealing against an arbitral award in contemporary Law is much more difficult as, quite often, state tribunals are not allowed to look at the contents of an award except for violations of the tallest order. This comparison illustrates how similar concepts are treated differently according to the importance legislators give them: a certain benevolence kept in check by legal safeguards in Rome, a strong inclination not to interfere in contemporary Laws.

3. Roman conclusion

There are many lessons to draw from analysing arbitration in ancient Rome. From an international standpoint, the main aspect of the Roman domination was to confirm what we had already seen with Greece on a different scale: when the power balance between parties is exceedingly slanted in favour of one or the other, arbitration becomes ineffective because the more powerful party has little incentive to concede willingly anything to the less powerful party.

In the case of Rome and her neighbours, the difference in military might, demography and overall organisation was simply overwhelming: even a military alliance across the geopolitical board against Rome would have certainly been insufficient, the proof being that the Roman empire self-destructed more than it was conquered by the various Barbarian tribes. The Roman approach to international arbitration was not to settle disputes peacefully, but to give a more peaceful appearance to their conquering geopolitical strategy. In certain instances, she did not trouble herself with appearances as we have seen when she acted as arbitrator for the dispute between Naples and Nola, but ended up awarding the disputed territory to herself, which was in effect a conquest without bloodshed.

While there are some elements that are similar to what is happening in the 21st century, there was not much to be passed on regarding international arbitration from Rome because of the general power imbalance. On the other hand, arbitration

238 De Loynes de Fumichon/Humbert p. 339.

was and remains commonly used to solve disputes when the power structure between parties is balanced enough to the point where no one can impose their will to the other. Such was for instance the case when legal disputes involved inhabitants of Rome only, or, in the current contemporary period, between two companies with similar means.

The main influence on contemporary arbitration was without a doubt the *arbitrium ex compromisso*. It is no secret that Roman Law had an immense influence on contemporary western private Law, but the case of arbitration is more complex given the lack of written sources concerning arbitration when compared to other domains of the Law. While contemporary arbitration faithfully continues certain aspects of the *arbitrium ex compromisso*, there are other fundamental aspects which either morphed into something else or disappeared entirely from contemporary arbitration.

The first of the two main aspects that have lived on since the Roman era is the capacity for the parties to determine the scope of the arbitrator's jurisdiction. Determining the power of the arbitrator was not as freely done as in the 21st century given that a public representative, the praetor, was involved during the entirety of the proceedings, albeit not to the same degree as in other procedures. The parties' capacity to determine the person deciding the case's jurisdiction is typical of arbitration[239] and has evolved since the Roman era to a stage where states are not involved and could hardly be even if they so desired[240]. Likewise, the choice of applicable Law has evolved to the point where some specialized scholars suggest that international *ius cogens* could be discarded if the parties so wished[241].

Regarding the *ratione materiae* competence of arbitral tribunals, certain domains have been out of their reach since Rome (criminal law, family law, etc.), usually on grounds of public order. However, contemporary arbitration sometimes reverts to clauses reminiscent of the era preceding *bona fides*. For example, the contract tying Uber Switzerland LLC to its drivers was as recently as April 2019 judged as an

[239] Other alternative dispute resolution processes such as mediation or conciliation also grant the capacity to define the scope of the third party during the proceedings, but in none of these institutions does the aforementioned third party have the capacity to render a definitive decision in opposition to one or both parties' will. Arbitration is the reflection of the parties' will to delegate some of their freedom to the arbitrator, who is then capable of rendering an award on which a party may not agree but is obligated to perform.

[240] Cf. *supra*.

[241] Bollée for example.

employment contract, contrary to what Uber Switzerland LLC argued. Said employment contract features an arbitral clause which would prompt the creation of an arbitral tribunal in the Netherlands for any legal issue arising between Uber and its employees, an arbitral tribunal whose sole arbitrator was to be chosen by Uber[242]. In our opinion, this clause is outlandish because it echoes the *leges Catonianae*, which handed a disproportionate advantage to the employer to the detriment of their employees. While the *leges Catonianae* were ultimately deemed unlawful, contemporary contracts have yet to be labelled as such, which is a clear indication that contemporary parties have a bigger capacity to determine the scope of both the arbitrator's jurisdiction and the applicable Law.

The second of the two main aspects of arbitration that has survived since Rome is the iron-clad secrecy enjoyed by arbitration and its actors. The consequences of infamy were so severe in Rome that they could result in the loss of certain cardinal rights. This is why, in order to render the justice system more acceptable, tolerable even, arbitration channels developed in parallel of the usual state justice system.

We do not exclude that contemporary arbitration actors would suffer if the award concerning them was made public. It would however be so to a far lesser extent. Secrecy started as a way to protect Romans from the loss of public status, and although much has changed since in terms of context, the purpose of arbitral secrecy remains the protection of reputation. If the eventuality of definitely losing rights as fundamental as electoral rights is not, to the best of our knowledge, a sword of Damocles hovering over the heads of 21st century parties, arbitral secrecy still shields them from certain unwanted consequences, mainly the loss of reputation or revelation of illegal activities. The extent to which arbitral secrecy should be maintained in our current context is another discussion entirely, for another essay perhaps.

While this following aspect may not be as typical of arbitration as the two previously analysed, it is reflective of a bigger problem, and how deep we currently find ourselves in the contractual positivist mindset[243]: the submission of future disputes to arbitration. The idea behind the anticipation of non-existent disputes is the so-called legal certainty: if the parties involved know in advance under what modalities their problems will be solved, they can supposedly anticipate their legal

[242] Wyler/Heinzer pp. 32 ss. Cf. also the most recent decision on the matter from the Federal Tribunal: *arrêt* 2C_575/2020 from the 30th of May 2022.

[243] Cf. *infra* part 3, III, 2.

needs and make the necessary preparations ahead of time. Indeed, knowing what will happen in advance is often thought of as psychologically reassuring.

In Rome however, there were no arbitration clauses for future disputes, which only started to become a regular feature during the 19th century. As seen *supra*[244], the parties switched from a normal procedure to an arbitral procedure after the problems had occurred. This could seem quite surprising, because the Romans' disapproval for legal uncertainty is illustrated by the well-known example of the citizens whose status changed from *alieni iuris* to *sui iuris*[245]: it was pure horror if the new *sui iuris*' first action was not to write his will, to ensure that his succession ran smoothly and in order for everyone to know to whom the family heirlooms would pass, to avoid legal uncertainty regarding the family inheritance.

However, even with this mentality, Romans never thought of arbitration as something to be used for future disputes, nor did they delude themselves into thinking that they could anticipate everything and record it in a written arbitration clause. While we have seen certain arbitral clauses intended for future disputes in Greece, it never reached the frequency of the late 20th and 21st centuries. We will see to what extent this desire for legal certainty has started to warp the very legal-philosophical essence of arbitration, equity[246]. We will also see how this quasi-veneration for contractual clauses squarely placed arbitration under the thumb of contractual positivism[247].

The payment of arbitrators is one of the bigger differences between Roman and contemporary arbitration. In Rome, receiving money as a judge or arbitrator was considered corruption, a far cry from contemporary practices.

One justification of this difference might lie within the very system of justice the Romans had: the role of the judge was important for the decorum, but the main legal mind behind any procedure was the praetor, who administered Law before the case arrived in front of the judge. A contemporary judge on the other hand is, very roughly, akin to a fusion between a *iudex* and a praetor, in addition to having more discretionary power, which usually means shouldering heavier responsibilities. Unlike the *iudex*, it was expected of the *arbiter* to make use of his discretionary

244 Part 1, II, 2.

245 The usual case is the son whose father dies. Before the death of his father, said son was *alieni iuris*, which means that for certain acts, he needed the consent of the person on whom some of his rights rested, the *sui iuris* person, his father usually.

246 Cf. *infra* part 2, V, 5, B, *d*.

247 Cf. *infra* part 2, V, 5.

power (his equity *ex aequo et bono* to be more precise), even though the praetor could intervene in an arbitral procedure. It could therefore be argued that even though the Roman *arbiter* was the one to take the most important decisions during the proceedings, the praetor still exerted a certain control over arbitral proceedings. Contemporary arbitrators, on the other hand, do not enjoy "safety nets" in doing their job. In both instances, although we are not quite convinced by this argument, it could be said that contemporary judges/arbitrators are being financially compensated for accrued responsibilities when compared to their ancient Roman counterparts.

The problem is, the weight of responsibilities alone does not justify such different visions, between eras, of the financial compensation for people exercising the same task. If such was the case, Roman *iudex* and *arbitri* would be paid but less so. More convincingly, the reason for which Roman *iudex* and *arbitri* were not paid, other than the corruption aspect, was that acting as such was considered a duty to fulfil, not for the sake of individual glory, but for the common good.

This collective approach to society was typical of both ancient Rome and ancient Greece, where the citizen was more important than the individual. The transition in legal philosophy, from citizen to individual, is not the subject of this work, but the analysis of the concept of *auctoritas* picks up this core separation in an attempt to delimit, explain and develop the aforementioned concept[248].

Lastly, Romans were well aware of an aspect of the judiciary that contemporary jurists tend to ignore or dismiss entirely: equity. As Cicero and Seneca the Young both wrote, a judge's craft is justice through laws, an arbitrator's craft is justice through equity. According to them, judges were supposed to follow the instructions laid out in the praetor's edict in order to do justice, contrary to arbitrators who had to base themselves on their experience, knowledge and overall sense of justice in order to give a decision[249].

Equity is often discarded in contemporary legal theory because it supposedly does not rest on scientific enough foundations, and more importantly, because this sole concept disproves legal positivism, the most dominant legal doctrine since the 19th century, even though it has lost a lot of credibility in recent years[250]. Equity has direct ties to another concept, one briefly mentioned a few times: *auctoritas*. In our

248 Cf. *infra* part 2, I, II.

249 Cf. *infra* part 2, V, 5, C, *c* regarding the types of justices.

250 Cf. *infra* part 2, III, 1 regarding the definition of legal positivism.

view, *auctoritas* is the philosophical foundation of equity (especially equity *ex aequo et bono*) which in turn is the legal reflection of *auctoritas*[251].

As we have seen[252], equity does not require an intricate knowledge of legal technique, but it does require an acute sense of justice, especially in the cases of specific equity and equity *ex aequo et bono* (*"ius est ars boni et aequi"*[253]). This should be coupled with an understanding of the two main types of Aristotelian justices: the *suum cuique tribuere* and commutative justice. The reason being that those two types of justice are the vectors through which the overall sense of justice materializes itself[254].

Auctoritas' very partial definition is that one is acknowledged as an authority in a specific domain because they are viewed as more competent than their peers in said domain. Much more importantly, *auctoritas* is the capacity to augment an inherited common good, as we will see at length in part 2 *infra*[255]. In Law, this often translates into how jurists can augment their society by ensuring the good service of justice. In this context, the most authoritative jurists are those capable of wielding equity with the purpose of ameliorating their society, especially when laws are lacking. What was relatively common in ancient Rome, specific equity and equity *ex aequo et bono*, is becoming scarcer in our contemporary era, especially because of the hubris caused by the positivist doctrine that leads us to think that laws can be perfect, that they are the vector of univocal legal solutions unbefitting of any interpretation[256].

[251] Cf. *infra* part 2, I, II.

[252] Cf. *supra* part 1, II, 2, B, *b.*

[253] Ulpian, Digest 1.1.1.1.

[254] Cf. *infra* part 2, V, 5, C, *c* regarding those two forms of justice, which could, really, be regrouped under the umbrella of the sole distributive justice.

[255] The latter definition, more complete, is not antithetical to the first one underscoring the "expertise side" of authority. Quite the contrary, a person who is an authority on a subject is still deserving of the moniker "authority", if only because they augment what they inherited more than "non-authorities" on the same matter. For instance, an authority on real estate law teaching at a university will augment the common good through education and research more than a "non-authority" would. With that being said, an epistemic authority remains deserving of being called an authority as long as they participate in the augmentation of the common good, which remains the single most important criterion when judging whether someone is indeed authoritative or simply knowledgeable.

[256] Cf. *infra* part 3, III.

Some of the most fundamental legal techniques and procedural tools used in the 21st century were already in use in Rome (secrecy, choice of the arbitrator, scope of the arbitrator, etc.). While certain tools used in contemporary arbitration are of common Law descent (cross-examination for instance), its most important aspects were inherited from the Romans.

The comparison between Roman and contemporary eras teaches us yet another important lesson: arbitration can only function when the power balance between the states and persons involved is not so lopsided that the stronger side can ignore the award and proceed according to their will, with no care for the weaker side.

This lesson is a reminder that alternative dispute resolution and arbitration in particular, are certainly efficient to solve conflicts, but not when one party can ignore any potential award without significant repercussion. In such situations, the only way to compel the stronger party to perform an award is *auctoritas*. In this case, *potestas* is indeed not an option as the party wielding it is the one which has to comply with the award. It is only through the force of argumentation, through moral and intellectual superiority, that one can sway a party benefitting from a disproportionate power advantage to accept that respecting and properly performing the arbitral award is a good idea from the standpoint of the common good, which includes healthy relations between members of a society.

Having parties whose "degrees of *potestas*" are similar makes the situation much easier as the necessary "*auctoritas* threshold" will be lower: the more we gear towards equivalent degrees of *potestas*, the more the impact of *auctoritas* is felt. While a broken power balance most definitely reduces the sway *auctoritas* holds over arbitral proceedings, it remains the only option to force the more powerful party into a compromise.

The downfall of the Roman Empire marked a brutal change on the European scene and Law was deeply impacted by these events. Traces of arbitration were scanter, in particular before the 11th century, but it does not mean that they dwindled in numbers: oral tradition took centre stage and with it, the difficulty to trace sources centuries later. The fragmentation of Rome and the multiplication of sovereign people and independent territories of comparable political and military might were quite the fertile ground for arbitration.

Indeed, as we now know, international and intercommunal arbitration thrived when conflicting parties could be classified in neighbouring tiers in terms of overall power, military in particular. Besides, by the time the Roman Empire fell,

Christianity was already the single most influential philosophical doctrine in Europe and it was not reticent to use arbitration to solve all types of disputes[257].

Even before the end of the Roman Empire, various emperors enacted legislation drawing from the Christian vision of arbitration: in 321, Constantine ordered judges to remain silent should the parties prefer the bishop's court to the state ones. In 408, Arcadius, Honorius and Theodosius decreed that any bishop's judgement was binding no matter the person's religion. The three emperors' decree specifically mentions bishops as citizens and adds that their judgements were to be enforced by public officials, because episcopal awards must enjoy the same level of reverence as state judgements[258]. In addition to this general evolution, we shall examine a litany of factors that accelerated the development of arbitration in Europe during the Middle Ages.

[257] Cf. *infra* part 1, III, 3, 4.
[258] Theodosian Code, 1.XXVII.1-2.

III. Arbitration in the Middle Ages

1. A quick introduction

The Middle Ages are without a doubt the most complex and complicated era analysed in this first part. The sheer number of communities, laws and customs as well as the ever-shifting boundaries of territories and countries whose very seat of power regularly moved all make for a hard-to-grasp geopolitical situation. In addition, the power struggles yielded very different results depending on the region and the moment; unlike Rome which dominated her era, there are few powers whose domination was consistent throughout the Middle Ages, and while the Church comes to mind[259], the schism marked a brutal end to its overall capacity to meddle in international politics. Moreover, this era spans a period of over a thousand years and witnessed the rise or/and fall of several civilizations such as the West European barbarians, the northern Vikings or the various monarchies that laid the foundation of absolute monarchies whose effects are still felt centuries later.

These are but a few explanations to the complexity of the Middle Ages and as we have stated at the beginning of this historical part, this dissertation is not a work in history of Law and a proper analysis of arbitration in Europe during the Middle Ages would doubtlessly take a lifetime. We will therefore continue drawing a general picture and will unfortunately not make a distinct analysis of the different periods and countries in the Middle Ages, preferring instead to focus on the overall situation and more particularly arbitration in the late Middle Ages, cardinal to grasp the upcoming legal-philosophical examination of arbitration.

[259] Even then, the Church cannot be said to have been all-powerful from the outset of the Middle Ages, rather solidifying and extending its power over Europe around the 12th and 13th centuries, especially from a legal-judicial standpoint (cf. Jacob pp. 277 ss).

2. In general

Traditionally, the Middle Ages are considered to have started at the collapse of the occidental Roman Empire in 476, and ended in the latter half of the 15th century with the Fall of Constantinople, the Renaissance and the Great Discoveries. They were marked by a variety of factors and events: the decentralisation of power, the expansion and domination of Christianism as a religious and philosophical doctrine, the crusades, the black plague, the rise of scholasticism, feudalism and the birth of universities.

It is important to note that during the late Middle Ages, Roman Law was rediscovered in Europe as it was much more suited for the legal problems arising in western Europe than oral customs, in particular regarding commercial exchanges between northern Italy and northern Europe. Roman Law was mainly picked up and adapted by the Roman Catholic Church that used it to shape its canon Law, to which it added its authority to render it more acceptable to medieval Europeans[260].

Because it offered a well tried and established structure, the rediscovery of Roman Law prompted the rise of arbitrations in Europe. The socio-economical context of the late Middle Ages was yet another factor contributing to this rise in usage, which is why we shall focus mainly on this period[261]. Additionally, this rediscovery allowed medieval Europe to see how frequently arbitration was used in Rome[262]. For multiple other reasons examined hereafter and as a general word regarding arbitration in the Middle Ages, it is clear that international/interregional/ intercommunal arbitration was "ubiquitous" in medieval Europe[263]. While certain authors between the end of the 19th century and the first half of the 20th century argued that arbitration was occasional at best, they were wrong, the contrary being much more plausible for causes similar to that found in ancient Greece and thanks to a broader range of usable sources.

A shift whose effects are still felt today occurred during the Middle Ages. This shift was the blurring, by arbitration, of the line set by the Roman *summa divisio*

260 Fourgous pp. 33-34; Papaux, Introduction pp. 82-83; Powell, Late Middle Ages p. 53; Musson p. 56.

261 Fraser p. 191; de Taube p. 59; Fourgous p. 33; Powell, Late Middle Ages p. 54.

262 De Menthon chapter 2. Throughout this chapter, de Menthon lists the reasons why private procedures, private arbitrations in particular, influenced praetorian procedure in Rome, which was the equivalent of our litigation procedure in front of state tribunals, a public procedure.

263 Musson p. 57.

between private and public matters. According to the classical doctrine, there are three reasons explaining this shift: the use of arbitration by the Church in its ecclesiastical jurisdiction, the use of arbitration by the newly formed groups of cities such as the Lombard League and the use of arbitration in feudal societies in general[264].

3. The causes of the blurring between state and private matters

A. The use of arbitration by the Roman Catholic Church

There are three reasons explaining how private arbitration impacted public affairs and blurred the line between public and private matters. The first of these reasons is the role of the Roman Catholic Church. If having religious figures of authority act as arbitrators was nothing new (the Delphic oracle in ancient Greece for instance), they did not have the same degree of influence and authority that religious figures had in the Middle Ages[265]. Unparalleled in religious authority were the popes, heads of the Roman Catholic Church, who had enormous influence on all European bodies of Law through canon Law[266]. Popes were often chosen as arbitrators for private matters and less frequently for proper international conflicts, which certainly did not mean that they were not central figures in international politics and relations[267]. The pope set the tone for the Roman Catholic Church and as we will see hereafter, it penetrated all layers of society.

The world that emerged from the ruins of the Roman Empire was fractured in many pieces on a territorial level, with boundaries moving to the rhythm of various conquests. However, most of the era's actors were united under the banner of Christianism, and on a continent with ever-changing boundaries, the influence of

264 De Taube pp. 58, 59, 65.

265 Laurent, Papauté p. 40.

266 Mérignhac p. 31; Laurent, Féodalité p. 160; Laurent, Papauté pp. 46-49. François Laurent says it very well: "[…] *la papauté est l'organe de la foi qui règne sur les esprits; comment son autorité ne serait-elle pas reconnue? Elle est reconnue même par ses ennemis. Henri IV s'humilie devant Grégoire VII; cette humiliation qui a arraché des cris de rage aux adversaires de la papauté, est l'acte d'un chrétien; le fier empereur, tout en luttant contre le pape, reconnaît que les rois peuvent être déposés par lui, quand ils abandonnent la foi. C'était reconnaître la toute-puissance papale qu'il combattait; en effet, il ne peut être roi, s'il n'est chrétien; comme chrétien, il est soumis au pape, il est donc sujet de l'église, sujet du pape*." (Laurent, Papauté p. 49).

267 Mérignhac p. 32. Cf. *infra* for an interesting example featuring the kings of France and England as well as Boniface VIII.

the Roman Catholic Church stood out all the more[268]. Indeed, members of the clergy were not only spiritual authorities, but also landowners, and sometimes even princes whose actions shaped politics in Europe[269].

By the time the Roman Empire collapsed, the aforementioned clergy members had already spent two centuries using arbitration to solve issues arising between them to avoid using Roman Law, with the first traces of arbitration in canon Law dating from the 7th century[270]. While Christians were marginalised and mostly lived as private citizens in the Roman Empire, such was not the case in the Middle Ages, where they constituted the deepest and most influential segment of the population in Europe.

Before the collapse of Rome, the Church was quick to distrust Roman institutions, their legal ones in particular. Saint Paul himself berated Christians for letting Romans judge and condemn them according to Roman laws and institutions. He then moved on to say that only Christians were worthy of judging other Christians[271]. However, the rediscovery of Roman Law in the Middle Ages reconciliated the Church with its Roman inheritance: the former used the latter to define its canon Law by adapting it to the needs of the era.

Generally speaking, the Church encouraged the peaceful settlement of disputes over litigation. This was reflected in canon Law which formally favoured arbitration by using the Roman Law rediscovered in the late 12th century, in particular the *compromissum* and the *arbitrium* as well as the overall procedural freedom enjoyed by arbitrators[272].

While clerics certainly were heavyweights in European medieval politics, they also played a cardinal role on a lower, more local scale. It is for this reason that priests, bishops or abbots were often designated as arbitrators for local disputes. In addition to their technical and conciliatory talents, and because of the spiritual authority of the Church, they enjoyed a certain level of *auctoritas*. This *auctoritas* was further accrued owing to the incapacity of secular tribunals to fulfil their own mission properly. Indeed, as tribunals were an important source of income for lesser lords all over Europe, they barred their serfs from using arbitration. Consequently,

268 Mérignhac p. 31.
269 Fraser p. 191; de Taube p. 60; Laurent, Féodalité pp. 92-93.
270 Sayre p. 597.
271 Bible, First epistle to the Corinthians 6, 1848.
272 Cf. *supra* part 1, II, 2, A, *c*; Powell, Late Middle Ages pp. 52-54.

arbitration became reputed as a more honest way to obtain justice, one frequently used by commoners[273].

In comparison with local tribunals, arbitration was a much more straightforward channel to obtain justice, and having the Church instead of the state deal with it was a factor of the heightened usage of ecclesiastical jurisdictions. In addition to this, the constant wars and shifts of jurisdictions made for a very confusing legal landscape where the applicable state law could change in the middle of a trial, which is why the combination of arbitration and the Church offered a more stable environment to obtain justice. Clerics were often the best-read people in any given area, and since they also benefitted from the almighty Church's moral and general authority, people sought them out more actively to obtain justice[274]. Overall, ecclesiastical jurisdictions offered more guarantees of legal efficiency than their secular counterparts.

The influence of clerics is here quite clear: in order to solve both private or public disputes, and not unlike Greek arbitrators before them, they used canon Law, the tools they were most familiar with to solve conflicts that would otherwise have been decided by secular Law. The way the Church solved disputes therefore seeped into both private and public political disputes.

Moreover, heads of states and countries often wore two mantels: political (kings, princes, dukes, etc.) and religious (bishop, cardinal, etc.). For instance, of the six states that formed Livonia (which very roughly corresponds to modern day Latvia and Estonia), four were purely ecclesiastical constructions ruled by prince-bishops[275]. Every level of the clerical hierarchy was tasked with serving as arbitrators for both private and public disputes, though in general, the higher the disputants' societal rank, the higher the rank of the clergymen acting as arbitrators[276].

[273] Fourgous pp. 34-36.

[274] Fourgous pp. 34-36.

[275] De Taube p. 62.

[276] The 1177 Treaty of Nonancourt stipulates that disputes between Louis VII of France and Henry II of England regarding the status of Auvergne would be settled by three bishops (Fraser p. 195; Mérignhac p. 34). On the 9th of August 1475, all pending disputes between Louis XI of France and Edward IV of England, including those related to marriages between their families, would be settled by the archbishops of Paris and Canterbury, as well as the Count of Dunois and the Duke of Clarence (Mérignhac p. 34).

Even the lords who were not members of the clergy and did not favour arbitration were, more often than not, devout Christians and heeded the Church's principles, meaning that arbitration spread throughout Europe as a method of private resolution of conflicts. The same could be said about the savants called to arbitrate conflicts, those hailing from the prestigious universities of Bologna, Perugia or Padua in particular[277].

Private disputes made the bulk of the Church's activity in arbitration and, by absorbing what would have been secular trials and taking in the private cases of public figures, it efficiently expanded its reach throughout the continent. Arbitration thus became a vector for the de facto transfer of justice from the state to the Church. The Church extended its influence by being involved in both private disputes and disputes concerning public political personalities.

Private disputes, which were the most numerous, allowed clerics to impact the lives of lower-class citizens and local customs by using canon Law to solve disputes. Disputes involving the powerful were far less frequent but more important politically speaking. The higher-ranked members of the clergy were usually those tasked with the arbitration of such conflicts (the pope, archbishops and bishops, etc.). Arbitration was preferred to the inefficient secular litigation, and clerics were preferred to judges on the basis of their *auctoritas* and the fact that they were not, for the most part, state authorities. It is against this backdrop that arbitration flourished in the Roman Catholic Church[278].

B. The use of arbitration by newly formed communities

The second of the three reasons explaining the impact of private arbitration on public matters in the Middle Ages is the resurgence of intercommunal arbitrations on the model of ancient Greece. Indeed, at the beginning of the 12th century, the merchant cities of northern Italy preferred arbitration to solve their disputes, the cities belonging to the Lombard League in particular. So strong was the arbitral tendency in northern Italy that the emperor of the Holy Roman Empire, Frederick Barbarossa, despite being a fervent opponent to the very concept of arbitration, was forced to sign the Treaty of Montebello on the 15th of April 1175 after the Lombard League's victory at Alessandria. According to this treaty, both the League and the Emperor were to choose three persons to render a mandatory arbitral award in case

277 Mérignhac p. 37.
278 De Taube p. 61.

of future disputes. If problems regarding the execution of the award arose, the consuls of the city of Cremona would act as appellate arbitrators and deliver a definitive judgement on the matter[279].

Another example of this resurgence of intercommunal arbitrations (or intercantonal in this case) is that of Switzerland: between the 13th and 16th centuries, hundreds of contracts containing arbitration clauses were found[280]. Those contracts concerned matters that were public, private or both as arbitration was used without distinction in all legal fields. Given the state of the Swiss Confederation (small and surrounded by continental superpowers) and the speed at which frontiers shifted, the Swiss found in arbitration a way to maintain a form of legal certainty and avoid what is very aptly called *"Faustrecht"*[281].

Faustrecht designates the overarching legal uncertainty found throughout Europe after Rome's downfall: the heads of state and various lords were unable to maintain a high enough level of cohesion, which means that the legal organisation of society was led by the bottom and not the upper echelon[282]. Arbitration in Switzerland was therefore the quintessential bottom-up manifestation of Law, embodied in the 1291 Federal Charter as the judicial way to preserve the peace[283]. As already mentioned, the founders of Switzerland did not initiate a particular movement. Their actions were simply a reflection of the times which saw the failure of central states to unify justice, corruption, the difficulty to enforce judgements and the constant wars impacting laws, tribunals and the very concept of justice[284].

The Federal Charter of 1291 between the cantons of Schwyz, Uri and Unterwald itself contains an arbitral clause: *Si vero dissensio suborta fuerit inter aliquos conspiratos, prudenciores de conspiratis accedere debent ad sopiendam discordiam inter partes, pro ut ipsis videbitur expedire, et que pars illam respueret ordinationem, alii contrarii deberent fore conspirati*[285]. This text is widely

279 Fraser p. 192; de Taube pp. 62, 63, 78.
280 Fraser p. 193; Usteri p. 20.
281 The law of the jungle, "Faust" being a reference to the devil himself.
282 Monnier p. 424.
283 Monnier pp. 425, 427.
284 Usteri pp. 20-21.
285 Text downloaded from the official website of the government of the Swiss Confederation: ‹https://www.admin.ch/gov/fr/accueil/conseil-federal/histoire-du-conseil-federal/pacte-federal-1er-aout-1291.html› on the 11th of April 2019. The following French translation was downloaded simultaneously from the same website: *"Si d'autre part un conflit surgit entre quelques-uns, les plus sages des confédérés doivent intervenir en médiateurs pour apaiser*

considered as the foundation of modern-day Switzerland and is based on customs from all three cantons. The arbitral clause it contains is thus a bottom-up reflection of the private non-codified relations between the people who were not quite Swiss citizens at the time[286].

It would however be a mistake to think that private relations were the only place where arbitration took place. Indeed, about 250 documents prove that state contracts carried mention of an arbitration clause[287]. More than simply being applied to relations between citizens or between citizens and public entities, arbitral clauses were also used for matters between cantons, especially to de-escalate what was viewed as war-like behaviour, highlighting the already strong propensity of the "Swiss" to defuse tensions as quickly as possible, to prevent conflicts rather than solving them, to compromise *ex ante*[288]. A few arbitral elements from this era will be examined hereafter.

Firstly, arbitration was deemed the primary way to solve disputes between confederate citizens; the will to compromise permeates the Swiss legal mindset to this day. For example, according to art. 197 to 218 of the Swiss CPC, opposing parties must enter a procedure of conciliation or mediation in an attempt to find an agreement outside the traditional state court proceedings (bar the exceptions of art. 198 Swiss CPC). It is only if an agreement cannot be reached that the parties are authorised to move on to the litigation phase of the proceedings[289]. In a broader sense, the Federal Charter of 1291 could also be considered the starting point of a principle permeating all layers of the Swiss legal, political and social system: the need to agree, to compromise, to make sacrifices for the common good and to present a united front once a decision is taken[290].

le différend de la façon qui leur paraîtra efficace; et les autres confédérés doivent se tourner contre la partie qui repousserait leur sentence." The terms *"autres confédérés"* here refers to the other cantons, in charge of enforcing arbitral awards; the purpose was the conservation of a certain justice unity and harmony among all cantons. The type of arbitration we are therefore evoking here is not an inter-cantonal arbitration but a private one (cf. Usteri p. 20). However, establishing a separation between private and state matters was very hard in cases of this era, especially considering how varied and constantly evolving arbitral clauses could be (Usteri pp. 21, 35).

286 Usteri pp. 20-21.

287 Usteri p. 41.

288 Usteri pp. 42-43.

289 According to art. 209 para. 1, art. 221 para. 2 let. b and art. 244 para. 3 let. b Swiss CPC.

290 Usteri p. 20. The principle of collegiality is most apparent when reading art. 12 para. 2 of the Swiss Government and Administration Organisation Act (Loi sur l'organisation du gouvernement et de l'administration, "Swiss LOGA", RS 172.010). According to this

Secondly, the mention of the wisest[291] confederates is an obvious reference to the concept of *auctoritas* and a display of the Greek vision of intercommunal arbitration, which was perpetuated through the Federal Charter of 1291. The notion of "judge" features multiple times in the Charter, an indication of the difference between a public judge whose purpose it is to decide and the arbitrator whose task is to mediate between confederates. Regarding judges, the Charter makes no mention of any moral quality they were supposed to have, an implicit indication that arbitrators were held to a higher moral standard than "normal" judges.

This further enhances the *auctoritas* deriving from being arbitrator than from being a state judge[292]. The most renown arbitrator was Saint Nicholas of Flüe (1417-1487), now patron saint of Switzerland, peace and mediators. Known as a hermit-philosopher, Nicholas of Flüe was an arbitrator before he retired from both family and public life. Chosen as arbitrator despite being illiterate, he was a staunch supporter of the peaceful resolution of conflicts and the need for arbitrators and judges alike to be as neutral as possible in their line of work. He also paved the way for them to act as conciliators, peace-makers between parties; so influential was his work that he is now widely credited as the father of Swiss neutrality[293].

Lastly, arbitral justice was held in such high consideration that the authors of this text inserted the obligation for all confederates not party to the trial to "turn against the party rejecting the arbitral award." Each canton thus had the obligation to enforce awards, which rendered this institution central to the Swiss' collective sense of security and unity[294].

Ultimately, the purpose of arbitration has always been the peaceful resolution of conflicts, something Switzerland is historically known for. Engraving arbitration in the founding text crystallised its importance and, in our view, shows that the

provision, once a decision or orientation has been agreed upon between the seven members of the Federal Council, they must each defend this common position, even if they do not fully agree with it.

[291] The English and Italian translations of this text mention the term "prudent", *"i più prudenti"* instead of the French word *"sage"* which means "wise". The German version uses the term *"die Einsichtigsten"* which means "the most knowledgeable", "the ones with the most insight". While the philosophical and semantic implications may differ, the people to which they allude are quite clear: the "Swiss" citizens with the highest degree of *auctoritas*.

[292] This is not to say that state judges were void of *auctoritas*. We simply wish to emphasize the fact that *auctoritas*, while highly relevant to state judges, was even more so to arbitrators.

[293] Usteri pp. 204-205.

[294] Monnier p. 429.

medieval "Swiss" understood how important genuine conciliation and compromise were. They recognized that arbitration was an effective way to avoid resentment and maintain harmony between citizens. Doing so, from a justice perspective, implies that all parties accepted the decision, and that the best way to bring people closer was through compromise, a more thorough form of justice than picking winners and losers.

C. The use of arbitration in feudal societies

The third and final reason explaining the blurring between private and public matters was the feudal structure of medieval Europe[295]. One of the aspects of feudality consisted in the disintegration of centralized power born from the ashes of the defunct occidental Roman Empire, in particular after the dissolution of Charlemagne's empire[296]. Broadly speaking, central powers lacked the resources to enforce their own laws outside restricted areas, as was the case with London in medieval England. The administration of justice in the rest of the kingdom therefore rested upon "the cooperation of local society at all levels, with the scope for graft and inefficiency this entailed."[297]

The main impact was that the relationship between citizen and central state disappeared and the former was replaced by the individual, which became the essence of society and has been ever since[298]. This disintegration brought private landowners to political power on a continental scale. If the usual figures of political power such as heads of state retained a high amount of influence, they exercised it on a much smaller scale than during the Roman era. It is thus logical that elements of both private and public law were entangled given that it became very hard to make the distinction between the private person and the public lord: the very notion of legal subject was being altered. Private conflicts between two landowners regarding the boundaries of both their lands could quickly become a public conflict

295 Mérignhac pp. 35-36; de Taube p. 64; Fraser p. 191.

296 Laurent, Féodalité pp. VII-VIII.

297 According to Guth mentioned by Powell, the vast majority of lawsuits did not end with a court judgement, which begs the question as to how these lawsuits were terminated. Regarding England still, there was a wide lane for arbitration because English state courts easily recognized the awards and the competence of arbitral tribunals (Powell, Late Middle Ages pp. 50, 51, 56). This highlights the complementary nature of arbitration vis-à-vis state courts and litigation.

298 Laurent, Féodalité pp. VI-VII.

concerning the boundaries of two independent state entities, arbitrated by an even higher power such as a king or the pope.

The very structure borne from feudalism often forced vassals and commoners to seek the justice of their local lords and rulers. This evolution is crucial to grasp the developments of arbitration as it started mixing problems between private persons and the *res publica*. Feudalism implied that vassals were quite prompt to designate their overlord as arbitrator to their conflicts, or to solicit him via the state channels as a state judge in order to court his favours. Highest among landlords, kings were often selected to arbitrate such conflicts between their vassals who courted their favours[299].

Lords thus served both as judges and arbitrators, usually trying to make a profit off of justice. In contrast however, commoners tended to avoid official justice channels where lords also served as judge. They favoured arbitration instead, which was seen as a more efficient and less corrupted way to obtain justice, in particular because they could name their arbitrators. Lords did not favour arbitration, but it was so widespread that they could not oppose it, in particular when encouraged by the Vatican[300].

The fact that feudalism was the most important cause of the blur between public and private matters can be further demonstrated by looking at countries in which it did not operate to its fullest effect such as what would later become Russia. Following the death in 1054 of Jaroslav the Wise, Grand Prince of Kiev, Kievan Rus' began crumbling under repeated attacks from Cumans, the scheming of the Greek Orthodox Church's high clergy and internal bickering among the descendants of Jaroslav the Wise. The various attacks from northern Europe in the course of the 13th century completed this fragmentation of Kievan Rus' and consolidated the separation between the oriental and occidental parts of Europe. At this point in history, the occident part of medieval Russia was fragmented into twelve independent principalities which were disconnected from the rest of Europe on cultural, legal and social levels, meaning that feudalism had not taken root there. There are only scant traces of arbitration in western medieval Russia and none of them leads to a proper arbitral procedure[301].

[299] De Taube pp. 65-66; Mérignhac p. 35. Nowadays, cf. art. 38 para. 2 of the International Court of Justice statute.

[300] Cf. *supra*; Fourgous p. 35.

[301] De Taube pp. 68-69.

The closest we came to an arbitration was when, after seizing Kievan Rus', Roman the Great (otherwise known as Roman Halych) wanted to extend his dominion to all of medieval Russia. In order to alleviate the opposition of the other Russian princes and to avoid armed conflicts, Roman proposed the inception of a permanent arbitral tribunal. This tribunal would be competent to rule on oppositions between the various regions. However, the most influential amongst the princes, the Duke of Vladimir, rejected this offer[302]. Roman the Great died two years later at the battle of Zawichost.

While the idea of Roman the Great was quite avant-garde, it never came to fruition and was rejected outright before his untimely death. This example is as close as medieval Russia got to international arbitration. Moreover, this historical event happened in the western part of Russia, that is closest to the rest of Europe and to the stronghold of feudalism. Finally, despite its cultural and political ties to the rest of Europe, the lack of feudal political organization prevented the development of an arbitral system.

D. Personal addendum

Given the three reasons exposed *supra*, it is no surprise that the international chronic of medieval Europe was littered with arbitral awards[303]. At this point, we should remind ourselves of another factor explaining why there were so many arbitral awards in medieval Europe. Equal power between nations and a multipolar continent made for a fertile ground for arbitration, as no one power could impose its will to others.

Indeed, as we have already seen in both ancient Greece and Rome, the will to settle legal disputes (via arbitration in our case) or imposing one's will on other parties depends on the power balance of the relationship. Ancient Greece was an assembly of multiple city-states with various militaristic, economic, social, cultural and intellectual components. If Athens and Sparta were, historically, the most potent city-states, their might was not such that they could afford to ignore "lesser" city-states such as Messenia. Hence, even those two powerhouses were forced to compromise, despite the fact that their status allowed them to sometimes bypass doing so[304].

[302] De Taube pp. 70-71.

[303] De Taube p. 66.

[304] Such was the case when Sparta refused Megara as an arbitrator for its conflict with Athens. However, this refusal took place a mere 14 years after the end of the Peloponnesian War

On the other hand, Rome was mightier than all other entities at the time, so she was often the arbitrator and not the arbitrated. Even when acting as an arbitrator for disputed territories for instance, Rome would often claim those territories for herself as she knew that even if both conflicting parties were to join forces, this battle was a lost one for them before it even started[305]. In light of this dual example, it is unsurprising to see arbitration flourish in medieval Europe given how fragmented power was between people, states, regions, etc.

Of course, there were always going to be cases where the unevenness of the power balance would render the arbitral process grossly inefficient, but this occurred much more often in private disputes. In such cases, there was no need to threaten the weaker party with violence as Rome did. Legal warfare, lawsuit bombardments or sending masses of documents so large that the smaller party could never hope to browse through their entirety could be used as methods to push the weaker party to simply agree to meet the stronger party's demands, avoiding wasting time, energy and money[306].

4. The types of arbitration

In the course of the Middle Ages, three categories of international/intercommunal arbitration regarding public matters could be found throughout the continent: papal arbitrations, arbitrations concerning semi-autonomous public entities and arbitrations between sovereign states[307]. The main vector of arbitral justice however,

where Sparta emerged heavily wounded but victorious. The circumstances in which Sparta refused to be arbitrated by Megara for a conflict with its recently defeated arch-rival were thus quite unusual (Sparta considered Megara too weak), but even then, Sparta did not refuse to be arbitrated, it simply refused Megara as the arbitrator.

305 Cf. *supra* part 1, II, 1 regarding the example involving Naples and Nola in 180 BC. The reasons as to why less powerful states persisted in choosing Rome despite her tendency to annex disputed territories are not entirely clear, but we can reasonably suppose that they either wanted to curry her favour, or did so to have an arbitrator capable of enforcing the award.

306 For instance, in 1415, the powerful abbey of Crowland in Lincolnshire had two disputes with the inhabitants of Lincolnshire who claimed rights of common on lands part of the abbey's lordship. While the people of Lincolnshire were able to exercise their rights on the disputed lands for a year, the abbey retaliated by filing a claim to a panel of arbitrators, producing a massive amount of documents in its favour, proving its claim and excommunicating four villages. Needless to say, the abbey obtained everything it wanted including damages from the offending villagers (Powell, Late Middle Ages pp. 58-59).

307 De Taube pp. 74 ss.

from a quantitative standpoint, were private arbitrations. These arbitrations concerned private matters and were very often conducted by local notables such as clerics, jurists and figures of authority in general.

As with contemporary arbitration, arbitrators were selected by the parties who usually agreed upon this choice, hence the need to render a final award acceptable to both[308]. While not in the same proportions as in the 21st century, jurists were already favoured as arbitrators, albeit for different reasons. The reason as to why they were, indeed, chosen as arbitrators was not because of their technical skills, but because they were an important component of the societal fabric. This role allowed them to work out acceptable deals for all, which, in turn, participated in the construction of their *auctoritas*. *Auctoritas* was ever-present and could be considered a pre-requisite for anyone wishing to arbitrate a dispute[309].

A. Papal arbitrations

A central political, intellectual and spiritual figure in medieval Europe, the pope regularly had an interest, vested or not, in arbitral procedures all over the continent. He could intervene whether it was in a dispute between clerics of his own Church, in problems arising between public or semi-public entities or basically in every case a member of the Catholic Church was involved as a party or as an arbitrator.

It is worth noting that for procedures internal to the Church, the pope was more of a judge than an arbitrator as he could enforce his own decisions. Overall, he founded his competence as an arbitrator on the concept of *auctoritas apostolica*, which was certainly an important aspect of his spiritual dominion over medieval Europe. By making use of his *auctoritas apostolica*, the pope could conciliate conflicting parties and have them both agree to perform the final award[310]. This *auctoritas* was, in the field of arbitration, widely built on many consecutive popes' desire for peace and mission to procure every Christian with a safe space to exercise their faith[311].

308 Musson p. 59.

309 Cf. Musson, *passim*.

310 Frey pp. 53-54. Relevant examples were legion: the 1238 papal arbitration which ended a long-standing feud between the Republic of Venice and Genoa (Gregory IX) or the 1278 papal arbitration for the quarrel inside the Florentine branch of the Church regarding the nomination of Latinus of Ostia as cardinal (Nicholas III). Cf. also Jacob pp. 277s, 301 concerning the long-winded Vézelay trial wherein the evolution of the jurisdiction of the pope within his own institution is quite interesting: from arbitrator wielding his moral authority above all to a judge with clear formal prerogatives.

311 Keller p. 849.

Arbitral procedures headed by the pope were based on canon Law rather than on an arbitral clause deriving from the will of the parties: those procedures took place inside the judicial structure of the Church, not in another jurisdiction chosen by the parties. Indeed, the pope was considered all-powerful but only in matters involving religion or morality in the Christian world, which was certainly an already large-enough scope. However, when two states or heads of state agreed to an arbitration concerning matters outside the aforementioned scope and designed the pope as the arbitrator, it was not as head of the Roman Catholic Church, but as an individual.

In 1296, Pope Boniface VIII summoned both Philip IV of France and Edward I of England to settle the mounting multiple disagreements between them. While Boniface VIII wanted to arbitrate this issue as the supreme ruler of the Christian world, Philip IV and Edward I both rejected this idea. According to them, the person serving as an arbitrator in this dispute was not Pope Boniface VIII but Benedetto Caetani. Despite their unwillingness to let the pope extend his political power, both kings were eager to use Caetani's *auctoritas* to support their respective claims. However, Caetani was unable to shed his papal cassock and arbitrated according to the procedural and material laws of the Church. As a result, both kings rejected this award[312].

This case is interesting as it illustrates how *auctoritas* operates both when one relies on it and when it is lacking. On one hand, Philip IV and Edward I were hoping to use the aura of the pope and on the other hand, they were reticent to give the pope the opportunity to dictate the terms of their politics. By asking the pope to act as a private person, they were hoping to strip him of his papal privileges while maintaining his *auctoritas*, the one "attached" to Caetani's award. This would show that Caetani's *auctoritas* was not intrinsically linked to the papal office, but something more personal, in this case at least. However, Caetani was unable to let go of his papal status and gave an award that was lacking in authority and acceptability. The capacity to understand the limits of the parties' tolerance is an integral part of an arbitrator's *auctoritas*, which, in this case required more of him than being the pope.

Authority is not a mere reflection of some higher hierarchical position derived from laws, nor is it a simple moral superiority vis-à-vis other people. Authority is, in reality, the capacity to augment a given society's inherited common good, its

[312] Fraser p. 194; de Taube p. 75; Frey pp. 54-55.

foundations[313]. In arbitration, this translates into the capacity to take into account the overall situation, not the arbitrator's own preferences, nor the will of the two parties alone, but of the entire context and the ramifications of the final award. More than that, the augmentation of the common good attached to authority means that an authoritative arbitrator must be able to solve a conflict and improve upon the pre-conflict situation, whenever possible, hopefully avoiding the recurrence of a problem in the future[314]. In this case, Caetani's failure to act authoritatively would initiate the deterioration of the Church's rapport with the king of France, ultimately leading to this pope's demise.

Auctoritas is a highly personal concept, directly related to the personal capacities and personality of its wielder. Used to maximal efficiency by the pope, the *auctoritas apostolica* was not necessarily, however, wielded by him at all times. Through the use of representatives, the pope could delegate some of his many tasks, "lending" said representatives a fraction of both his power and authority. While it is certain that these recipients could never hope to wield this authority with the same efficiency as the pope himself, they could nonetheless use it to a certain degree of effectiveness, depending on their own level of *auctoritas*. In the case of *auctoritas apostolica*, the impact of personality on authority was thus twofold: using the pope's own authority and the variation of degree to which this authority could be used according to the person wielding it. Those recipients were often other clergymen (cardinals and bishops mostly), preferably people of *auctoritas* themselves.

For instance, the bishop of Cremona, recipient of the papal authority in Lombardy, headed the 1210 arbitration procedure between the *podestà*[315] of the city of Cremona and the *podestà* of the people of Cremona. In this case, both parties hailed from the same city, which is why the bishop of Cremona was chosen, although the representative of papal authority was usually a member of the clergy foreign to the cities involved. For example, about a year before he became Gregory IX in 1227, then cardinal-bishop of Ostia Ugolini di Conti was tasked by Honorius III to arbitrate the conflict between the knights and the people of Piacenza. The commercial and political rivalry between Genoa and Pisa lasted roughly from the 11th to the 13th century, period which saw the fair share of successful and failed

313 Cf. *infra* part 2.

314 Cf. *infra* part 2, V, 5.

315 Interestingly, this word derives from *potestas*, which implies that the rulers bearing this title were the vehicles of public might rather than the wisest amongst citizens of their society.

arbitrations between the two cities, usually with the involvement of the Church. On the 28th of January 1176, the cardinals of Santa Cecilia and Santa Maria compelled the parties to promise to abide by intercommunal law in their current conflict. If this promise was breached, an appellate arbitral tribunal would serve as a safeguard between them with the archbishop of both cities, as well as two jurists chosen by him, serving as arbitrators. This promise was renewed on the 19th of May 1188 and the content of the award confirmed in December of the same year by Pope Clement III[316].

B. Arbitrations involving partly sovereign public entities

The second category of international arbitration in the Middle Ages were the arbitrations between partly sovereign public entities. In sheer numbers, those international arbitrations were by far the most important as they concerned the very entities created through feudalism. The most symptomatic examples can be found in medieval Italy where small states and sovereign city-states coexisted in great numbers. There are traces of approximately 200 arbitral awards found in the region between the 12th and 13th centuries, but given that there were probably many more arbitrations whose traces never reached historians, it would not be unreasonable to consider this number to be a rather low estimation[317].

The relations between these public entities were first and foremost commercial. The Venetian Republic for example was widely known as one the most powerful cities in Europe during the Middle Ages owing to its mercantile firepower. Given the nature of the relations between these Italian city-states and small states, it is not surprising that arbitration flourished: it was the most convenient way to settle a dispute between merchants quickly.

Moreover, those small states often waged war against each other or forged alliances. When adding the interferences of foreign powers such as the Houses of Anjou or Savoy, the Roman Catholic Church and the Papal States, it is not surprising that arbitration was frequently used. While medieval Italy was the most fertile ground for arbitration, the conclusions drawn from the above-mentioned examples also apply to the rest of occidental medieval Europe[318]. So legion were arbitrations of this type that only some of the most telling ones will be explained.

316 Frey pp. 59-61. Cf. also Jacob pp. 277s, 301 concerning the Vézelay trial mentioned *supra*.
317 De Taube pp. 76-77.
318 De Taube, p. 77.

The prime examples follow the intervention of Frederick Barbarossa in northern Italy in April 1175, which led to an increase in nationalism in this region in the aftermath of the northern Italian cities' victory against the German emperor. It was in this spirit that the consuls of the Lombard League constituted themselves as the Lombard League Tribunal. In May 1199, two envoys of the tribunal were tasked with the mission to quell the unrest between Mantua and Ferrara by operating as arbitrators. While Mantua first sent these envoys back, it soon reverted its decision and allowed the envoys to return and complete their task, which was to broker peace between the two parties[319].

The Lombard League was by no means friendly with the emperor, but it does not signify that the latter held no sway on northern Italian politics. The interactions between the League and the emperors of the Holy Roman Empire were quite complex and sometimes brought emperors to intervene in arbitral proceedings, quite a feat given their limited appreciation for this institution. For example, on the 7th of December 1193, Henry VI annulled the arbitral award of the 16th of October 1193 given by the *podestà* of Parma Guglielmo d'Osa regarding a conflict between the bishops of Belluno, Feltre and Ceneda and the city of Padua against the city of Treviso and its *podestà* Ezzelino II da Romano. Henry VI then paired his decision with an *obiter dictum* according to which he refused to acknowledge any award not rendered by him[320].

Hence, while arbitration was heavily favoured amongst those part of the Lombard League, it was seen by the more powerful overlords of the Holy Roman Empire to be an impediment to their dominion, which is why they opposed arbitral awards. Frederick II, son of Henry VI, followed at least twice his father's example: in 1226, he opposed an award from the *podestà* of Bologna ending a conflict between Bologna and Modena. He did so again in 1232 when the city of Alessandria got the better of the city of Asti according to their arbitrator, the mighty city of Milan[321]. However, so far as it is known, the instances where the Holy Roman Emperor successfully intervened were vastly outnumbered by the times where arbitrations were triumphantly conducted, which is, again, unsurprising given the pace at which intellectual and commercial exchanges in northern Italy took place between the 11th and 13th centuries.

[319] Frey pp. 21-22.
[320] Frey p. 22.
[321] Frey p. 22.

C. Arbitrations involving sovereign public entities

The last category of international arbitrations, those between sovereign entities, were also numerous and often concerned matters of the highest political importance[322]. Once again, only some of the most significant cases are detailed hereafter[323].

The first example concerned a case where Louis IX of France[324] was chosen as arbitrator in 1263 for a conflict involving Henry III of England (also Duke of Aquitaine at the time) and some of his barons who had rallied around Simon de Montfort, 6th Earl of Leicester. This arbitration was the prelude to the Second Barons' War when, in the Mise of Amiens dated from the 23rd of January 1264, Louis IX sided with Henry III. According to the *"Grauamina quibus terra Anglie opprimebatur"*[325] which contained the details of the barons' complaints against the king, Henry III was accused, *inter alia*, of being heavy-handed on taxes to compensate the fact that he was often tricked out of the royal treasury's money[326]. It is interesting to note that when the request for an arbitration was made in July 1263, the barons were winning the war, Henry III having just surrendered to Earl of Leicester's terms without so much as a fight. The latter was however so concerned with the possibility of a civil war outbreak between royal and baronial partisans that the Mise of Amiens was the result of a self-inflicted limitation in order to prevent such an outbreak[327].

For Simon de Montfort, the objective of this arbitration was to obtain a legal, consensual basis on which his provisional government could rest in order to avoid bloodshed and as Treharne writes, "Earl Simon was too civilized to believe in violence as the solution of political problems."[328] A firm believer in the notion that kings were earthly representatives of God, Louis IX unauthoritatively sided with

322 De Taube p. 77.

323 See above for the case involving the emperor Frederick Barbarossa, the Lombard League and the Treaty of Montebello signed on the 15th of April 1175, which is another example of an arbitration between sovereign entities. Indeed, while the Lombard League was not a country on its own, it regrouped enough independent city-states with their own armies to be deemed sovereign, especially if the League was strong enough to best the Holy Roman Empire on the battlefield.

324 More commonly known as Saint Louis for his zealous Christian faith and the way he displayed it by flogging himself in public or by initiating the 7th and 8th crusades.

325 "Grievances which oppressed the land of England."

326 Treharne/Sanders pp. 268-277 ss.

327 Treharne pp. 223-224.

328 Treharne p. 224.

Henry III on every issue save for his financial claims for injury. It is highly possible that Alexander IV's papal bull dated 13 April 1261 absolving Henry III from his oaths to his barons played an important role in Louis IX's decision[329]. However, despite Simon de Montfort's willingness to sue for a consensual peace, although in a position of power, the Mise of Amiens was so biased in favour of Henry III that the Second Barons' War broke out in February 1264. Even Thomas Wykes, a fervent royalist and Montfort critic said that Louis IX had acted "with less wisdom and foresight than were necessary."[330]

Much like the aforementioned award given by Pope Boniface VIII, it is obvious that this award seriously lacked in *auctoritas*, so much so that it was the direct cause for the ensuing civil war in England. From a legal-philosophical standpoint, this is a prime example of what happens when an arbitrator acts without wisdom, without striving to understand the general good beyond the case, his high position in society notwithstanding. Being able to render an arbitral award acceptable to both parties, especially the losing one, is a core component of any arbitrator's *auctoritas*. Indeed, no judge or arbitrator will ever have an *auctoritas* high enough to ensure the proper enforcement of their award when so blindingly siding with a party as did Louis IX. The capacity for fairness and wisdom is very much part of what every arbitrator should be, foundations to the concept of equity[331].

Other examples of arbitrations between public entities include the arbitration between Eric II of Norway and multiple cities of the Hanseatic League in northern Europe (Rostock, Wismar, etc.). During the first phase of the procedure, the parties had to submit their grievances to a panel of four people with Magnus III of Sweden intervening as a mediator. If the panel did not render a proper arbitral award, King Magnus was to intervene as a second arbitrator and make his own arbitral award *(summum iudex)*[332].

The last example of arbitration involving public entities concerns an Italian case opposing the Duchy of Milan and the Venetian and Florentine Republics, with the Marquis of Saluzzo and Este as arbitrators. A compromise was signed on the 26th of April 1433, which led to the peace of Ferrara[333]. However, two years later, Pope Eugene IV joined the pending procedure as a fourth party in order to support the two

329 Treharne/Sanders pp. 45-46, 238-239.
330 Treharne p. 236.
331 Cf. *supra* part 1, II, 2, B, *b* and *infra* part 2, V, 5 and part 3, III.
332 De Taube p. 80.
333 Verjizl p. 209.

republics. This modification of the parties also changed the arbitrators as the Marquis of Saluzzo was replaced by two cardinals. Their award, dated 1435, ended up serving as the foundation for the peace treaty signed between the belligerents on the 16th of August 1435[334].

D. Private arbitration

By far the most commonly used type of arbitration overall, we will not go into as many details as this subject would warrant given the massive body of texts and the sheer diversity of ways private arbitration was handled throughout western Europe in the late Middle Ages. Private arbitration, contrary to the other categories, was part of a country's internal Law and therefore reflected matters of lesser political importance compared to those examined *supra*.

Often touted as parallel to state justice, medieval arbitration was so prevalent that it was very often more integrated in the state system than nowadays. Unsurprisingly, Roman Law played a central role in the way arbitration was construed, in no small part due to canon Law, which used many of the principles and legal tools inherited from Roman Law. Among other things, the arbitrator's freedom to define proceedings according to his preferences and the promise to enforce awards under pain of a financial sanction were kept similar to their Roman counterparts, as well as the two main aspects of the *arbitrium ex compromisso*[335].

In addition to Roman Law, canon Law also heavily influenced private arbitrations because, as was the case in more "political" arbitrations, clerics were very often a part of arbitral disputes, usually as arbitrators. Given that arbitrators were the ones with the most influence regarding the choice of applicable rules, it is not surprising that bishops, priests or abbots leaned towards canon Law or at least some version of it to solve arbitral disputes[336].

It is interesting to note that the more the Middle Ages advanced, the more laypersons used arbitration. From 22% in the 12th century to 83.2% in the 15th century, arbitration clearly went from being focused on clergymen (the overwhelming majority of litigants were clerics) to being much more democratic and widespread. Given that arbitration was a very popular way to seek justice, it

334 De Taube p. 84.

335 Cf. *supra* part 1, II, 2, A, *c*. Given how influential the *arbitrium ex compromisso* was on contemporary arbitration, it is only natural for it to exert a high amount of influence on arbitration in the Middle Ages. Powell, Late Middle Ages pp. 52-54.

336 Mérignhac pp. 32-35; Jeanclos pp. 423-424.

does not seem excessive to trace a parallel between the increase of laypersons in arbitration with the growing influence of the Church over the same period[337]. The reasons for this shift are quite obvious and benefits from the main advantages of arbitration: a speedy procedure, a more human and acceptable justice, a more peaceful way to end a dispute accepted by all social classes and a way to lessen hierarchical dependence on the region's overlord who often acted as judge in disputes[338].

In the case of England, ecclesiastical arbitrations far outnumbered their secular counterparts, at least until the latter half of the 14th century. By the 15th century, laypersons were more prominent arbitrators than clerics, and within the layperson class, jurists were the most sought-after arbitrators, not so much for their technical knowledge as for their ability to compromise and understand the general underpinnings of a conflict. Under Elizabeth I and James I, Lord Chancellors were also renowned arbitrators such as Edward Coke or Francis Bacon[339].

Reflective of the Church's influence at this point in the Middle Ages, ecclesiastical arbitration in France provides us with an example of how clerics benefitted from certain advantages missing from other types of private arbitration. Indeed, canon Law allowed parties to be arbitrators whereas civil Law allowed it in certain circumstances only, and always with the possibility to use a *bonus vir* should the arbitrating party act contrary to equity. Both civil Law and the Roman tradition from which canon Law derived considered, at least partially, that the duality party/ arbitrator was not acceptable, whereas canon Law allowed it. This shows that the Church could get away with more than their civil counterparts given their pre-eminence in society. Moreover, laypersons were barred from arbitrating issues pertaining to the spiritual plane which were restricted to those with clerical privilege[340].

337 The term "layperson" is here used to designate people who were not full-time clergymen but had a different professional occupation. There is little doubt that most of these laypersons were very religious, despite not being professional clerics. As such, the increase of layperson involvement in arbitral procedures was not the reflection of dwindling clerical influence, rather an expansion of the Church's reach, beyond the circles of professional clergymen.

338 Jeanclos pp. 424-426; Musson p. 57. Cf. *supra*.

339 Powell, Late Middle Ages p. 55; Musson pp. 59 ss; Roebuck, 17th century pp. 274, 280 ss. Cf. *supra* for Greece.

340 Fourgous p. 94.

5. The rapprochement between arbitration and mediation

Already observed during the Greek era[341], the rapprochement between arbitration and mediation is more obvious in the Middle Ages than it was in the Antiquity, the reason being that the failure of the central state and the many armed conflicts provided ample opportunity for arbitration to take place. In this context, the peaceful aspect of conflict resolution took a more important dimension for various reasons, the most prominent of which was that it was strongly supported by the Church[342]. Peacefully resolving conflicts is indeed key to both arbitration and mediation, the idea being to end a conflict without any lingering negative feelings. This is not an implausible idea given how strongly arbitration and equity *ex aequo et bono* were coupled during the Roman era and how medieval Laws inherited this vision of arbitration from ancient Romans[343].

This is confirmed by the fact that medieval arbitrators in France and England were more concerned with rendering an award which would satisfy both parties and benefit society than selecting winners and losers[344]. More profound than "simply" maintaining harmony inside a society, the idea of avoiding this binary result is the reflection of distributive justice, *suum cuique tribuere*, "to each their due." Moving away from the exceedingly rigid mentality inherent to commutative justice[345], the combination of distributive justice and societal harmony not only provides legal interpreters with a final cause towards which they can strive, but the most flexible interpretative frame to exert their talent[346]. Indeed, as developed *infra*[347], distributive justice is the format granting legal interpreters the highest number of

341 Cf. *supra* part 1, I, 2, C, *b.*

342 Mérignhac p. 38.

343 Cf. *supra* part 1, II, 2, B, *b.*

344 Powell, 15th century pp. 35-36; Jacob pp. 69, 188-189.

345 Cf. *infra* part 2, V, 5, C, *c* and part 3, III.

346 To be sure, the notion of flexibility does not mean the right to interpret as we please. As we will see *infra* in part 3, legal interpretations, like many forms of interpretations, are restrained by the limits of analogical reasoning, which is the foundation of said legal interpretations. Indeed, as jurists, we are necessarily constrained by each case's contingency. We could not, for instance, start interpreting the most basic sales contracts of homemade croissants by willy-nilly referencing real estate laws, banking laws, mergers and acquisitions laws, the geopolitical conflicts in eastern Africa, the state of the market of Pokémon cards and the reproductive cycle of dolphins. There comes a point where the analogical reasoning becomes too removed from the initial case, to the point of absurdity. Cf. for instance Eco, Foucault's Pendulum *passim*, which smartly explores the limits of analogy.

347 Cf. *infra* part 2, V, 5, C, *c* and part 3, III.

interpretation combinations. By avoiding the fixed allotment of proportional measurements, we can move freely between proportions, without the arithmetical limitations of commutative justice. Without the need to find winners and losers, we open up the interpretative field to all possibilities featuring neither or both. More than a simple calculation, the most important effect of this paradigm switch, from commutative justice to distributive justice, is to broaden horizons and increasingly open mentalities[348].

The importance of the rapprochement between arbitration and mediation is underscored by the fact that judges were prevented from setting a broader scope to examine peripheral matters relevant to their cases. Arbitrators, on the contrary, could do so as they were tasked with peacefully solving the conflict: a broader mandate to achieve broader results. Interestingly, this broader mandate did not impede on the parties' prerogatives and their procedural freedom as litigants retained the possibility to interrupt the proceedings in order to seek a compromise without interference.

The case of England is symptomatic: the main function of mediation-oriented arbitration was to find an acceptable compromise for all parties involved, "acceptable" implying a high enough degree of fairness reached through equity *ex aequo et bono* for everyone not to leave empty-handed entirely. This further demonstrates the equitable nature of arbitration, a nature far bigger than the simple legal technique to which it is often reduced nowadays[349].

The fragmentation of English medieval society and the relative weakness of the central state meant that local communities enjoyed a high degree of independence and cohesion, which entailed two consequences, both of which accentuated the importance of arbitration. The first one was that the acceptability of legal decisions emanating from the central state was very low, in particular when enforced through *potestas*. The second consequence was that it was easier for local arbitral tribunals to hand out acceptable judgements. Indeed, thanks to the knowledge these tribunals had of local customs and mentalities, people accepted their decisions more readily.

[348] Cf. *infra* part 2, V, 5, C, *c* regarding commutative justice and the aforementioned change in mentality. For now, we simply wish to quickly define commutative justice, in order for the reader to understand the main difference it holds with distributive justice. Commutative justice is the reflection of an egalitarian vision of Law, which consists in the equal allotment of charges and benefits between parties (50-50, 33-33-33, etc.). Much more rigid than distributive justice, it is the most fundamental legal-philosophical consequence of the contractualist mindset we will explore further in part 3, III, 2, 3 *infra*.

[349] Powell, 15th century pp. 39-40.

The fact that they usually knew their arbitrators also helped in enhancing the acceptability of the award. The process was rendered all the more efficient when those arbitrators were considered as figures of authority[350].

In 13th century France, arbitrators and *amiables compositeurs* theoretically had different roles and prerogatives but, unsurprisingly, this turned out to be a distinction without a difference given that their respective missions were nearly identical. This is confirmed by the fact that the official formula to designate an arbitrator encompassed both the terms of "arbitrator" and the term of *"amiable compositeur"*, in order to avoid any confusion regarding the prerogatives of the person arbitrating the case. It also helped in ensuring that no party would terminate the process on a technicality regarding said title[351]. Usually, however, parties agreed upon the choice of arbitrator and acted in good faith.

In a 1223 case between the city and the bishopric of Tournay, the parties agreed to select arbitrators from "the other side of the aisle": the city would choose two clerics whereas the Church selected two city bourgeois[352]. The number of arbitrators could be odd or even, but the parties were not overly concerned with this matter as arbitrators usually found a way to settle disputes, even when split equally, which is what prompted the trust of the parties in them, inciting them to act in good faith in the face of a respectable institution[353].

In general, arbitration and mediation should always be examined through the lens of *auctoritas* and equity, as both underlie the purpose of arbitration and mediation, in addition to being their legal-philosophical essence. While equity can rightfully be associated with every single method of rendering justice, it plays a more important role in less formal contexts such as mediation or arbitration, not only through general equity, but specific and *ex aequo et bono* equity as well. Both arbitrators and mediators must be aware of the Law's general limits, but within those limits, they have more room to operate and use various legal tools which a judge would often refrain from using by fear of setting a precedent or of being corrected by a superior court.

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350 Such cases underline the fact that having an homogenous society renders such proceedings a lot easier than in our multicultural world. Indeed, the more diverse a society is, the harder it will be to find common grounds and values, in turn implying that arbitrators need to be more competent than ever to find acceptable solutions for all parties. Powell, 15th century pp. 42-43.

351 Demars-Sion pp. 11-12 and the authors in footnote no. 86.

352 Fourgous p. 97.

353 Fourgous pp. 101-102.

On the other hand, the arbitrators' authority was of prime importance given the lack of legal tools to compel parties to perform awards. It is neither shameful nor a sign of weakness to acknowledge that another person, while still our peer, enjoys an *auctoritas* based on their capacities to find equitable solutions benefitting all, but also to make them as acceptable as possible, rendering them very efficient, voluntarily applied by those involved.

6. Oaths

As seen in ancient Greece and Rome[354], arbitrators had to swear an oath in order to act as arbitrators. This is not something that can be ignored when construing arbitration in the light of the concept of *auctoritas*, in particular in a society where religiosity and spirituality were centrepieces as was the case with medieval Europe.

In addition to the spirituality of the era, the choice of arbitrator was generally made between the various honourable persons living in the vicinity. If certain cases were decided by arbitrators far removed from the community, such was not the most common occurrence given the time and difficulty to cover distances.

Despite the parties' usual good intentions when using arbitration, people were not naïve enough to believe that everyone would instinctively follow the rules. In order to prevent regrettable situations, two means were generally resorted to: inserting a criminal clause in the compromise or taking an oath to respect the compromise. Swearing an oath was much more effective to ensure the parties' cooperation, to the point where a resounding majority of arbitral conventions contained a general oath. Using God as a witness was a very efficient method to bind oath takers, but in order to further enhance it, a *res sacra* was used during the oath (a cross, relics, a sacred text, etc.)[355].

The oath was more efficient than the penal clause as it was easier to craft and bore heavier consequences: perjury was indeed graver than paying a fine. Furthermore, the impulse to fulfil the compromise came from within the parties and not without, for the oath is something very personal contrary to an outside sanction[356]. So strong was the concept of oath that people suffering from insanity thus lacking

354 Cf. *supra* part 1, I, C, *b* and *infra* part 2, II, 3.

355 Fourgous p. 113.

356 There are still, to this day, many traces of oaths in legal texts around the world and Europe in particular. Cf. Papaux, Préambule pp. 96 ss; and more broadly regarding oaths, cf. Agamben, Language pp. 42 ss.

the capacity to judge, could do anything like ordinary people if they swore an oath, with a few notable exceptions such as being a woman[357].

The main difference with the ancient Greco-Romans was that, by the time of the Middle Ages, oaths had lost their collective dimension. We had gone from multiple Gods to a single god, from a relation between an entire city and a group of Gods to a relation between an individual and a single deity. Having lost the collective dimension of oaths was already a step away from *auctoritas* and towards modern individualism, as we shall see *infra*[358]. While this might seem trite at first glance, this shift was to have consequences still felt nowadays, in particular with the current reigning legal doctrine, contractual positivism[359].

7. Conclusion to the Middle Ages

The overview of arbitration in the Middle Ages is interesting in a variety of manners. Mainly, the proliferation of international arbitral procedures was due to many factors among which the absence of a military, political and cultural dominant superpower as with the Roman Empire. While there were obviously strong factions (the Church, the kings, etc.), they were never strong enough to impose their views through sheer military intimidation.

It was therefore essential, in order to solve disputes without starting a war with very uncertain outcomes, to find alternatives to deal with them. During the Middle Ages, wars were very frequent[360], and given the geopolitical state of Europe at the time (many fiefdoms and lords of comparable power, the absence of a central state, etc.), the settlement of disputes via arbitration made the most sense as it allowed European lords to make peace without bloodshed, to conserve their military strength for the more powerful foes. In other words, international arbitration at the state level could be considered a military strategy allowing its users more time to prepare for upcoming geopolitical events. It is thus unsurprising to witness international/ intercommunal arbitration rise as a means to shorten wars or to prevent them altogether[361].

357 Fourgous pp. 114-115.

358 Part 2, III, 1, 2, 3.

359 Cf. *infra* part 3, III, 2.

360 Laurent, Féodalité p. IX.

361 Our interpretation of the high usage of arbitration in times of turmoil seems to be confirmed by Fraser who evokes the specific case of northern Italy and the fact that arbitrations were used as "interludes in the ceaseless intestine struggle among the rival cities" (Fraser p. 192).

As a result, one of the most war-filled eras in terms of frequency in European history allowed arbitration to flourish[362]. Such a chain of events, in spite of the contrast it provides, is quite logical: arbitration is a way to settle disputes outside of the usual judiciary setting and cannot thrive in a world void of conflicts, as its essence depends on the very ills it seeks to cure. Therefore, in addition to the power balance required, arbitration has, historically speaking, always needed a healthy dose of conflicts between major societal players[363] to thrive. The same could be said about smaller scaled arbitration, as long as the balance between parties was not too slanted to one side from a *potestas* perspective[364]. As soon as ordinary people had a dispute with powerful institutions, arbitration could easily become corrupt and inefficient[365].

Additionally, the concept of *auctoritas* can also be quite easily seen at work when looking at the Middle Ages. Most of the arbitrators called upon to settle disputes were selected because they could impose their decisions to uncooperative parties through strength of character rather than strength of arms. This was possible because they were capable, to various extents, of augmenting the common good, if only because they were the ones who understood it best: clerics for the spiritual common good, a community's wisest for the secular common good.

Given the overall balance between governments, lords and political factions, an arbitrator could rarely give an international award deprived of authority and apply it through sheer strength of arms: it was necessary for the award to have a minimum degree of adequacy, acceptability, fairness and authority. In short, the award needed to reach a certain standard as far as *auctoritas* was concerned[366].

Other than clerics or kings, arbitrators included various French parliaments (which would use judicial, not legislative powers), doctors of Law hailing from the universities of Perugia, Padua and Bologna in particular and arbitral committees with very specific mandates[367], all of whom were selected because of their expertise, reputation for fairness, capacity to decide *ex aequo et bono* or even their personality. Given how easy and tempting it was to use arbitration as a delaying

362 Mérignhac p. 38.

363 Heads of states, figures of power, high-ranked clergymen, rich merchants, etc.

364 Cf. *infra* part 2, II.

365 Such was the case when the people of Lincolnshire contested the existence of property rights of the abbey of Crowland on disputed lands. The abbey easily won this dispute as it knew its way around the applicable law, and because it threatened to excommunicate the four rebellious villages (Powell, Late Middle Ages p. 59).

366 Cf. *infra* part 2, V, 5.

367 Mérignhac p. 37.

geopolitical strategy, the prominence and authority of a case's arbitrators played a huge role as to how the parties would behave and how brazen they acted tactically, particularly when disrespecting the spirit of arbitration[368].

It is important to remember at all times what the final cause is, the *telos* of arbitration: to do justice as peacefully as possible. Justice can take an immense number of forms and shapes, but all should include a certain degree of satisfaction when justice has been done, which is obviously more readily achievable if we avoid seeing justice as a zero sum game, with winners and losers[369].

Consciously or not, arbitrators were often assimilated to the *amiables compositeurs*, whose role was closer to that of a contemporary mediator than a contemporary arbitrator, highlighting once more how arbitration played the role of maintaining harmony in a given society. This is telling as to how arbitrators were expected to reach arbitration's final cause: by way of *auctoritas*, not by imposing their will and decisions top-down, but by understanding the entire case and producing the best possible solution, not by forcing an unwelcome decision down the parties' throats.

It was thus imperative for the various actors of arbitration to take into consideration the conflict in its broadest possible context[370], which meant seizing the impact of potential solutions on the parties, the conflict, future potential litigants, relations and society as a whole. Keeping the purpose of arbitration in mind allows us to see why some of its aspects evolved during the Middle Ages and why others have lasted from ancient Greece to our time[371].

Arbitration is often synonymous nowadays with complex factual situations, which increases the importance of general equity, the virtue allowing judges (and arbitrators) to translate Law in its abstract form into concrete justice, the overarching final cause of Law[372].

It is only natural that a project as ambitious as a peaceful society would be littered with obstacles and contingencies, to the point where purely technical solutions are not viable and where equity is the only vector of justice flexible enough to

368 Powell, Late Middle Ages p. 62.

369 Cf. *infra* part 2, V, 5, C, *d* regarding distributive justice. Cf. also *supra* part 1, I, II with ancient Greco-Romans.

370 Powell, 15th century p. 37.

371 Cf. *infra*, conclusion of part 1.

372 Cf. *supra* part 1, II, 2, B, *b* regarding Aristotle's definition of general equity, which remains pertinent nowadays.

apprehend the factual contingency and deliver awards preserving the peace. Despite the legal positivist doctrine's best efforts to convince us otherwise, a justice relying on equity rather than legal texts is more efficient in keeping the peace than one relying solely on the top-down application of said texts, equity *ex aequo et bono* in particular.

Looking beyond the Middle Ages, it is our conviction that a good jurist can never limit their analysis to a case's relevant legal texts, which is why centuries after Rome's downfall, equity *ex aequo et bono* still played a very important role in medieval arbitration despite the fact that the institution was not as distinctly removed from state courts as during the Antiquity. We will see on multiple occasions the extent of the importance of equity, especially *ex aequo et bono*, for the arbitral project, from a legal-philosophical standpoint rather than genealogical[373].

An interesting example is that of the U.K., before and after the Treaty of the Union formally regrouped Scotland, Wales and England under the same banner on the 1st of May 1707. Unlike contemporary continental Europe, the U.K. has always been keenly aware of the importance of equity, as is confirmed by the existence of the Court of Chancery for many centuries. The Chancery and arbitral tribunals both wielded equity to solve disputes, but more broadly, served as a viable alternative to the state litigation courts given that said equity allowed them to forgo much of a Law considered corrupt by many[374]. When considering the Aristotelian definition of general equity[375], arbitration is perhaps its most fertile ground, given that arbitrators are required to build the "biggest bridges" between Law and case because of the extreme contingency ruling arbitral cases, international ones especially.

The tendency to arbitrate disputes decreased the more absolute monarchies consolidated their stronghold on Europe. Combined with the diminution and fragmentation of the Church's influence on civil society, the usage of arbitration started to decline during the 14th and 15th centuries before becoming very scarce in the 16th century[376]. In the early modern period, arbitration was at first considered an efficient way to unclog the state court system and therefore fell under the

373 Cf. *infra* part 2, V, 5, C, *d* and part 3, III.

374 Powell, Late Middle Ages pp. 66-67.

375 Cf. *supra* part 1, II, 2, B, *b* and *infra* part 2, V, 5, C, *d* and part 3, III. Very quickly, for the time being, Aristotelian general equity is simply the bridge between the Law (general and abstract) and the case (individual and concrete).

376 Mérignhac p. 38; Hilaire p. 190. There were of course certain exceptions, the most notable one being England.

surveillance of the classic judiciary system, but its use sharply dropped in comparison with the Middle Ages[377].

By that point in time, lawyers and jurists were increasingly become involved in the arbitral process. It is for this reason that arbitration became progressively integrated in to the litigation process and state courts which, in return, offered support and protection to arbitration. However, this reached a point where the integration of arbitration in to state courts would raise the following question: is an arbitration harnessed by state courts still arbitration? Can a mandatory arbitration truly be called an arbitration given that its wilful aspect has been removed? Moreover, because of the higher implication of jurists in arbitral proceedings and the slow continental shift towards positivism, the entire institution progressively became "legislated", which adds further legitimacy to our interrogations regarding arbitration's evolution[378].

[377] Hilaire p. 187.
[378] Musson p. 75.

IV. Arbitration in the early modern period

1. In general

The early modern period, which is usually considered as spanning from the fall of Constantinople (1453) or the age of discoveries (circa 1492) to the French Revolution (1789). In the course of this period, a high number of discoveries, political and legal developments, philosophical and theological doctrines as well as scientific breakthroughs paved the way for the Occident as we know it in the 21st century. Here are a few examples of those achievements: Newton's laws of motion and universal gravitation, the Protestant Reform of 1517, Europeans discovering the Americas and the genocide[379] of the indigenous people as well as the enormous growth of the slave economy, the birth of the modern state structure, the Lumières and the beginning of state secularisation. It is easy to understand why the early modern period is considered by many academics as a sort of golden age for knowledge, and while many events have indeed changed the course of humanity, part 2 will demonstrate why certain developments were a step back rather than a step forward.

In this era, the notion of sovereign nation would take quite a turn and with it, the evolution of Law. Societal developments precede legal developments in a crushing majority of cases in history, although there are some cases where the evolution of society is so quick that Law struggles to reflect it accurately or even be acceptable. Such was the case in the late Middle Ages, to the point where Roman Law replaced the various customs as it was more adapted to a fast-pace economy.

[379] Cf. Brown, Wounded Knee *passim* regarding the abhorrent genocide of the unaptly called American Indians.

There are instances of this also happening in the early modern era, and one of them brought the era to a close, the French Revolution, which started due to massive wealth and legal inequities between the clergy and the nobles on one side and the commoners and peasants on the other. Such was also the case with American independence, where the laws of England were so unacceptable and unreflective of the U.S. that it unilaterally declared itself independent from the Crown and went to war with George III over it.

Regarding arbitration however, this period cannot be considered very fertile. Indeed, while arbitration survived, it did not flourish. This was in no small part due to the thriving of absolute monarchies and the birth of modern states and societies, which became more polarized in terms of where the power resided. In particular, central states had low levels of tolerance towards parallel justice systems as they were seen as impediments to the official channels conceived by the central state.

In order to exercise a firmer control over arbitration, it was often incorporated in the state system and even sometimes rendered mandatory, which quite literally deprived it of one of its main characteristics (free will). In the end, not only did arbitration decline, it did not undergo many remarkable changes during the early modern era.

Like the Middle Ages, the early modern period is too vast and complex for us to render a full analysis. It is for those reasons that we will only give a brief breakdown regarding the most influential countries of the era, in particular regarding the aspects most useful to understand the rest of this dissertation. These countries are, historically speaking, those which have most influenced contemporary arbitration.

2. In France

By definition, arbitration implies as little intervention from the state as possible, but a 1510 decree (which follows another decree from 1363) issued by the parliament of Paris dictated otherwise. It allowed parties to appeal against arbitral awards in front of state courts on any legal ground, and if the court confirmed the award, the parties could lodge another appeal to the parliament. Contrary to contemporary arbitration, the right to appeal could not be forsaken beforehand by the parties. The direct consequence of setting up state courts as appellate courts was to establish a judicial control over arbitral tribunals. Moreover, the arbitral award could only be enforced

if it had obtained an *ordre d'exécution* from the judicial authorities, which was not the case before the 16th century[380].

Additionally, arbitration was made mandatory in some fields such as commercial, family or inheritance law. Mandatory arbitration may seem antithetical to the fact that arbitration had become less important, but it is proof that the French state did not want arbitration to enjoy the degree of freedom it had over previous centuries. It was effectively transformed into another branch of the state judicial apparatus, to which arbitrators now belonged in the same way state judges did. Even more so, arbitrators were lesser judges as they did not possess the right to enforce their own decisions, which were enforced by state judges[381]. Arbitrators were considered closer to mediators than "proper" arbitrators *(amiable composition)*, and while this could be akin to the ancient Greek conception of arbitrator, the Greek arbitrators could still enforce their own awards, which was not the case here.

Parties could be summoned during a trial and the proceedings would be carried out and concluded in front of an arbitral tribunal instead of the state court. The underlying idea was to satisfy the royal government by making royal justice, the official state justice, seem less slow than it really was. In the end however, local magistrates supported by local doctrines usually decided that an obligatory version of arbitration was unlawful[382]. This did not improve the perception people had of the justice system, which remained encumbered.

More broadly, the question as to whether this institution could really be called arbitration is highly doubtful. One of the main components of arbitration is the will of the parties, without which, neither arbitration nor other alternative dispute resolutions would be possible. Therefore, if the arbitral structure did indeed remain in place[383], it was hollowed out.

The most significant downgrade suffered by arbitrators however, was the fact that they were chosen for their expertise in legal technique, and not because they were the wisest or the most authoritative members of their community. They could be attorneys or non-jurists working in a field related to the dispute, but in both cases, arbitrators were people who understood the technical aspects of a dispute, commercial ones in particular. The idea being that they had to know the limits of

380 Hilaire pp. 192-193; Fourgous pp. 179-180.
381 Hilaire pp. 193, 199; Fourgous pp. 179-180.
382 Hilaire pp. 209-216, 225-226; Demars-Sion pp. 2 ss.
383 Arbitrators, most of the procedure, etc.

what they could do, not to impede on anyone else's prerogatives, state judges especially. They did sometimes refer to broad concepts including equity and *bona fides*, but were mostly concerned with analysing the laws and drawing legal consequences[384].

This downturn is without a doubt an excellent reflection of the evolution of legal philosophy since ancient Greece. Under the influence of a Christianism intertwined with the offshoots of Plato's vision, jurists of the early modern era had adopted an extremely top-down approach to Law: at the top were the texts of law and at the bottom were the cases, the contingency. Under this paradigm, open textures and general principles do not stand at the apex of Law, rather serving as a mere corrector in the rare instances where the legal texts are mute.

It is because arbitrators were considered under this different light that they were appointed to the most technical domains of the time (commercial and family law). Many positivists would argue that a jurist's authority only derives from their capacity to articulate laws, to be a good legal technician[385]. By enacting such laws, Louis XII and Francis II removed the essence of an arbitrator's function: to decide *ex aequo et bono*. The purpose of those laws was as mentioned *supra*: to unclog state tribunals, which both kings did by forcing the most technical and uneventful domains of Law onto arbitrators[386].

From the 16th century onward, arbitration saw the number of legal domains to which it applied reduced in order to further prevent a parallel justice system to the royal state system. This shift is most apparent and understandable in France under Louis XIV's reign. Not one to share power, the Sun King was determined to reform the then-current court system to make it as representative of his will as possible. It was therefore quite logical that he was disinclined to promote an entire system that bypassed state justice, and by extension, his very own justice[387].

384 Hilaire pp. 209, 224.

385 This vision of Law is contested by an ever-increasing part of the contemporary legal theory doctrine. Cf. van Hoecke p. 7 for instance, who argues that a jurist's capacity to communicate is the key to unlock good legal interpretations. A jurist's authority would thus not be measured according to their technical skills, but according to their capacity to craft good interpretations of the Law, which further reaffirms Law as an art, the *ars juris*, and not a science, the so-called *Rechtswissenschaft*. This is a line of argumentation that shall be reutilized *infra* in part 3.

386 Hilaire pp. 192-194.

387 Roebuck, Louis XIV pp. 44-45.

Furthermore, the very notion of peaceful resolution did not necessarily fit with Louis XIV's absolutist vision of justice, a vision best exemplified by his revocation of the Edict of Nantes through the 1685 Edict of Fontainebleau and the various wars that started under his reign: the Franco-Dutch War (1672-1678), the War of the Spanish Succession (1701-1714), etc. The mere possibility of setting up an arbitral system in parallel to the official justice channels over which Louis XIV lorded was simply intolerable[388]. Under his tyranny of justice, arbitration thus declined in France.

Within the limits that have already been discussed, arbitration steadily became a lesser justice system in continental Europe, eventually becoming an annex to state justice by the 18th century. Ironically, by the end of the 18th century, revolutionaries viewed arbitration as a solution to the disgraced state justice system, for the simple reason that arbitration, as a perceived expression of natural justice, stood in "opposition" to it. In addition, arbitration was gaining momentum in legal circles by the time of the Revolution, even though it seems they'd rather it was voluntary[389]. This is why it featured heavily in the law of the 16th and 24th of August 1790, a law that set up an automatic amicable arbitration system which was nearly free for all to use[390]. The main idea behind the revolutionary shift of the justice system was the acceptability of the final decision, of the people rendering the decision and of the texts of law on which such a decision was based[391].

3. In England

A. Elizabeth I of England

"The English have always been given more to peaceableness and industry than other people and, rather than go so far as London to be at so great charges with attorneys and lawyers, they will refer their difference to the arbitration of their parish priests, or the arbitration of honest neighbours."[392] While we have serious doubts concerning the higher "peaceableness" of the English, we do not dispute their appreciation for a quiet state of mind, for peaceful dispute resolution. Along with many other factors (their insular status, a relative continuity of the political system,

388 Bonnet pp. 143 ss.
389 Demars-Sion pp. 9-10.
390 Hilaire p. 226; Fourgous p. 181.
391 Demars-Sion p. 1.
392 Edward Chamberlayne, Angliae Notitia, no. 1684.

the absence of a paradigm-shifting invasion, etc.), this yearning for a peaceful state of mind made arbitration the obvious choice to resolve conflicts without going through the grit and grind of litigation.

Unlike France, arbitration continued to thrive under its "usual" form in England in the 16th and 17th centuries, which reflects a trend that went beyond the Middle Ages because arbitration was too convenient to neglect, even if the early modern era was less of a fertile ground in this regard than the late Middle Ages.

As criticized as the justice system was by the end of the Middle Ages and at the beginning of the modern era, it would be a mistake to think that arbitration was simply the reflection of the failures of medieval justice. It was an institution well anchored in the habits and customs of the English. The reasons underlying the popularity of arbitration were similar to those of ancient Rome (procedural flexibility, relative secrecy and swiftness), the main difference being that the parties' reputation was not as cardinal in medieval Europe as it was in ancient Rome and that decisions were final, without appeal[393].

This means that quite a few arbitral trials left traces in the form of written awards which have been used by historians to demonstrate how widespread arbitration was in England in the course of the early modern period, and in particular during the Elizabethan era.

The Elizabethan era (1558-1603) corresponds to the reign of Elizabeth I and is generally perceived as a period during which England benefitted from an economic and political expansion. More to our point, it is also considered by historians as the golden age of arbitration as Elizabeth I further encouraged a process that was already popular. The reason why arbitral trials were favoured under Elizabeth I might have hinged on her personality and the way she manoeuvred politically: through conciliation and consultation. She could be very decisive if need be, but even in such instances she always cared to give the appearance that she had consulted all parties involved, even if she had already made up her mind regarding the matter at hand[394].

393 Powell, Late Middle Ages pp. 55-56.

394 Roebuck, Golden age pp. 157, 161 ss. Having witnessed her mother's decapitation at her father's hands, Elizabeth I had a penchant for peaceful solutions to disputes. She herself served as an arbitrator in a surprisingly high variety of cases for a monarch, taking interest in a variety of cases such as the failed promise of the Dowager Countess of Rutland to reimburse a bailiff. She was most active as an arbitrator for quarrels between members of

The process was called arbitration but still grouped both arbitration and mediation. They were not yet distinct legal fields and the arbitrators in charge of the trial shifted from one to the other as they saw fit. Given that their objective remained the peaceful resolution of disputes, it was important that they had both tools at their disposal.

In general, Elizabeth I and her subjects settled disputes through less intrusive mediation if possible, but if necessary, they would use arbitration to tie loose ends. The reason for which mediation and arbitration were grouped under a single banner was probably because they had the same *modus operandi*: equity *ex aequo et bono*, which flourished during the Elizabethan era[395].

The idea behind this coupling was that mediation and arbitration were simply different steps of the same process: if it was possible to solve a dispute through sheer mediation, why employ a more intrusive method? Arbitration was thus used when mediation failed, but all in all, no distinction was made because they amounted to something bigger: peaceful dispute resolution, the settlement of problems without rancour[396]. In other words, there were still remnants of the ancient conception of justice whereby societal harmony was more important than picking individual winners and losers in the judicial process[397].

nobility, not ones to easily accept the authority of a great number of people (e.g.: the conflict between Lord Mountjoy and the Earl of Huntingdon).

395 Roebuck, Golden age pp. 3, 8-9, 38 ss, 337.

396 The 20th century positivist mindset brought about certain changes in the way arbitration was used: arbitrators became more interested in protecting their vision of the systems of laws than the peaceful resolution of dispute through equity and common sense. From the moment arbitrators eluded what had been their mission for millennia, it is only logical that the remnants of their previous institution would coalesce around a new concept, distinct from arbitration. It should therefore not be too surprising that mediation and arbitration separated only quite recently, during the latter half of the 20th century, when arbitration started becoming too estranged from mediation for them to work in tandem. And even then, mediation seems to be slipping away from its traditional role (itself filled in by conciliation) and into the vacuum left by arbitration, as the latter has been inching closer to litigation for the past 40 years (cf. *infra* part 2, V, 5, A, B). Mediation is thus becoming much more akin to what arbitration was before the latter half of the 20th century. Arbitration, on the other hand, seems to be leaving behind its purpose of peaceful resolution of disputes, with an inflation of attorneys intervening in the process and the increase of procedural twists (Roebuck, Golden age pp. 8-9; Nolan-Haley pp. 61-62; cf. *infra* part 2, V, 5, B, *d)*.

397 Cf. *supra* part 1, I, 2, B.

B. James VI of Scotland (1567 to 1625), James I King of England and Ireland (1603 to 1625) and his descendants

James I continued the policy of favouring the peaceful resolution of conflicts, and while he was not as adamant as Elizabeth I in doing so, he still felt a certain repulsion towards judicial aggressiveness. Unlike his predecessor he seldom attended meetings of his Privy Council, but like his predecessor, he served as arbitrator, albeit less often (both Charles I and II followed in his footsteps in this matter, although they were less influential than King James I)[398].

James I was surrounded by some of the most influential jurists in European history. The most notable was Francis Bacon, a man whose brilliance is widely acclaimed in both sciences and humanities. Lord Chancellor, Bacon was a shrewd and outstanding arbitrator, whose talent for interdisciplinarity was reflected in his awards. Bacon understood the importance of equity *ex aequo et bono* and was therefore quick to elaborate solutions outside the spectrum of laws[399].

Bacon was ideologically opposed to Edward Coke, one of his contemporaries and the father of common Law. Still, Coke valued arbitration as Bacon did because he was keen on avoiding resentment between parties. The main difference with Bacon, from a legal standpoint at least, was Coke's penchant for legal technicities, the will to solve conflicts not through what could be imaginative schemes, but by anchoring the solution in legality[400].

Arguably the most influential jurists in the U.K.'s history, it is not surprising that they were often called to arbitrate and considered as the best. Their authority as Lord Chancellors and intellectuals far outranked their peers', each with their particular style: Coke as a stern legal technician and Bacon as a brilliant intellectual with a remarkable insight into the human mind. While their works have been detailed in hundreds of books and will not be scrutinized here, it is interesting to note that *auctoritas* can emanate from very different personalities with distinct worldviews and legal philosophies, as long as they improved the legal tradition they were bequeathed by their predecessors, the common good.

398 The cases in which James I acted as arbitrator also often involved members of the higher social echelon such as the conflict between the earls of Ormond and Desmond for which he rendered an award on the 3rd of October 1618. James I was involved in an estimated 466 cases as arbitrator over the course of his reign (Roebuck, 17th century pp. 45-46).

399 Roebuck, 17th century pp. 275 ss.

400 Roebuck, 17th century pp. 259 ss.

British Law had been continuously and steadily refined under the surveillance of the Crown, which is why the history of arbitration in early modern England is more linear than in France. Arbitration was used as a complement to litigation, not as a shelter from it, meaning that both systems grew in parallel. The most noteworthy aspect of arbitration remained the acceptability of its awards: given that most arbitrations happened on a local level and featured awards rendered by people whose *auctoritas* was high enough for the parties, arbitration made for a generally acceptable way to bring about justice with a high degree of proximity to the dispute[401].

4. In the United States of America

When talking about the U.S.' judiciary system, it is important to keep in mind that until the Judiciary Act of 1789 which officially created the federal judiciary system, the U.S. did not have a unified judiciary system and each state applied laws in very different fashion. Until Marbury v. Madison[402], American case law was decided by state courts. For this reason, any historical analysis of arbitration in the early modern period in the U.S. has to be done on a state by state basis. The English influence, which was very strong during the colonial era, waned after the declaration of independence, but not before multiple states had adopted their own pieces of legislation in regard to arbitration[403].

Given the state of societal structure in colonial North America, arbitration had an important role in the resolution of disputes of communal nature before the American revolution. Indeed, arbitration in its simplest state is an essentially voluntary process, and most importantly, is not enforceable. Parties were thus entirely free from a legal standpoint to perform an award or not.

The strength of a community's ties was therefore cardinal to the success of the arbitral enterprise. Mann evokes the importance of those ties: "Modern reformers tend to overlook this point in their eagerness to tout arbitration as a panacea for creeping legalism and other social ills. Arbitration and other consensual alternatives

401 Powell, 15th century pp. 21-24, 27-29.

402 5 U.S. 137 (1803). The primary holding of this decision was to expand the jurisdiction scope of the U.S. Supreme Court to include the power to verify the constitutionality of all of Congress' legislative action.

403 S. Jones, pp. 240, 246. These states included but were not limited to: Massachusetts, Connecticut, Pennsylvania or the already imposing city of New Amsterdam.

to law can succeed only when they are tied to a community. […] One has to look closely to see social and economic change reflected in matters of technical legal form. But if one does, the view is well worth the effort."[404] This lesson, which he exemplifies through the case of colonial Connecticut, is of paramount importance and will be developed *infra* in part 2 of this work.

Admittedly, once we discard Algonquians, the social structure of colonial Connecticut was much less complex than what we usually find in the 21st century in the West. Indeed, there was more than enough land for anyone wishing to settle down to do so. Because people all had the same cultural baggage and communities were small enough for their inhabitants to usually know the vast majority of their neighbours. Most importantly, communities could establish an element of continuity, with younger members settling down in the very community they grew up in.

Communities in Connecticut often chose arbitration to solve disputes between them. Despite a certain paucity of documentation on the topic, there is no reason to doubt that arbitration was well-spread throughout the state. Indeed, arbitration was well-documented in neighbouring Massachusetts and New Amsterdam before the 17th century. As both states were bigger and less homogenous than Connecticut, arbitration could go wrong more easily. Pennsylvania was also a state were arbitration thrived in the 17th century, as was Maryland. There is therefore no reason to doubt that arbitration was an accepted form of adjudication in 17th century Connecticut[405]. Moreover, arbitration was well-adapted to the society of the time, given that it did not set lines between victors and losers, but attempted to do justice for all parties involved. In addition, arbitrators were quite free to find solutions that were suitable to the grievances, preferring societal harmony to individualistic solutions.

At the start of the 18th century however, the number of Connecticut communities grew and the ties between them became more strained, which made the arbitration practices used until then obsolete. As a consequence, arbitration adopted some of the ways of litigation (deeds, bonds, etc.), which was the first of many steps undertaken by arbitration making it more akin to litigation over the course of American history. Awards increasingly became purely monetary, inching closer to

404 Mann pp. 443-445.
405 Mann p. 449-451; Oldham/Kim pp. 245, 256 ss, 261 ss; Haydock/Henderson p. 144.

contractualist commutative justice and moving away from distributive justice and interpretative flexibility[406]. This last shift is probably the best indicator of communal ties coming undone[407].

The last change regarding Connecticut arbitration in the early modern period was the codification of commercial arbitration. Until this point, merchants had no need for any codification because they had more tightly-knit interests than the rest of society. In particular, they enjoyed the flexibility afforded by arbitration as well as the possibility to be judged by their peers and according to the *lex mercatoria*. The Connecticut Arbitration Act was enacted in 1753 and its main addition to arbitration was to render awards directly enforceable. This is something found in many national laws in the 21st century, a reflection of both the difficulty to arbitrate conflicts when a society becomes too complex, and the need for legal support when arbitration suffers from too great a lack of *auctoritas*. While the legalization of arbitration did wonders for its effectivity in terms of performing awards, the toll was a heavy one: the fading of arbitration's adjudicatory nature, to become "downright legalistic."[408]

The history of Connecticut arbitration is an excellent illustration of what will feature *infra* in parts 2 and 3: the key to a functioning arbitration system lies in the strength of societal ties, the trust citizens have in one another and the overarching system dispensing justice. This is typically why the idea of an independent international arbitral order is lacking from a legal-philosophical perspective, because such an order would be too far removed from the societies where its awards apply[409].

Quite the opposite, arbitration is heavily influenced by local factors, dependent on the people involved, the applicable Law, etc. In this context, Connecticut provides a good historical example: what worked for a certain community did not necessarily function for others, which is only logical given the extreme contingency of life as a whole, and the fact that the more heterogenous the society, the harder it becomes to define the overall societal links[410].

406 Cf. *infra* part 2, V, 5, B, C and part 3, III.

407 Mann pp. 457 ss; Nolan-Haley pp. 66 ss.

408 Mann pp. 469 ss.

409 Cf. *infra* part 2, III, 2, 3 and part 2, V, 5, A, B, C.

410 Cf. *infra* part 3, III as well as Kenny, who skillfully develops the concept of comparative localist analysis. Mann p. 480.

Overall, arbitration in the northeast of the U.S. was widespread and concerned very diverse matters, not unlike England at the time: property, wills, commercial or maritime law. As has often been the case throughout history, people of *auctoritas* have been called upon to act as arbitrators[411].

[411] Oldham/Kim pp. 257-258.

V. The late modern period

1. A few general observations regarding the 19th century and the events which laid the groundwork for the arbitration trends of the 20th century

The late modern period is the last historical period that will be analysed here as we intentionally leave out the contemporary period, which roughly and generally corresponds to the years ranging from 1945 to the present. Indeed, the developments and evolution of international arbitration in the wake of World War II have brought arbitration down a somewhat different path than that taken thus far. This path requires the comprehension of the concept of authority, in much more vivid details than what we have shown so far. A historical analysis focusing on pure legal technique would somewhat be superficial and would not do justice to the arbitration phenomenon in our view. Consequently, the period ranging from 1945 to the present will be developed *infra*[412], under a sensibly more legal-philosophical lens.

The late modern period roughly begins with the French Revolution and ends with what is perhaps the most significant historical episode in modern occidental history, World War II. The decoupage of both modern and contemporary periods varies depending on historians. More particularly, French historians traditionally refer to the contemporary period as beginning with the French Revolution in 1789 or the abolition of the monarchy in 1792, and whose end has yet to be reached. According to a more Anglo-Saxon current however, the contemporary era roughly covers the last 80 years, which essentially coincide with the post-World War II order. In this work, we will use the Anglo-Saxon vision, for it better corresponds to the decoupage of arbitration's own evolution. As a consequence, the late modern

[412] Part 2, V, 5.

period as referred to in this chapter spans the period between the French Revolution and the end of World War II.

Our analysis of the late modern period will focus on the three most influential occidental countries concerning arbitration, with a few passing mentions to South America. The three countries are France, the U.S. and the Kingdom of Great Britain (later to become the U.K.). At the start of the French Revolution, arbitration was itself embroiled in times of turmoil, as the early modern period was not propitious to its development outside of England and, to a lesser extent, the U.S.[413]

This changed during the late modern era as the influence of England, then the U.S., grew to the point where their use of arbitration slowly started to become the point of reference in the West, as well as the figureheads of its revival in continental Europe.

Before pondering over the Anglo-Americans however, let us take a look at the ups and many downs of arbitration in France. The late modern period began on a fairly high note for arbitration in France, with the Revolution seeing it as a remedy to the heavily criticized state courts of the *ancien régime*, which were considered to be corrupt and incapable of properly doing justice[414].

This enthusiasm was short-lived and soon replaced by yet another period of scepticism during the Consulate and the First Empire (1799-1804, 1804-1814). Napoleon had a clear preference for a strong and centralized system of justice, not unlike Louis XIV. This mindset was quite widespread, with certain commentators calling arbitration a "satire of judicial administration", marking a clear penchant in favour of state justice and Montesquieu's idea of the *juge bouche de la loi*[415].

The most noteworthy case, the Prunier case, would prove a serious impediment to the conduct of arbitration in France. In this case, Joseph-Marie Portalis deemed that an arbitration clause was unlawful because from the moment of its inception, it needed to contain the identity of the arbitrators as well as specifically delimit the subject matter. This made it all but impossible to craft arbitration clauses for future disputes for the rest of the 19th century in France, until a series of laws enacted between 1904 and 1925 overturned the Prunier decision[416].

413 Cf. *supra* part 1, IV.

414 Cf. *infra* part 2, III, 1, 2, 3 where we take a look at whether this opinion was justified.

415 Born I pp. 40-50; Schinazi pp. 68-73 and the quoted references.

416 Compagnie L'Alliance v. Prunier, Sirey 1843, I, pp. 561 ss. Cf. Schinazi pp. 73-76 for a full account.

With arbitration effectively barred from concretisation in France, the most noteworthy arbitral legal text of the era was the Jay Treaty between the Kingdom of Great Britain and the U.S. signed on the 19th of November 1794. Named after the negotiator of the treaty, John Jay, it put in place the systematic use of arbitration to settle disputes ensuing from the American War of Independence (1775-1783).

Art. 5-8 of the Jay Treaty stipulated that problems regarding damages sustained during the war, or issues concerning trade on the Mississippi river, would be settled in front of an arbitral court whose composition resembled contemporary ones: each party could choose one arbitrator and a third one was appointed by both arbitrators in unison. These commissions as they were called, functioned effectively until 1831 and have served as model for countless disputes since. The Jay Treaty is often considered to be an influential source of contemporary Anglo-American arbitration, from which many laws derived[417].

Contrary to France, arbitration never ceased in Great Britain during the 19th century, especially in England, which was the world's most dominant nation economically, as well as the epicentre for trade at the very start of globalization. Given the multiple interactions between British and foreign merchants, the opportunities for arbitration were numerous, especially considering that British soil was relatively spared from armed conflicts over the 19th century. Arbitration thus steadily grew in Great Britain during that period to the point where it was widespread and commonly used by the time World War I began. Examples include the Liverpool cotton association (founded in 1841) setting up arbitration committees, which would intervene in the crushing majority of disputes on the Liverpool cotton market. Another example is the London corn trade association (founded in 1878), which set the tone for other trade associations with a highly successful arbitration mechanism[418].

On an inter-state level, the Alabama claims were the major case of the era, mainly based on the Washington Treaty signed on the 5th of May 1871, which used the Jay Treaty as its model. This dispute, wherein the U.K. was ordered to pay the U.S. reparative damages for attacks on Union merchant ships by Confederate raiders whose vessels were built in the U.K., took place in 1872.

Without delving into all the intricacies, this case is considered an important landmark in international arbitration: "The *Alabama* arbitration is, however,

417 Carreau/Marrella p. 647; Born I pp. 12-14, 21; Schinazi pp. 51-52; Keller pp. 851 ss.
418 Schinazi pp. 45-50.

significant as one of the very few instances in history when the world's leading nation, in the plenitude of its power, has agreed to submit an issue of great national moment to the decision of a body in which it could be, as it was, heavily outvoted."[419]

These claims served as inspiration for some of history's great cases regarding the payment of damages inflicted upon one country by another and has often been directly mentioned in other similar cases[420]. More importantly, this case catalysed the efforts deployed to codify arbitration usages, which is unsurprising given that the Alabama claims happened dead in the middle of the codification movements in Europe and in the wake of the Jay Treaty[421]. What is really interesting for our dissertation, however, is that it proved to be a major factor in the shift from equity *ex aequo et bono* to legal texts in arbitration, a starting point in the technocratization of the field[422].

To be clear, we were still very far, at the time, from contemporary awards, and arbitration still revolved around equity, *ex aequo et bono* especially, at least until the 1920s[423]. The Alabama claims marked a change in that, for the first time, arbitration mainly used written laws rather than equity to do justice, and that the judicial became more important than the socio-political despite being narrower. In other words, this case was a tipping point of arbitration's capacity to apprehend the common good[424].

Arbitrators drawing inspiration from written laws obviously does not mean that they are incapable of taking the common good into account, simply that in combination with the positivist wave, this shift became a fundamental one rather than one of means. Instead of simply using a text of law to support an argument or untie judicial knots, these texts started becoming the purpose of arbitrators. Convinced that the most overarching issue of a case was purely legal and not socio-politico-legal, arbitrators began to withdraw into a role of legal-technical caution in order to satisfy modern chimeras of objectivity or legal science. By conflating an entire case

419 Bingham pp. 14, 24.

420 Such was the case after the allied intervention in the Russian Civil War as Russia sought damages for the prejudice caused by the United States, France and Great Britain when they tried to overthrow the Bolshevik government in an effort to rope Russia back into World War I (K p. 139).

421 Jonkman/de Blocq van Scheltinga p. 3.

422 Schinazi pp. 57-62; Keller pp. 858 ss.

423 Cf. *infra* part 2, V, 5, A, B.

424 Schinazi pp. 182-186.

analysis with the analysis of its sole legal aspects, arbitrators have effectively reduced their scope, forgetting that their role entailed much more, and that the requirements for being an arbitrator should not be limited to legal knowledge, but extend to their wisdom and general knowledge[425].

Beyond the U.K., most of the 19th century was a prolific era for the legislation of arbitration laws and treaties worldwide, numbering in the hundreds by the end of the century[426]. In parallel to the change brought about to the legal-philosophical core of international arbitration (text of law-equity), this inception wave of legal texts marks the start of arbitration's textual inflation, even though it would take some time for it to reach its apex.

Among those with a fondness for arbitration, South Americans developed their own inter-state casuistic, not only impacting the developments of international arbitration, but international Law as a whole, particularly the creation of international courts, and via the organisation of multilateral conferences. The frequent inclusion of general arbitral clauses for future disputes in treaties was also becoming a staple, although the use of arbitration was viewed as an *ultima ratio*, to use after negotiations had failed[427]. The political balance struck in South America would not, however, be so simply exported to western nations.

Facing countries with comparatively small military and economic weight, Occidentals behaved more aggressively towards South Americans than with each other, especially considering that international arbitration was, at the time, viewed as a vector for peace, defusing conflicts before they blew up[428]. The arbitral claims between Occidentals and South Americans can attest to this as, except for a few cases, the former were claimants willing to aggressively use arbitration in contradiction with the peaceful final cause of arbitration treaties. Such a conduct was already in line with what would happen after World War II[429].

This behaviour is reminiscent of ancient Rome, with the notable difference that recently, powerful countries would try to preserve their image by adhering to arbitration treaties rather than openly attacking smaller countries, so long as said

425 Cf. *infra* parts 2, V, 5, B, C and part 3, III regarding arbitrators' propensity to shackle themselves.

426 S. Harris pp. 306 ss.

427 S. Harris pp. 305 ss. For example, the Second Hague Conference of 1907, which established South American states as independent and accepted by the global community as such.

428 S. Harris pp. 309 ss.

429 S. Harris pp. 315 ss; cf. *infra* part 2, V, 5, A, B.

treaties remained in line with their interests. This nefarious behaviour may have incited its victims to question the arbitral institution in tandem with the powerful countries' actions, which would be somewhat akin to throwing out the baby with the bath water, leading to some of the problems of authority international arbitration currently faces[430].

This arbitral history of South American states probably explains, partially at least, why they have demonstrated more scepticism than Middle Eastern countries in the face of the post-World War II occidental imperialistic use of arbitration for control of natural resources[431]. They understood that, for exceedingly powerful countries, the resolution of conflicts could remain peaceful, but on the condition that the resolution went in their favour, as history repeatedly illustrates[432]. This was already apparent during the first Pan-American Conference of 1890, which resulted in a general arbitration agreement to prevent armed conflicts that was heavily skewed in favour of the U.S., simply to prevent them from leaving the conference[433].

The 1890 conference was the prelude to the 1899 Hague Convention for the pacific settlement of international disputes which enacted the creation of the Permanent Court of Arbitration. Although it did not reap the success hoped for by its inceptors, it would nevertheless serve as a solid base for the growth of arbitration institutions in the 20th century[434]. The International Chamber of Commerce ("ICC"), for instance, is a direct consequence of this event[435].

All in all, although arbitration clearly did not enjoy the same widespread success as it had in ancient Greece, ancient Rome or medieval Europe, the pendulum was gently but surely oscillating towards renewal and away from anxiety, clearing the way for the developments of the 20th century, particularly on the international scene[436]. At that point in time, evolutions in occidental arbitration were spearheaded by the Anglo-Americans, with the rest of Europe leaning closer to the mentality championed by the *Code Napoléon*[437].

430 Cf. *infra* part 2, V, 5, C regarding the "crisis" of authority in contemporary arbitration.
431 Cf. *infra* part 2, V, 5, A, B.
432 Cf. *supra* part 1, I, II.
433 S. Harris pp. 314-315.
434 Jonkman/de Blocq van Scheltinga p. 7.
435 Cf. *infra* part 1, V, 3, where the ICC will be discussed more lengthily.
436 Schinazi pp. 85-86.
437 Sumner p. 128.

Steadily becoming widespread, the actors of the occidental arbitral world also started to change. From occasional arbitrators to full-time professionals, the trajectory of the occupation of arbitrator began shifting markedly during the 19th century. It would not be until the 1930s that this shift would become the norm. What follows is a section dedicated to this shift at the crossroads between the 19th and 20th centuries. The U.S. and U.K. are interesting case studies as they show, quite like the ICC whose analysis is also featured *infra*, how arbitration (d)evolved towards technocratization and the influence of professional positivist jurists.

2. The professionalization of arbitration, towards technocratization

Anglo-American arbitration between, roughly, 1800 and 1939, is quite interesting because it heralds a mentality shift in arbitration that would repeat itself once more, to a more extreme extent, during the 1980s and 1990s: the professionalization of arbitration and the heightened technocratic and procedural thresholds. What was once seen as a privilege, a societal duty or both, was slowly but surely becoming a full-time activity. This certainly did not happen overnight, but given that we find ourselves currently at an important historical juncture of professional arbitration, we would be remiss not to lay out the circumstances of its inception[438].

Some of the first arbitration "professionals" could already be found in 18th century England. However, accepting retribution felt uncomfortable to the point where they would give it away to charity. Interestingly, arbitrators were not the only ones donating to charity, the merchants often did so with the reparation money for damages featured in an award, for the rough duration of the 18th century, often

[438] We will see *infra* that the latter half of the 19th century marked the slow but steady passage to an increasingly business-oriented type of arbitration, centred around individuals. This shift, emblematic of the modern atomization of society, was accompanied by a more legal-philosophical evolution: positivism, legal and contractual, setting in and becoming the uncontested predominant legal doctrine in the West (cf. *infra* part 3, III). The main consequence of positivism was the legislative inflation of all fields of Law, and although international arbitration resisted longer than most, it eventually became just as positivistic as the others. This, in turn, had a huge impact on the actors of international arbitration, an impact in no small part due to the professionalization and the technocratization of international arbitration. All of these changes in arbitration, be it its emphasis on commutative justice, technocratization, legal positivism, contractual positivism, legislative inflation, and to a lesser extent professionalization, are all elements we will talk about in part 2 *infra*. For the time being, it is more urgent to comprehend how we reached such a stage.

boasting about it in the newspapers to further ameliorate their own reputation. The safeguard of their reputation as merchants and arbitrators mattered more than being allotted money[439].

As we have repeatedly seen over the course of history, an arbitrator's reputation is key to their success. It is thus unsurprising that reputable people remained the arbitrators of disputes at every societal level, especially the highest one, and that they would want to protect it, much like contemporary arbitrators make every effort to protect their reputation as solid legal technicians.

Inheriting in some measure Elizabeth I's fondness for arbitration, the English often pushed for arbitration to end disputes instead of other means such as duelling. Agreeing to refer one's disputes to arbitration was proof of good reputation and character, and agreeing to act as arbitrator even more so. Arbitrators were therefore quite often of a superior social status to that of the parties, unless they had been chosen for their specific expertise[440].

That being said, the further we advance through the 19th century, the more instances of small payments appear punctually. According to British politician Francis Place: "When […] I was in the deepest poverty […] I had many matters brought to me for […] arbitration or arrangement […]. I gained much knowledge […] by these interferences, for which I never made any charge, unless, the matter related to an association or large body of men, […] in three or four instances where the parties were found to be rogues, […] I have made charges, as I did not think that rogues and evil disposed persons had any claim on my time because they had misbehaved themselves."[441] Although Place, despite his impoverishment, refused to charge a fee to the parties he arbitrated, he nonetheless charged those he considered "rogues and evil" and for large groups of men. Anecdotal from a quantitative perspective, Place's actions nonetheless show that he did not reject billing people unconditionally for his time as an arbitrator.

[439] Roebuck/Boorman/Markless pp. 284-286; Boorman p. 118. Although 18th century arbitrators were regularly involved in arbitral trials, they did not make a living out of it, which is why we are using quotation marks to describe them. Quite like amateur and professional football players, the limit we place as to why an arbitrator is professional or not, is whether this person's activity as an arbitrator is a regular-enough source of income. In the case of 18th century and early 19th century arbitrators, judging by this criterion, they could not be considered professional arbitrators.

[440] Roebuck/Boorman/Markless pp. 284-285, 289.

[441] Place pp. 225-226.

Monetisation of arbitration thus grew throughout the first half of the 19th century[442]. For instance, Richard Needham, a cotton weaver until the 1840s, considered that he need not be paid for nightly arbitration activities, contrary to urgent affairs taking place during the day which took him away from his livelihood[443]. At this point, arbitrators were still outstanding community members, although the communities in question were progressively shrinking: from Rome to a medieval city to a big merchant guild. By the mid-19th century, arbitrators had sparse legal knowledge; it was their local knowledge that provided them with the opportunities to arbitrate[444].

Arbitration in the U.K. became successful enough that by the 1850s, it started drawing in people whose prime desire was to enrich themselves through the profession of arbitrator. Thomas Gorman was one of the first recorded arbitrators to ask for additional fees "for his trouble" as arbitration "became part of his business"[445]. In 19th century U.K., the notion of professional arbitrator was emerging but had not yet overtaken its more traditional alter-ego, which would happen later, in the early 20th century[446].

Stepping back from arbitration, and considering the more overarching historical context of the era, there were known consequences to the acceleration of rural emigration caused by the industrial revolution, one of which was the thinning out of the social fabric. The people who still generated enough trust, respect and authority were found in increasingly concentrated places such as legal circles or among technicians of a specific field such as architects[447]. This phenomenon was reminiscent of pre-independence Connecticut seen *supra*.

With the industrial revolution, the centre of gravity of *auctoritas* thus shifted from the wisest to the most proficient in a specific domain, the best technicians in their field so to speak. Those two factors (the rise of arbitration laws and the rise of technicians) further increased the number of professional jurists in charge of rendering arbitral justice, and incidentally, the number of people making a living off of arbitration rather than donating their fees to charity[448].

442 Boorman p. 119.
443 Roebuck/Boorman/Markless p. 286.
444 Roebuck/Boorman/Markless p. 289.
445 Boorman pp. 118-119.
446 Roebuck/Boorman/Markless pp. 281 ss and *infra*.
447 Roebuck/Boorman/Markless pp. 295 ss.
448 Statistically speaking, barristers acted as arbitrators in only 5 of 49 references entered in the King's Bench in 1785, whereas this number soared north of 60% for 260 references by 1805. Roebuck/Boorman/Markless pp. 277, 295.

The developments regarding the professionalization of arbitration in the U.S. followed a different trajectory, but with similar timing. By the 1850s, arbitration was common to the point that it became increasingly difficult to find people willing to suspend their own professional activities to act as arbitrator. Professional arbitrators, on the other hand, could jump from one case to the next, ensuring maximal productivity in terms of the number of awards rendered[449].

This increased usage of arbitration can be explained by the congestion of public tribunals. Indeed, the speed at which state justice handled cases was so slow, that switching to an arbitral procedure became a non-negligible gain of time. It is at this point that the arbitration legislating started to inflate in the U.S., when its usage rate was increasing[450].

The congestion of courts was quite damaging to litigation professionals who saw their share of the conflict resolution business dwindle because of the shift from state courts to arbitral tribunals, in addition to having their reputation suffer from the slowness of state courts. Relocating from state courts to arbitral tribunals, those professionals were not particularly well-liked in arbitration circles, especially commercial ones, where speed and the lack of legal complications were very much appreciated[451].

On the other hand, classic legal professionals (judges, attorneys, etc.) were decidedly unhappy to see their share of the justice business decrease to the benefit of non-jurists. It is mainly for this reason that, at the turn of the 19th century, the legal community single-handedly launched a political assault on how arbitration was construed and more importantly, who administered it. This was done through the AAA[452] and its predecessors, the ASA and the AAF.

The result of these actions was the creation of statutes concerning the use of arbitration, both on state and federal levels. Enacting arbitration statutes was a way for legal practitioners to get hold of a bigger slice of the arbitration pie, as legalization rendered arbitration more complicated, more technical, restricting its accessibility to people whose profession it was to navigate those muddy waters.

449 Benson pp. 491-492.

450 Benson p. 489.

451 Benson pp. 493, 497 ss.

452 Created in 1926, the American Arbitration Association (“AAA”) was the result of the merger between the Arbitration Society of America (“ASA”) and the American Arbitration Foundation (“AAF”). In those organisations, jurists far outnumbered other professions. Benson pp. 495-497.

The lobbyism undertaken by legal professionals mainly resulted in the creation of two laws, which would have an undeniable weight in the pre-World War II U.S. practice of arbitration: the 1920 New York arbitration law and the 1925 FAA.

Following the steps of the Jay Treaty, the New York law helped to spread in the U.S. legal landscape the idea that arbitration agreements could also be valid for future conflicts, not just past or ongoing conflicts. The FAA on the other hand, rendered opting out of an arbitration agreement more difficult. The application scope of the FAA fluctuated during the 20th century, but ultimately, the U.S. Supreme Court has made it applicable to an increasing number of situations[453]. Other states would eventually pass arbitration laws as a result of the same lobbyism: New Jersey (1923), Oregon (1925), Massachusetts (1925), etc[454].

Following the overall legalization trend in the U.S., the 20th century has seen the birth of a myriad of international conventions and treaties on arbitration, to the point where non-specialists would probably be unable to answer one of Law's most basic questions: what is the applicable law[455]?

Wielding legal positivism like a cake knife, decade after decade, legal professionals complexified the practice of arbitration to carve out ever bigger pieces of the arbitration pie. By doing so, they prevented non-professionals from being able to effectively conduct an arbitration. The material norms were not much more complicated, but procedurally became much more so. It was thus through the use of the "least arbitral" concepts, those furthest removed from equity *ex aequo et bono*, that arbitration in the U.S. steadily excluded non-jurists from it. It is through technocratization and the concretization of legal positivism that U.S. legal professionals plucked non-professionals from the practice of arbitration, the ones least prone to positivist applications of the Law, the ones most capable of maintaining the legal-philosophical core of arbitration: equity, *ex aequo et bono* in particular. More overarchingly still, after centuries of doing justice, arbitration had

453 Haydock/Henderson pp. 147-169. The scope of application of the FAA is now so wide that only facets of arbitral procedure can now be attacked in court on the basis of the FAA.

454 S. Jones p. 247-250.

455 A quick research in Switzerland's arbitration laws and treaties yields us a result both notable and eerie: hundreds of legal texts, partially or entirely devoted to arbitration, are currently (29 November 2019) applicable in Switzerland. At this point, we are very clearly of the opinion that non-jurists would be utterly incapable of navigating this legal labyrinth. Interestingly, Switzerland is not a country known for its legislative inflation as far as civil Law countries are concerned.

now become an institution whose "justice" would be measured according to the degree to which arbitrators could conform themselves to procedural rules[456].

The state of U.S. arbitration Law, by the 1930s, had thus become very distant from what we have seen on a historical level. This shift would prove significant given the weight of the U.S. around the globe in the 20th century, especially after 1945 and the flattening of western Europe. An institution supposed to be easily accessible to citizens of all classes had been rendered much more elitist, inaccessible without the help of a specialized attorney. This legalization trend has not waned since, and the numbers of the first half of the 20th century regarding lawyer representation in arbitration trials in the U.S. are telling: 36% in 1927, 70% in 1938 and 91% in 1947[457].

3. Arbitration institutions, the telling case of the ICC[458]

A. The beginnings

A relatively recent creation in the arbitration timeline, the arbitration institutions have put in place entire systems designed to favour the use of arbitration by providing permanent structures to facilitate logistics. Moreover, those wishing to use an arbitration institution usually have to apply the set of rules decided by the institution, which allows the parties to know beforehand the applicable formal and material law should a conflict arise. Those institutions are typical of the 20th century onwards.

Arbitration as we know it nowadays is in no small part the result of the developments of the ICC and its court of arbitration. In fact, the developments of arbitration as a whole in the early half of the 20th century largely coincide with the developments of the ICC's court of arbitration. This impact goes beyond the trivial

456 This movement away from equity and towards positivism and formalism goes beyond the 19th century. As we will see *infra* in part 2, III and part 3, III, the fundamental concepts and thoughts of positivism can be traced back to St Augustine and even Plato for certain aspects. In U.S. arbitration, Mann (pp. 473 ss) convincingly shows how equity was steadily pushed aside by arbitral tribunals in their positivistic quest, most strongly in the 19th century but dating back to the 18th century already.

457 Benson p. 496.

458 This section is essentially based on the article from Grisel/Jolivet/Silva Romero, which lays out very well the developments of the ICC from its inception to the end of the first half of the 20th century. We strongly recommend consulting said article for a more detailed explanation on the matter. For complementary details, cf. Schinazi.

juxtaposition of legal texts, reaching through to the very conception of arbitration, its legal-philosophical foundations. The most obvious of these foundations is the shunning of equity *ex aequo et bono*, but the interpretative process itself has been defanged through commutative justice and contractual positivism[459].

Like many other international institutions, the ICC was created in the wake of World War I as a means to preserve peace and avoid repeating the dramatic events that had just transpired. As such, the ICC was seen as the legal arm of the League of Nations and mounted its own arbitral tribunal in 1923. However, it suffered from the consequences of European politics between the wars[460].

Initially, the ICC leaned more towards conciliation than arbitration, and the arbitration features were ruled by specific and *ex aequo et bono* equity. This method of arbitration was therefore still in line with the historical trajectory of arbitration, although this had started to change over the course of the 19th century[461]. With time, the ICC heavily reinforced its formal frame by laying down stricter rules regarding procedure, eventually overtaking non-institutional arbitrations on the path to legal positivism[462].

At the beginning however, the ICC used conciliation as a mandatory first step for the parties before allowing them to use arbitration. Between 1920 and 1928, 260 cases were filed of which 71 were settled through conciliation. These numbers highlight the importance of conciliation in the arbitral setting and the fact that arbitration remained closer to conciliation and mediation than to litigation, at the time at least[463].

ICC officials considered arbitration to be honorific and not something to be paid for, with the sheer reputational gain for being designated arbitrator sufficing. Parties and arbitrators needed a trustful relationship, which the use of money would have tainted. The latter were often well-known people in the field from which the disputants hailed from, meaning that jurists only composed a small contingent of all arbitrators. However, given that the idea of arbitrators being paid professionals had been fairly widespread for a few decades at least, it is unsurprising that gratuity was soon discarded[464].

459 Cf. *infra* part 3, III.
460 Grisel/Jolivet/Silva Romero pp. 403-405.
461 Cf. *supra* part 1, V, 2.
462 Schinazi pp. 182-186.
463 Grisel/Jolivet/Silva Romero p. 409.
464 Schinazi pp. 168-170; cf. *supra* part 1, V, 2.

The most important aspect of ICC arbitration at the time however, was the prevalence of equity *ex aequo et bono*, which was used to decide each case on its merits. Arbitrators were indeed encouraged to decide by basing themselves on trades usages rather than state laws, with the ICC going as far as saying that *"l'arbitre décide du litige en équité, comme un homme d'affaires, sans être lié par les lois ou par les règles juridiques de procédure."*[465]

The ICC's conception of equity *ex aequo et bono* differed from that of the Romans as it applied more narrowly, only in the field of trade[466]. Both ancient Rome and Greece gave much less importance to merchants and traders than modern western Europe, at least from the industrial revolution onwards. The concept of general equity, however, has remained steady since Aristotle: to bridge gaps between laws and case; the fewer laws there are, the more space remains for specific equity, equity *ex aequo et bono* even, when laws are completely discarded[467]. The applicable Law in arbitration is not the same as in litigation, and one should not expect arbitral tribunals to follow the same rules as state tribunals as this would dilute their raison d'être and complementarity with state courts.

This is quite clear when we know that until 1975, ICC rules did not mention the very notion of law. Only 9 awards out of the 70 that were rendered between 1920 and 1945 were based on legal texts, and in 3 of those 9 awards, the laws used only served to justify the arbitrators' analysis of equity *ex aequo et bono*.

Regarding the performance of awards, the applicable ICC rules in 1922 called upon the parties' honour to faithfully perform the award, which is reminiscent of how arbitrators were not paid because acting as one was already an honour. The only sanction the ICC could inflict upon an uncooperative party was a disciplinary one, though it seldom used this option because parties complied with the end result in a vast majority of cases (87% as of 1937)[468].

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[465] Grisel/Jolivet/Silva Romero pp. 411-412.

[466] By the time of the creation of the ICC, legal positivism was unquestionably the dominant legal doctrine in occidental countries, a doctrine born at the end of the Roman millennium. As such, even with the emphasis put on equity by the original ICC, its scope would be heavily narrowed in comparison to how it was used in arbitration for centuries, if only because texts of law were much more numerous, particularly in a field like international trade law. The freedom of interpretation was already severely hindered (cf. *infra*).

[467] This is but an exceedingly short definition of equity. For further developments on the concept, cf. *infra* part 2, V, 5, C, *d* and part 3, III. Cf. also *supra* part 1, II, 2, B, *b* for its Roman conception and its three variants.

[468] Grisel/Jolivet/Silva Romero pp. 412-414; Schinazi pp. 186-188.

B. The ICC through the Great Depression and World War II and a glimpse of arbitration in the latter half of the 20th century

The Great Depression of 1929 increased arbitral trials and awards. Similarly to the Middle Ages, people turned to more moderate forms of justice in times of societal crisis. The reasons explaining this shift are not entirely the same as they were for the Middle Ages given that European states were not as weak as they had been.

The precise reasons for which arbitration became more popular have not been pinpointed, but it is not hard to imagine that in a severe economic downturn, people preferred settling their disputes through the flexible equity *ex aequo et bono* instead of rigid and inadequate laws, significantly limiting the costs of justice and the weight of procedures. In this context, the ICC further eased its procedural rules by rendering the pre-arbitral conciliatory phase optional[469].

World War II on the other hand had a deeply negative impact on the ICC, which saw requests for arbitration plummet and its headquarters transferred from Paris to Stockholm. Hoping to turn this around after the war, the ICC steadily abandoned equity *ex aequo et bono*, and even specific equity to the benefit of legal texts which is something reflected in the composition of ICC arbitral tribunals: an increase of jurists to the point of quasi-omnipresence[470].

This shift is also a consequence of the objectives laid out by the ICC at its inception which consisted in making arbitral proceedings more uniform, to reinforce the validity of arbitration clauses and facilitate the dissemination of arbitral awards[471]. The policies of the ICC culminated in 1958 with the New York Convention on the recognition and enforcement of foreign arbitral awards.

Not in the best of shapes after World War II, arbitration has witnessed a steady growth ever since. We will take a closer look at this post-World War II period *infra*[472]. For now, let us simply remember that arbitration's usage throughout the world has yet to see a decline since 1945, despite certain relatively alarming signs[473].

Following World War II, commerce slowly gained traction again in occidental countries, to the point where, combined with globalization, it made state procedures and trials more complicated than ever. Were enacted as a consequence:

469 Schinazi pp. 180-182.
470 Grisel/Jolivet/Silva Romero pp. 422-423, 429-430.
471 Grisel/Jolivet/Silva Romero p. 442.
472 Cf. *infra* part 2, V, 5, A, B.
473 Cf. *infra* part 2, V, 5 and part 3, III.

the Arbitration Act (1979) in the U.K., the Uniform Arbitration Act (1955) in the U.S. and the *Décret* no. 80-354 (14th of May 1980) in France. These three pieces of legislation put in place legal regimes which were very liberal towards arbitration, revolving around the single notion of party autonomy and enshrining the will of the parties as the centrepiece, the purpose even, of arbitration[474].

International arbitration of all types has since followed suit with an ever-increasing freedom of action for its actors. As briefly mentioned in the Roman conclusion *supra*, it has reached the point where certain well-known actors of international arbitration openly argue in favour of having arbitration entirely bypass national rules of *ordre public*[475].

This arbitration freedom is well exemplified by the possibility given to companies to sue governments for matters of economic policy. The best illustration is unquestionably the award between Uruguay and Philip Morris[476] which is based on the *Accord entre la Confédération suisse et la République orientale de l'Uruguay concernant la promotion et la protection réciproques des investissements* dated 7th of October 1988[477]. In this case, Philip Morris attacked the Uruguayan state for adopting measures to protect public health by curbing the use of cigarettes. Those measures proved effective but dented Philip Morris' revenues, which was the basis of its claim against the state of Uruguay.

As we draw to the end of this first part on the genealogy of arbitration, we would like to mention why the post-World War II era was intentionally left out of the analysis is that it requires the use of the concept of authority. Remarkably versatile and useful for overarching analyses and the scrutiny of paradigmatical changes, authority is central to understanding arbitration as it has happened since 1945, from a legal-philosophical standpoint at least.

This approach was selected for two reasons. The first is that the historical developments of the past seven decades have seen arbitration become the legal arm of occidental countries in former colonies, helping Europeans maintain a certain hegemony in what were supposed to be independent countries. The second reason

474 Carbonneau pp. 730-741. There were of course many other texts laying out similar prescriptions such as the Swiss PILA, but again, the focus is directed on the most influential countries, historically speaking at least.

475 Cf. Bollée.

476 ICSID Case No. ARB/10/7.

477 RS 0.975.277.6.

justifying this approach is that the path on which arbitration has recently been set raises serious legal-philosophical concerns related to issues such as the weight of positivism in arbitration, the very conception of arbitral justice and the interpretative capacities of arbitrators.

VI. Historical conclusion. Legal and political fluctuations, philosophical consistency and lessons drawn from history

The lessons drawn from history are legion, and while there is a tendency among contemporary academic researchers to underestimate the importance of the past[478], it remains essential to take a proper look at it, as it allows us to draw lessons and conclusions for a better analysis, without having to retrace the steps of our brilliant predecessors. This methodology is coherent with parts 2 and 3 regarding authority and philosophical hermeneutics, both of which underline the importance of "what was before" for the purpose of doing better now.

The first historical lesson is one we have underscored multiple times: arbitration can only properly exist in presence of a reasonable balance of powers. Whether in ancient Greece, in the Middle Ages or in our contemporary world, arbitration thrives when it is impossible (or at least disproportionately difficult) for a party to impose their will on the other. Said otherwise, the heart of arbitration is not power but authority[479]. This is typically why arbitration should make every effort to stay away from the litigation format it seems to have espoused recently[480]: it was never conceived for the imposition of sanctions for not complying with an award, unlike state court judgements.

Related to this first lesson is a concept which will be the centre of part 2 and on which we have already digressed: *auctoritas*, or authority. We have no trouble

[478] Eco p. 59.
[479] Cf. *infra* part 2, II regarding this distinction.
[480] Cf. *infra* part 2, V, 5, B.

admitting the importance of *potestas* (power) in Law and human relations in general, but in the arbitral paradigm, *potestas* will usually play out *ex ante*, when the only question regarding arbitration is whether or not the parties should sign an arbitral clause. If a party can impose their will to the other party, they make use of *potestas*, not *auctoritas* by bypassing peaceful conflict resolution. This is what happened under ancient Rome's watch: international arbitration was practically inexistent because the single most important actor of the time did not tolerate opposition and could easily silence dissent through strength of arms.

Potestas can also intervene *ex post*: the dominant party loses yet refuses to apply the award. However, this eventuality has happened less frequently in the course of history than the first one, the reason being that once a party is committed to the arbitral process, it generally accepts the arbitrators' judgement on the matter, already showing the importance of *auctoritas*.

Auctoritas permeates through arbitration's every step and its voluntary nature illustrates it really well. Because the parties accept and recognize the authority of the arbitrator, the process can be brought full circle with the application of the award and the peaceful resolution of the conflict. *Auctoritas* has many shapes in the legal world, but in arbitration, it essentially resides in the arbitrators, who are its main vector of incarnation. This is most apparent when examining arbitration in ancient Greece and during the Middle Ages: the arbitrator was usually someone of high repute concerned with the welfare of his society, which made their judgement all the more significant.

Contemporary arbitration certainly enjoys being favoured by national laws, often reflective of *potestas*, but it does not need them in order to exist or even thrive as history has shown us. What is essential to arbitration is to maintain a minimum level of *auctoritas*. If not, it risks falling down a path where it becomes interchangeable with state litigation, where arbitrators do not care about rendering authoritative awards because they have the means to enforce them through *potestas*, through power.

Even more so, we have started to see that, roughly in parallel with the period corresponding to the rise of legal positivism, arbitrators have veered towards an increased specialization, towards technocratic professionalization and away from flexibility, a movement which has drastically accelerated after World War II[481]. The latter is not only a matter of accrued use of procedural tools, whereby arbitration

[481] Cf. *infra* part 2, V, 5, A, B.

becomes increasingly similar to litigation, but a matter of mindset mostly. The lack of flexibility translates into a reduction of the interpretative scope, as we will see with commutative justice and contractual positivism[482].

Furthermore, peripheric factors such as increasing costs and slowness of the procedure[483] are sociological factors also participating in this movement away from arbitration. If it wishes to last in its current form, wearing the cloak of authority becomes all the more important, or parties may risk asking themselves, "why waste so much time and money for such litigation-like results?"

The final part of this work will focus on hermeneutics. While the topic has not really transpired in this historical chapter, it does not mean that hermeneutics is absent from arbitration, simply that it is so often and so naturally used that seldom do we ponder over its existence, let alone its purpose. Moreover, hermeneutics plays a much more central role when people of various cultures are involved, which was not the case until very recently in the history of arbitration. Indeed, arbitration existed between Greeks of various origins, but Greeks nonetheless, Romans or people hailing from the same region, but now it is very easy to imagine an arbitral tribunal comprised of Japanese, Portuguese and Russo-Canadian arbitrators whose task it is to settle a dispute between an Argentinian firm and a Malian working on a Haitian ship docked in Seoul.

The importance of hermeneutics cannot be overstated in 21st century arbitration and will remain a philosophical concept of utmost importance for as long as society remains heterogenous, which is likely to last given how easy it is for people of various countries to interact with one another through a great variety of vectors (airplanes, internet, etc.). A hundred years is a short period of time when compared to thousands of years of human history, but the last hundred years have witnessed the birth of a different world from what humanity has been used to, in which we now live, a paradigm where cultures interact with each other on an extensive scale and where interpretation has never been more complex, to the point where hermeneutics, which could probably function quite passively until then, is now becoming something that must be actively practiced.

It is also interesting to note the historical importance of the peaceful aspect of dispute resolution. What may seem a mere triviality and a very obvious point has not always been so. Indeed, we could compare ancient Greece, Rome and the

[482] Cf. *infra* part 3, III, 2, 3.
[483] Drahozal pp. 652 ss.

Middle Ages to contemporary times. In the first case, Greeks were keenly aware of the necessity to solve disputes while avoiding remaining grievances, and while Romans had a more clear-cut approach to arbitration, they understood just as well the importance of a peaceful justice when striving towards societal harmony. During the Middle Ages also, it was not uncommon for arbitrators to award some form of compensation to both parties in order for them to obtain what they came for: justice; and as we know, disputes where the fault lies squarely at the feet of a single party are quite rare. However, there were notable cases where the arbitrator would ignore this to the point of triggering a war[484]. In contemporary arbitration, the options available to end a dispute are probably more numerous than ever but in a high number of awards, there is a winner and there is a loser, which are usually decided depending on the sum of money allotted, thus showing that arbitration is currently closer to litigation than it should be.

However, arbitration's history has demonstrated that trends are not irreversible by any means. The current state of affairs is a reflection of the atomisation and judiciarization of our society, a society where the lack of trust in our authorities combined to their lack of *auctoritas* and the multiplication of individual rights has led to an increase in the number of lawsuits.

In our view, it is also a reflection of the legalization of our society. The more texts are potentially applicable to a conflict, the harder it is to navigate the Law. The legal theory behind this movement, legal positivism, is fairly recent, and was most certainly inoperant for many centuries whereas Law was still very much a centrepiece of every human society. The inflation of legal texts (used in arbitration and ruling over arbitration) and the time spent by each arbitral tribunal analysing the base contract are without a doubt, the proof that arbitration has followed this very path, albeit more slowly than other legal domains. The deconstruction of positivism is integral to parts 2 and 3, for the good reason that it is often used as a shield against some of the arguments we will put forth *infra*.

"The further backward you can look, the farther forward you are likely to see." If Winston Churchill was right, then hopefully the work we have so far laid down will prove useful not only in terms of understanding the arbitral paradigm, but also in terms of foreseeing how arbitration could evolve. It is our firm conviction that we must use legal philosophy to comprehend the paradigm of arbitration, which is

[484] Cf. *supra* part 1, III, 3, C regarding Saint Louis and the Mise of Amiens.

what parts 2 and 3 focus on, each with their own themes, drawing from the lessons unearthed in this genealogical first part.

In this spirit of drawing lessons from history, we would like to lay out our own definition of arbitration, the one we will be using for the remainder of this dissertation. Following its genealogy, the purpose of arbitration is to obtain justice, in complement of the better-known traditional litigation in state courts. This implies that arbitration must be able to do justice where state courts cannot or have difficulties doing so, for intrinsic reasons[485]. More particularly, arbitration fundamentally differentiates itself on two fronts: procedural and material.

From a procedural standpoint, arbitration exhibits a high degree of flexibility, which entails that parties and arbitrators enjoy a certain freedom when establishing and applying the formal rules of the arbitral trial. Parties can decide what suits their interests best and arbitrators decide how to proceed in order for the arbitral process to give itself the best possible chance to reach its objective i.e., doing justice for the parties in a way befitting of its society's overarching traditions and values.

More importantly, from a material standpoint, arbitration is characterized by a very broad freedom, one wherein the legal interpreter is not held back by laws, customs or precedents impeding its overall capacity to do justice. As such, if concrete justice demands that arbitrators step away from unjust laws, they not only can but should do so, which is the chief reason why arbitration is a mechanism far removed from positivism as we will see *infra*. The legal-philosophical foundations of arbitration are thus not laws or contracts, but equity. And even if equity *ex aequo et bono* is not applicable, the margin enjoyed by arbitrators to shore the gap between Law and cases is much wider than that of judges, leaving ample space for both general and specific equity to be wielded very freely by arbitrators. This means that arbitrators are the jurists with the most interpretative space as they are not beholden to laws given that these have already proven too rigid if parties solicit an arbitration.

To be clear, and somewhat anticipating some of our developments *infra*[486], this does not mean that arbitrators can decide anything to the point of ignoring the societal context in which the arbitral decision inserts itself. Typically, awards should always

[485] Typically, state procedures are frequently public, meaning that if a party might suffer a loss of reputation, they will often be reticent to divulge any information that may result in such a loss. Arbitration being very often secret in nature, parties may be more cooperative in the resolution of the conflict if it means that their reputation does not take a hit in the process.

[486] Cf. part 3, III.

take a society's common good into consideration, even if it means hurting the interests of the parties, although completely forgoing the interests of the parties is arbitrary. These two limits exemplify why, even in the case of an arbitration *ex aequo et bono*, arbitrators are never free to decide anything they fancy. More overarchingly, context is also very potent when it comes to restraining the margin of action of interpreters, which is why out-of-context interpretation will often be viewed as absurd[487].

The entire arbitral process simply begins with an agreement between parties. Such an agreement is nothing but the entry door to the entire process, and never its core. As we shall see, thinking otherwise disnatures arbitration and is one of the reasons why, in spite of its profound anti-positivist nature, arbitration has become very positivist indeed. Interestingly, because the tendencies guiding arbitration are in stark opposition with its nature, the institution has evolved to strongly resemble state litigation, both formally (to the point where arbitral trials can now take years to finish) and materially (as we will see *infra* with the overuse of legal references to justify a legal reasoning, ever reducing the margin within which interpreters operate).

[487] Cf. *infra* part 3, II, 2, B, *b, d.*

Part 2: **The concept of authority**

Introduction to authority

Following our brief historical summary of arbitration, we will now turn our attention to the most voluminous and philosophically charged part of this dissertation: authority. While it might seem that we have forgotten the historical part, rendering it superfluous, such is not the case. Indeed, international arbitration and authority in legal philosophy will be featured at the tail end of this second part on authority, which is when the history of arbitration will be used to illustrate the thesis, proposals and assertions we will make throughout this second part. However, one cannot blindly jump to the conclusion, which is why we need to take certain steps before reaching the arbitral authority. The "fusion" of parts 1 and 2 will then be used for part 3 of this work, as we will draw from part 2's closing act on arbitration philosophy in order to address the pitfalls of authority in part 3 (through a hermeneutical solution).

The notion of authority is one of great controversies. Before using and applying it to various situations, one must therefore first lay out a definition of what it is. The main controversy resides in the frontiers between the various conceptions of authority and power: *auctoritas, potestas*, legal or judicial authority, argument of authority, authoritarianism, etc. Given the range of authority's definitions, it is imperative that we circumscribe the notion with which we shall be working as well as possible, be it through a partial genealogy of the concept or an outline of its phenomenology.

We would also like to seize this opportunity to remind the reader that this dissertation is one of legal philosophy, which is why our work aims to understand authority in this context, through international arbitration in particular. As such, the genealogy, phenomenology, etc. of authority can only be partial as many angles cannot be examined. Authority is transversal to the extreme and applicable in any

given situation involving human beings (and probably animals, we would not bet against it). The "simple" study of *auctoritas* in ancient Rome is, to this day, still going through some major breakthroughs. We therefore wish to inform the reader that we absolutely do not have the pretension to exhaust such a monstrous field of the human intellect, but simply bring forth a humble contribution located at the crossroads between history, philosophy and Law. Hopefully, by doing so, we can help shed some light on an oft-misunderstood concept, even though doing it entirely justice in a single doctoral dissertation is downright impossible.

At the end of this part 2, we will hopefully have conveyed the importance of authority in Law. We will then move on to the last part of this work, hermeneutics, which will essentially lay out how the legal interpreter's authority can be furthered or diminished. More importantly, we will explain why the lack of authority and hermeneutical skills could prove extremely detrimental to the legal profession, arbitrators most of all.

Before diving headfirst in the etymology of authority, we would like to emit a quick disclaimer regarding the generally accepted definition of authority. We are fully aware that in two and a half millennia, concepts can heavily shift, as has been the case with authority. The problem we will be facing *infra* is that this shift has eviscerated authority of its substance over the course of the past four centuries, leaving it in a state where the crushing majority of people mistake it for power. One cannot simply apply the ancient Roman *auctoritas* to the present situation to solve everything, for it has become inadequate through the simple passage of time. This is why our purpose is not to describe the "original" Roman authority and apply it to our present international arbitration system.

The confusion surrounding power and authority has caused some to believe that the very concept of authority had vanished from this world[488]. Such would indeed be the case if we were to talk about the Roman *auctoritas*, but in reality, the concept of authority still exists nowadays, albeit under different designations, mostly "legitimacy".

As such, authority does not need a refoundation, merely a clarification of its definition. Doing so will allow us to see that authority still exists in plain sight, the best place to hide one's self. The clarification required will take some time, including a detour in ancient Rome but, in the end, this will allow us to exhume a

[488] Cf. *infra* part 2, III, 4, A.

definition of authority that is neither Roman, nor medieval, nor modern, but contemporary, adapted to the current state of international arbitration. No concept will thus be created for the occasion, as we simply highlight and use authority as a prism for the legal-philosophical conceptualization of international arbitration.

I. Etymology

1. A plea for etymology

In humanities in general, but in Law and philosophy most of all, it is essential when facing a particular concept, to study the etymology of the word(s) in which said concept is transcribed. Doing so allows us to understand the context and original meaning the concept had. More importantly, it gives us a starting point from which we can work in order to be as precise as possible with the concept as understood nowadays. In other words: it magnifies a concept through its historical dimension and allows us to glance at its possible future evolution.

Jurists should be well aware of the importance of history when interpreting legal concepts: what did the legislator have in mind when this rule was created? How has this notion been interpreted by such and such tribunal over the past decades? When facing a new concept, can we find older concepts which may allow us to build relevant analogies? This is but a fraction of the many instances where history is of immense importance for jurists.

Such is also the case for philosophers, on a similar scale but with different considerations in mind. Indeed, philosophers often manipulate notions and concepts which have existed for millennia. As such, they do not need a sense of history to understand the origins of a concept so much as they need a sense of history to understand the concept. For instance, a philosopher writing about the *suum cuique tribuere* without mentioning the foundational work of Aristotle will, in our eyes at least, only produce works of mediocre quality at best. Furthermore, in our day and age, philosophers rarely create new concepts. Stumbling across what seems like a novel idea when in reality, such idea has already been discussed at length elsewhere, is not uncommon at all. Studying a concept and studying its history are thus, for philosophers, two sides of the same coin and cannot be

separated from one another. Etymology is not only one of the many entry doors to history, but one of the most accessible. Its study is in our view *sine qua non* for the task at hand.

Etymology is far from the guessing game certain contemporary academics make it to be. Words are made of various radicals or "items" as they are sometimes called[489]. These radicals can be combined to form various words. In Japanese for instance, one can hardly learn kanjis without understanding 30-40 basic radicals whose combinations create thousands of kanjis. When one understands the various meanings a radical has, one can come across previously unseen kanjis and still be able to grasp their meaning.

One example hits very close to home for jurists and is quite easy to explain. The kanji 判 ("waka", "han" or "ban") represents the judgement and is made of two radicals, one on the left (半, "han", which means "half") and one on the right (刀, "katana" or "ken", the sword). The idea of justice thus represents both the notion of cutting something in equal halves and of balance between the parties with regard to the judgement. If kanjis' radicals can be combined to produce meanings, such is also the case with Indo-European words.

According to Gadamer: *"L'expérience de la transmission historique du passé dépasse fondamentalement ce qui, en elle, est objet possible d'investigation. Elle n'est pas vraie – ou non vraie – dans le sens seulement sur lequel la critique historique a compétence pour décider. Elle ne cesse de communiquer une vérité à laquelle il importe de participer."*[490] The truth to which Gadamer alludes is one to which etymology fully pertains, not only in and of itself but also as a gateway to a concept's various historical contexts.

Language as a whole is briefly mentioned here but will be the object of accrued scrutiny in part 3 of this work with a focus on hermeneutics. It is impossible to do hermeneutics without taking into account a person's prejudices (pre-judgements), which encompass both a person's and a domain's history, of which etymology is a part.

[489] Derycke/Dutrait pp. 113-114.
[490] Gadamer p. 14.

2. The etymology of authority

A. *Augeo*, to augment

The word "authority" finds its roots in Roman Latin. The main base is the word *"augeo"* which means to augment, to elevate. From *augeo*, the Romans derived the words *"auctor"* (author) and *"auctoritas"* (authority)[491]. We can already see that the three Latin words set forth are not necessarily thought to originate from the same root in our contemporary language: to augment, author and authority are words whose meaning could easily be viewed as independent from one another nowadays, but such was not the case in ancient Rome.

The reason for this rapprochement is to be researched even further in ancient Indo-Iranian languages where the item *"aug"* meant strength, and more particularly, godly strength. Saying that the common root to all these words is "to increase" is an understatement as *augeo* comes with a wide range of meanings and implications. Even the very translation of *augeo* is understated in our contemporary language. Indeed, a more complete definition would not be "to increase", but "to increase something pre-existent". In other words, it is the capacity, the gift even, to enhance, to raise in quality something that already was. A thought, an idea, an argument or a text all acquire a higher level of quality because their originator (their *auctor*) had the capacity, the power even *(aug)* to enhance said thoughts. The most ancient use of *augeo* even referred to the capacity to raise something out of nothing, to increase something that is not pre-existent[492].

This more ancient use represents the other facet of the essence of *augeo* and *auctoritas*: the act of creation through elevation, to promote something that was non-existent or akin to[493]. Assimilating *augeo* to the simple act of increasing does not do it justice as it was a verb with a quasi-mystical signification for the Romans, as underscored by the following offshoot of *augeo*.

B. *Augur*, the religious *auctor*

Neighbour to *augeo* was *"augur"*, the augur, which has the same item as *augeo*, implying that people who saw omens or harbingers were considered the among the first to be imbued with the capacity to augment or to "receive" the augmentation

[491] Benveniste p. 148.
[492] Benveniste p. 149.
[493] Benveniste pp. 150-151.

from the Gods, at least on the Indo-European continent. *Augeo* was, etymologically speaking, the capacity to elevate, to heighten or even create and was first bestowed upon augurs due to their capacity to communicate with the Gods[494].

The importance of augurs in ancient Roman daily life cannot be overstated, whether it was in the public or private sphere. The Roman *auctoritas*, as we shall see later on, was amongst other things, founded upon the notion of ancestry and the perpetuation of their will. The founder of Rome, Romulus himself along with his murdered brother, Remus, were considered to be the first augurs. Indeed, the very foundation of Rome rested on omens from two different places with Romulus' being the most favourable. And so, Rome was founded on Palatine Hill from where Romulus saw his omen rather than on Aventine Hill, from where Remus saw his auspicious-but-less-so omen[495].

Concretely, the most important influence of augurs was their influence on Roman political life, even on the juridical life during the archaic days of the Monarchy. In many instances, obeying omens was mandatory, even for magistrates who could be demoted for not doing so, at least until another omen corrected this[496]. The most telling example of the link between politics and religion was a certain Julius Caesar who, during the earlier times of his legendary political career, poured immense sums of money in order to get elected *pontifex maximus*, the highest rank in Rome's public religion structure.

While aedile at the time (63 BC), one could wonder why Caesar strived for the highest religious office in Rome. The main reason was the *dignitas*, one of the components of *auctoritas*, that was attached to this office[497]. What Caesar did was

494 It is not a question of whether they truly saw into the future, something in which we personally do not believe. However, Romans fully believed in the ability of some people to do so, which is often what matters most in displays of *auctoritas*: belief (cf. *infra*).

495 Montero, *passim*. Legend has it that Remus' omen involved six vultures, an auspicious omen but nowhere near as auspicious as the twelve vultures seen by Romulus.

496 Montero; Tucker p. 175; Szelmer p. 110.

497 *Dignitas*, which can loosely be translated as dignity in contemporary English, is a personal trait and a virtue. It was the quality that spurred a certain degree of esteem, respect and even deference from other people, not unlike *auctoritas* (Teyssier p. 33). *Dignitas* was a component of *auctoritas* and was concerned with the "aura" one could imprint upon others. It is defined by Rémy as the prestige and respectability that the upper echelon of the Roman society must possess; it is based on reputation and the exercise of an honourable office (Rémy p. 274). Given that *dignitas* is but a component of authority, we will not elaborate further. The complete analysis of all criteria constituting *auctoritas* is not our purpose, as we are instead focused on exhuming the foundations of authority. We could not, even if we

not unusual: young Romans wishing to enter politics often did so by going through the religious order, which allowed them not only to gain noble supporters, but also to acquire the *auctoritas* necessary to advance their future political careers, in particular for those of plebeian ascent[498].

For Romans, unlike Moderns, religion was an affair of *auctoritas* rather than *potestas*, something exemplified by Cicero. Elected augur in 53 BC, Cicero was sceptical that he was interpreting the commands of the Gods. He was, however, firmly convinced that augury played an important role in supporting the Roman republic and that it had to be employed to the benefit of the state[499]. We will see that the real source of *auctoritas* in Rome in general was not religious but sacred. While these two notions are too often considered synonyms, such is not the case: religion is but a means to understand what is sacred. However, it is not part of the sacred, which does just fine without the existence of religion[500]. The connection between sacredness, religion and all forms of authority is one that has been sustained throughout the course of history, at least ever since the foundation of Rome: the authority of augurs, that of the Roman Catholic Church, of the popes, the downgrade of the concept of authority along with the fall of religion during the Lumières, etc.

C. *Auctor* and *auctoritas*, author and authority

In the end, *augeo* split into five groups: *augmentum* (increase), *auctor/auctoritas* (author, authority), *augur* (the augur), *augustus* (which became a name) and *auxilium* (the auxiliary). The group reflecting the deepest meaning of *augeo* is *auctor/auctoritas*, whose essence is the capacity to enhance an existence or even imbue something with existence[501].

Auctoritas is often an underrated aspect of Law as many intellectuals consider its contemporary translation, "authority", under the pejorative light cast by the

wanted to, use the ancient Roman concept of *auctoritas* in a contemporary paradigm due to, if anything else, the long passage of time. Even more importantly, such an analysis could not be seriously authored without the capacity to read and interpret ancient Latin. It is even doubtful that such a task could be accomplished given how much of an *auctoritas*' existence depended on context and concrete circumstances, to which we have but a very restricted access.

498 Hahm pp. 82, 84.

499 Tucker p. 174.

500 Cf. *infra* part 2, I, 2, D.

501 Benveniste p. 150.

Lumières. According to the modern and contemporary vision, authority is a word evoking at best a legal authority such as a tribunal or a branch of the administration, and at worst something bereft of legitimacy and reason, which coerces people to act in a certain way, not through rationality but through sheer strength. The contemporary vision of authority is one where *auctoritas* is mistaken for *potestas*, which is the Latin term for power and whose foundation is *auctoritas*, not the other way around contrary to what many may think nowadays[502]. Authority is a concept which has been used in countless disciplines: psychology, Law, political sciences, sociology, economy, theoretical physics, etc. However, a majority of scholars do not use the notion of authority accurately, instead focusing on the more modern and narrow vision of authority.

As already mentioned, *augeo* implies in its deepest meaning, the act of creation[503]. More precisely, it was an act of foundation from which subsequent people, institutions or actions derived their legitimacy. Those people also required *auctoritas* in order to perpetuate the foundation and its previous augmentations. As such, *auctoritas* cannot be separated from the time paradigm as it represents the past foundations of a present action/institution/person aiming to act for the sake of the future[504].

Those with *auctoritas* are, in the end, the ones who found and those who augment the foundation by perpetuating it and transmitting said augmented foundation to future generations[505]. For instance, the foundational sequence of Rome was authored by Romulus: the augur of the 12 vultures and Remus' death. After that, both people and institutions were tasked with the augmentation of this founding act and acquired *auctoritas* by doing so (the senate, Caesar, Augustus, the *patres*, etc.). It is not an accident if the great Roman historian Livy's magnum opus was named *Ab urbe condita*, "From the Founding of the City", because Livy's main axis of analysis was the transmission of the foundation of Rome and the subsequent augmenting events that occurred[506].

The relationship between *auctoritas* and the foundation of Rome is of extreme importance according to us, because it explains much of the crisis of authority dear to Hannah Arendt. Authority is not a mere version of domination, one that gives a

502 Cf. *infra* part 2, II regarding this distinction.
503 Benveniste p. 151.
504 Cf. *infra* for the temporal aspect of authority.
505 Arendt, Authority p. 121.
506 Bilheran p. 24; Arendt, Authority pp. 121-122.

psychological edge to a person. It is the key around which revolves our belonging to a society and sets our purpose as members of this society. It is what brings people together, around a societal project and prevents us human beings from becoming outcasts in our own societies, a perspective so dreadful Socrates preferred death.

D. *Sacer*

Conceptually independent from authority and power, sacredness nonetheless occupies an important part of the authority structure in Rome and for good reasons: each Roman authority is founded upon something or someone sacred (a God, a ritual, etc.).

The term "sacred" derives from the Latin word *sacer*, which is a close semantical cousin of *sanctus*. *Sacer* was considered to be a word of ultimate meaning, one which allowed neither comparatives nor superlatives. The reason for that was that there was nothing that could be considered equivalent to *sacer. Sacer* had a double implication: it represented both what was related to the Gods and what was cursed and repulsive. This is why *sacer* is the etymological root of both sacredness and sacrifice/sanction. This is also why sacred rules entailed an immediate sanction for whoever tried to violate them: what was sacred required the most violent form of legal retribution[507].

It is interesting to see that the notion of sacredness held different meanings in ancient languages, to the point where the only common denominator between all those languages was sacredness and godliness, not religion, ritual, a cult or a priest[508]. This is seen very clearly when looking at the etymology of the word "religion", one too often thought to be a synonym of sacredness. "Religion" comes from the Latin word *religio*, a word itself tied to two other ones: *legere* (to gather, to bring to one's self) and *ligare* (to link)[509]. In both cases however, *religio* concerned the link between us and the sacred. Religion was therefore a method to come into contact with sacredness, but it was not sacred in and of itself. Religion is but a means to reach sacredness and as such, has always stood far below sacredness.

[507] Benveniste pp. 187-192.
[508] Benveniste p. 180.
[509] Benveniste pp. 268 ss.

E. Etymological conclusion

From this etymological analysis, we can very easily see how important the role of tradition is for authority. By inheriting the will and life work of people before us through customs and traditions, we augment what has been passed down to us. Jurists, in particular those specializing in legal history, should be well aware of this as the elements of customs are the *longa consuetudo* and the *opinio juris sive necessitatis*. The first one reflects the temporal consistency needed for something to become Law, while the second one shows the importance of belief in Law and its authority. Customs are not set in stone and evolve with time in order to suit the needs of society. They are, said otherwise, augmented by successive generations of jurists who build upon the authoritative work of their predecessors. The authority of Law can thus directly be traced to traditions[510].

As we will see *infra*, Roman *auctoritas* was essentially collective and thus societal. The foundation of a city, whose institutions supposedly represented all of its citizens and kept the foundational *auctoritas* well alive by doing what was good not necessarily for each individual, but for the city. We are not implying that some people did not try to profit off of their position in society, simply that the career as a public servant was the *cursus honorum* for a good reason. As such, ancient Roman *auctoritas* required a society made of citizens and not individuals in order to thrive. Indeed, individuals do not have a common foundation for they are theoretically, entirely self-determining and free to will their way through life.

F. Authoritarian and authoritative

Among the more helpful European languages in the semantics of authority, English grants us two adjectives in this field: authoritarian and authoritative, both stemming from the same Latin root of *auctoritas*. Reflecting the conceptual split of authority[511], those two words refer to two different conceptions of authority, different concepts even.

The first of the two adjectives, "authoritarian", is commonly associated with political regimes of an all-powerful figure. According to the Merriam-Webster dictionary, "authoritarian" either means "having a blind submission to authority", or "favouring a concentration of power in a leader […] not constitutionally responsible to the people." The first definition is more uncommon due to the

[510] Gadamer p. 450.
[511] Cf. *infra* part 2, II, III.

passive role of the authoritarian person, although it already underscores the problems we will face *infra* due to the confusion surrounding the concept of authority. Indeed, as we will see, the very idea of "blind submission" is antithetical to the concept of authority, which, in actuality, requires a constant esprit critique.

The second definition of authoritarian is even more symptomatic in this regard, for it openly confuses power and authority. These two concepts have opposite intellectual matrices, although optimally, power and authority complement one another[512]. In any case, any definition of authority confusing it with power should always be avoided. This, in the end, is why the term "authoritarian" will not be used in this part on authority: it is too imprecise, confusing, false even, in a context requiring a high level of semantical precision.

The second of the two adjectives of the English language is "authoritative", and is defined by the Merriam-Webster dictionary as "proceeding from authority" and "possessing recognized or evident authority". Much more neutral, this definition has the merit of affording us the possibility to paint the concept of authority with any colour we wish. The only debatable element is that of a recognized authority. Although authority is necessarily recognized by the ones to which it applies, such is not obligatorily the case for those unaffected by it, as we shall see throughout part 2. Overall, the flexibility afforded to us by this more neutral definition justifies its usage in this dissertation, as it allows us some breathing room in an otherwise semantically tight dissertation, a tightness explained by the confusing modern evolution of the concept of authority.

[512] Cf. *infra* part 2, II, 5, B.

II. Rome and the opposition between *auctoritas* and *potestas*

1. Introduction

Before starting this Roman section on authority, we would first like to emit a little disclaimer concerning the terms and concepts that shall be used hereafter. In ancient Rome, *auctoritas* and *potestas* were extremely wide-ranging and could be declined in a multitude of more specific subspecies. Even *imperium*, which was a particular case of *potestas*, had many variations. Likewise, religious authority, *auspicium*, was sometimes opposed to the *augurium*, yet both were forms of *auctoritas*.

We will not go into the details of all the variations we have come across for reasons of time and purpose. From a time and space perspective, we simply cannot analyse in full details the Roman notions of authority and power, for it would require devoting the entire dissertation to it[513]. As regards its purpose, this work is not focused on Rome and is not historiographic. What matters to us here is the concept of authority, and how it can be philosophically construed in the 21st century, in arbitration law more specifically. The purpose of the Roman section is to provide the starting point of authority and will be used to shed some light on the contemporary concept of authority through its genealogy. It is however a means to an end, and not the end itself. For this reason, we will limit our writings to what is important to understand the concept of authority rather than opening Pandora's box and attempting an exhaustive genealogy of authority.

[513] For the most detailed account we have seen, cf. Berthelet and the collection of articles edited by David and Hurlet, who not only understand the various declinations of *potestas, auctoritas* and *auspicium*, but also how they interacted with one another in the Roman political arena, something which eludes many contemporary authors.

It is important to note that the concept of *auctoritas* was not as monolithic as it may sometimes be construed. While it often characterized a type of moral authority (the senate, the *princeps*[514]), the term *auctor* was also used when certain acts needed to be validated (legal guardian). In both cases, the overarching idea remained despite the fact that its materialization varied greatly from one happenstance to the next. This idea was that of augmenting or founding something; basically, it was a matter of leaving Rome in a better state than when we first entered it.

We do not agree with certain authors who consider moral and legal authority to be entirely separate issues[515], for if their forms were different, their essence was the same. Indeed, it is somewhat complicated for us to view moral and legal authority as two separate concepts when the underlying idea (augmenting the common good) and the mentality permeating the concept (constantly trying to improve what was bequeathed to us by our forefathers) are the same. Whether legal, political, moral or philosophical, any situation improved upon resulted in an increased *auctoritas* for those augmenting the common good linked to these various fields.

For instance, there are some similarities between the senate and a *pater familias*, both of which are classic figures of *auctoritas* despite the fact that they operate in different domains and on different scales. By crafting *senatus consultes*, the senate could influence the general direction of Roman society, providing support in the interpretation of the Law to make it fairer, to augment it. On the other hand, a *pater familias*, in spite of being an important figure in ancient Roman society, could clearly not influence Roman society the way the senate did. Generally limited to his household, a *pater familias* was tasked with taking care of his family. In other words, the *auctoritas* of a *pater familias* did not derive from an augmentation of the entire society, but of his family. Both cases clearly touched different domains, the senate acting in a legal-political setting while the *pater familias* did so in a private, intimate context. One's authority was thus legal-political and the other's was familial. Despite these differences, the essence of authority remains i.e., augmenting the inherited common good (society for the senate, family for the *pater familias*).

The most common iteration of this problem is the comparison of authority in ancient Rome and ancient Greece[516]. Because both civilizations had very different governing methods, we often read that the idea of authority was "foreign" to

[514] This word means "first among citizens", but is often wrongly translated as "prince". Let us remind ourselves that there were no princes in Rome.

[515] Magdelain, Senatus p. 386.

[516] Bur pp. 21-23.

ancient Greece[517]. This is where focusing on the essence of authority rather than its shapes allows for a broader picture, one where authority is not only incredibly versatile, but also found in numerous human societies, even probably all.

As very often in philosophy when dealing with concepts hard to pin down, it is easier to understand what they are not rather than what they are. The contrast between *potestas* and *auctoritas* will thus essentially serve to grasp what the latter is, rather than the former. For this reason, we will make a digression on power *(potestas)*, if only to highlight how it differed from authority *(auctoritas)*. Moreover, *potestas* is partially constitutive of *auctoritas* as both go hand in hand and are seldom entirely separated from one another, *auctoritas* being even the foundation of *potestas*.

2. Concerning Augustus

The reflections surrounding the difference between *auctoritas* and *potestas* and, more broadly, between authority and power in the political context, start in ancient Rome. The most important evolution was the one brought about by Augustus given his status as a person of both incredible *auctoritas* and *potestas*. The idea here is to follow the Aristotelian methodology to understand concepts: by looking at their concrete incarnations[518].

As already stated, ancient Romans knew very well what was the difference between *auctoritas* and *potestas*: *"Cum potestas in populo auctoritas in senatu sit."*[519] Other than the senate, Cicero also referred to *auctoritas* when speaking about a young Octavius to Atticus: "The young Octavius does not lack in spirit but in *auctoritas*"[520], the same Octavius who would then become Augustus, an etymological derivative of *augeo*, the root of *auctoritas*[521]. Augustus later remedied the issue underlined by Cicero, and while he held a certain legal degree of *potestas*, he was able to draw a clear line between both attributes: *"Post id tempus auctoritate*

517 Arendt, Authority p. 104; Revault d'Allonnes pp. 54-55; Ricoeur, Juste 2 pp. 114-115, all of whom committed this error in what were otherwise very astute and thought-provoking articles and books.

518 Aristotle, Nicomachean Ethics 1140a24-25.

519 Cicero, De legibus 3, XII. "Power to the people, authority to the senate" (free translation).

520 Cf. Cicero's letters to Atticus 16, 14, 2.

521 Benveniste p. 150.

omnibus praestati, potestatis autem nihilo amplius habui quam ceteri, qui mihi quoque in magistratu conlegae fuerunt."[522]

In saying so, Augustus declared that his superiority did not reside in the *potestas* that laws granted to him and his peers, but in his personal *auctoritas* which he drew from within himself. In this regard, the reign of Augustus was very interesting as it marked the transition between the Roman Republic and the Roman Empire. At the time of the *Res Gestae*, Augustus' *auctoritas* was still personal and not yet official, which it would eventually become during his reign[523]. The example of Augustus is very interesting, not only given its historical importance, but also because he was the first major occidental political player to use it as openly and as his main claim to glory.

By the end of the Roman Republic, the senate could hardly govern. Caesar remedied this problem by ramming his dictatorship through, but Augustus proved a savvier political player by abandoning his uncontested *potestas* at its pinnacle in order to acquire an *auctoritas* strong enough to eclipse that of a dwindling senate[524]. This is something Augustus was well aware of when he let the senate decide what title should be gifted to him. "Romulus" was first envisioned, but the parallel with the first king of Rome was too obvious. And so "Augustus" was chosen for it was reminiscent of Rome's founder, upon whose work he could continue to build, something directly related to the etymological understanding of *auctoritas, augeo*[525]. The *tour de force* accomplished by Augustus was most apparent when looking at it from a military perspective: his *auctoritas* was so high that his *imperium* extended inside the sacred *pomerium*[526]. It is however important to remember that *auctoritas* did not start with Augustus, but he did emphasize it to the point where none incarnated the concept better than him[527].

The case of Augustus is unique, and we could have also used his example as the conclusion of this Roman chapter, the reason being that he was the first to merge *potestas* and *auctoritas* at their highest level in a single entity. Before him, those

[522] Res Gestae 34.3. "From the time of my sixth and seventh consulships on, I surpassed all of them in *auctoritas*, but I had no more *potestas* than my colleagues in each magistracy." (Rowe p. 15)

[523] Magdelain, Auctoritas pp. VIII-IX.

[524] Cf. *infra* regarding the difference between *potestas* and *auctoritas*.

[525] Cf. *supra* part 2, I, 2, A.

[526] Magdelain, Auctoritas pp. 39, 51-52, 59-60, 68, 111-115. Cf. *infra* regarding the *pomerium*, a sacred limit within which Roman military commanders could not use their military prerogatives and privileges, and the military *imperium* which was a military form of *potestas*.

[527] Rowe p. 15.

with *auctoritas* validated the actions of those with *potestas*[528]. The reason why we start with him is to set the archetype, the most prominent display of Roman *auctoritas*, in order to give the reader a good sense of what this concept was and still is.

Before he became Augustus, Octavius cumulated an impressive list of titles, functions and honours in both the *potestas* and *auctoritas* departments[529]. As quickly mentioned above, the Roman republic was becoming increasingly hard to govern, if only because it had become an empire by that time, which made ruling from Rome very difficult. In addition to Caesar's assassination and the intestinal war waged by his presumptive successors, Rome was essentially staring down into the abyss of imperial decline. Following his military successes, and with his *potestas, auctoritas* and politico-religious accolades, Octavius was in the best position to "restore the *res publica*" following the basic meaning of *auctoritas*: by augmenting its past foundations[530].

Eventually succeeding Caesar, Octavius did more than simply wear his predecessor's mantel, to the point where the senate granted him the name of Augustus on the 16th of January 27 BC. Given the institutional crisis Rome was in during the last century BC, Augustus needed to reaffirm the foundations upon which Rome was built in order to consolidate her for the future. So much so that the senate initially wanted to grant him the name "Romulus", a choice finally rejected because as Rome's first king, using his name went against the republican ideal Octavius was trying to restore[531]. From this point onwards, Augustus' *auctoritas* was officially enshrined in the Roman *res publica*, the very essence of Rome herself, and became sacred and venerated by all. And so, before lending his *auctoritas* to certain elite jurists[532], Augustus elevated said *auctoritas* to the point where it became formally enshrined into Roman Law[533].

528 Cf. *infra* part 2, II, 5.

529 Cf *infra* regarding the distinction between *potestas* and auctoritas; cf. also Berthelet pp. 286-288 for more details. The most notable items on this list are: 9-time consul, augur, pontifex, grand pontifex and 5-time proconsul without the *pomerium* affecting his *imperium* (a historically unique case in ancient Rome, cf. *infra* regarding both notions of *pomerium* and *imperium*).

530 Berthelet pp. 320-321.

531 Magdelain, Auctoritas pp. 58-59.

532 Cf. *infra* part 2, II, 4.

533 Magdelain, Auctoritas pp. 61-62. We will see *infra* (through the three-dimension theory of Miguel Reale) that the formal validation of an *auctoritas* was not constitutive of it, but it is unquestionably a sign that such an authority had reached a formidable magnitude.

The reason why Augustus was so adamant about enhancing and displaying his *auctoritas* was because he understood very well just how crucial it was for his refoundation to be seen as an unparalleled symbol of *auctoritas*. As mentioned already, he needed to insert himself as highly as possible in the Roman tradition, the one inherited from their ancestors, the *res publica*. However, and given the historical circumstances in which he began his ascent of Roman politics (a dying republic with an assassinated leader), he was particularly mindful of the future and the foundations he would lay for it to last[534]. It is because he understood how time was (and still is) the metaphysical characteristic of authority that he was able to wield it with such dexterity and understanding[535].

More concretely, Augustus' newly officially acquired *auctoritas* allowed him to lend some of his credence to others so that they too, might benefit from his immense aura. Chiefly, the most renowned jurists, those benefitting from an epistemic *auctoritas*, started to give *responsa* publicly[536]. Under the Republic, jurists already emitted *responsa*, but they did so privately, directly with a judge or a party[537]. These *responsa* were a jurist's primary source of *auctoritas*, a reflection of their skills and knowledge as legal professionals, something to which Augustus added his own *auctoritas*. By doing so, he ensured that after many years of political mayhem, a certain balance would be restored through Law, a Law solidified by both the epistemic *auctoritas* of the best jurists and the official overarching one of the emperor. These *responsa* were now officially validated and as a consequence, they acquired a *force obligatoire*[538].

In the end, the *responsa* of the best jurists acquired a certain *potestas*, for going against them was going against the Law. However, the occurrence of *potestas* was only made possible by a double actualization of *auctoritas*. The first is epistemic and stems directly from the knowledge of jurists. The second is official, that of the emperor, and intervenes indirectly to grant the jurists' epistemic authority[539] a supplement of authority, one that allows the *responsa* to acquire *potestas*. This

534 Hurlet p. 366.

535 Cf. *infra* part 2, V, 3, B, *b*. Revault d'Allonnes pp. 150-153; Kojève pp. 119-120.

536 Cf. *infra* part 2, III, 4, C regarding the notion of epistemic authority. A *responsum* was the answer from a trained jurist to a legal question. Quite like an *avis de droit, responsa* were private in nature, an outside analysis offered by any jurist uninvolved in the legal case. Augustus changed this, and for about 200 years, jurists with a formally valid epistemic *auctoritas* became allowed to give *responsum* publicly (Machelard pp. 542-543).

537 Pomponius, Digest I, 2.2, 47-49.

538 Schiavone p. 317.

539 Cf. *infra* part 2, III, 4, C.

process happened many times and shows how authority legitimizes power and how both concepts have been intertwined for millennia. As we will yet again see *infra*, displays of *potestas* were subordinated to the validation of *auctoritas*, meaning that power could not be exercised without the "approval" of an authoritative vessel.

This was an extremely important aspect of Roman politics, something Augustus partly shattered when he became *princeps*: he could use his own *auctoritas* to justify all he did with his *potestas* in order to reaffirm the foundations of Rome. While magistrates, especially those of higher ranks, often had both *potestas* and *auspicium* (cf. the upcoming section *infra*), which allowed them to justify their actions, Augustus brought this to unchartered territories by making this association legal and official for the first time. The aforementioned magistrates were subject to hierarchical checks and balances, through the actions of the senate in particular, but Augustus was not, for his *auctoritas* stood at the pinnacle of humanity in addition to being enshrined in Roman Law[540].

Augustus was the arch example of *auctoritas* in Rome, but a notion so complex cannot be apprehended through one case, no matter how historically important. As we will see right now, *auspicium* played a significant role in the actualization of authority in Rome. Even more so, it was very often through the vessel of *auspicium* that *auctoritas* served as the foundation of *potestas*.

3. *Auspicium*, the sacred aspect of power and authority

Auspicium gave the right to take auspices and was the key to exercising power for any magistrate. Its main role was to grant all acts of *potestas* the necessary *auctoritas* to render them acceptable in the eyes of the Gods and the Roman people. The one whose *auctoritas* was solicited was Jupiter's[541]. *Auspicium* was not strictly reserved to members of the Roman clergy, but "belonged" to anyone interpreting signs of the divine[542].

Given the importance of religious liturgy and Rome's nature of martial conqueror, military officers could also double up their *imperium*[543] with *auspicium*. "In fact, there was a deep connection in the Roman mind between *auspicium* and *imperium*

[540] Berthelet pp. 304-307; Magdelain p. 62.
[541] Berthelet pp. 20-23, 41.
[542] Certain magistrates could be wielders of *auspicium* in addition to their *potestas* if their activities also entailed the use and interpretation of sacred sources (Magdelain, Urbs p. 216).
[543] Cf. *infra*, part 2, II, 5, A.

(military authority[544]), and the two terms are frequently combined to represent the power of the military commander, a rapport that illustrates the fundamental importance of both types of authority. The Romans were a highly religious and ritualistic people, so *auspicium*'s status as a fundamental aspect of military command is not at all surprising"[545]. The same could be said about magistrates whose office could be invalidated if any flaw in their inaugural auspice was suspected[546]. The main idea was that Rome was a city of humans and Gods, meaning that those wishing to govern it needed the approbation of its superior citizens, Gods[547].

Religion was so omnipresent in Rome that *auspicium*, despite being a vessel and a form of authority, was directly linked to all walks of the Roman *potestas*, all the way to *imperium* itself[548]. Said otherwise, even the most brutal acts of *potestas* (war) had to be validated authority-wise, meaning that Romans saw authority as *sine qua non* to the actualization of any form of *potestas*. There could be no exercise of power without the authority of religion or, to be more precise, sacredness[549]. The common etymology of *auctor* and augur clearly shows that sacredness through religion was one of the most (if not the single most) important vessels of *auctoritas*[550], as priests could even force a magistrate to step down from office[551]. A famous occurrence of the prevalence of *auspicium* over secular *auctoritas* is the dispute between Attus Navius, an augur, and Tarquin the elder, fifth king of Rome. The latter wanted to double the number of equestrian centuries and name the new ones after himself.

[544] The use of the term "authority" is unfortunate here: we clearly are in presence of power rather than authority.

[545] Drogula, Command pp. 47, 68, 81.

[546] Drogula, Command pp. 70, 74; Tucker p. 175; Szelmer pp. 103-104.

[547] Cicero, De legibus I, 23.

[548] Berthelet pp. 15-16, 23.

[549] Religion is but a vessel for sacredness, which can exist without requiring any form of religion. Religion on the other hand cannot exist without something sacred to rally around. This is not a trivial distinction for the good reason that religion is not a philosophical concept, but sacredness is. As such, authority is tied to what is sacred in Rome (Gods, the *res publica*) rather than Roman religion. To be sure, the two are intimately linked, but the sacred aspect of religious ceremonies is derived from Gods and the *res publica*, not from the ceremony itself. This distinction becomes more apparent with Modernity, whose intellectuals sacralised science and Reason while spurning the Catholic religion: we thus find ourselves facing multiple sacred items, but without the religious decorum. The same could be said about legal positivists: many of them are agnostics or atheists, but all revere the text of the Law to the point of fanaticism (cf. also Ost/van de Kerchove, Limites p. 16).

[550] Santangelo pp. 746-747, 751; Szelmer p. 105; Cicero, De legibus 2.31.

[551] Cicero, De divinatione I, XVII, 33 and II, XXXV, 74-75.

Navius opposed this decision and thus the centuries were not named after Tarquin the elder, who was frightened enough by Navius' *auctoritas* not to oppose him[552].

The link between sacredness, society and authority is one many modern and contemporary authors fail to understand or even acknowledge. We will go into more details on the hubris of modern and contemporary scholars *infra* regarding the general concept of authority, but it is quite interesting to see that this hubris is also reflected in debates concerning ancient Roman culture. These concepts are sometimes viewed as fundamentally individual. By sinking deep into their own prejudices[553], these authors project a 20th century occidental neoliberal[554] vision of Christian religion onto ancient Rome, one where tradition and authority have been discarded as opposites to rationality and science[555]. We will attest *infra* to the fact that such a vision is false and a consequence of the oversimplification of society by Moderns[556].

The core of the common good, the *res publica*, was sacred. And because sacredness was such an important part of morality, but more importantly, the centre of Roman *auctoritas*, it was a collective affair and not an individualistic one, whether it involved all priests or all Romans[557]. The authoritative aspect, the sacredness of the *res publica*, is here understood as we have laid it out in our etymological section: the augmentation of what we inherit from past generations, with eventual acts of creation along the way, as with Augustus for instance. Through its authority, sacredness helped to insert Romans in their society, past and present, hereby giving them a purpose, even a sense of grandeur, that individualistic societies can never hope to match.

This collective identity was also reflected in the exercise of *auspicium*. Priests were indeed more often considered as a collective institution than a sum of individuals, which is why despite their personal *auctoritas*, their institutional *auctoritas* was more significant[558]. The non-members of the clergy also acted collectively rather

552 Cicero, De divinatione I, XVII, 31-32; Santangelo p. 759.

553 Cf. *infra*, part 3, II, 2, B, *b.*

554 We are essentially talking about the generalized individualistic-to-the-extreme behaviour advocated by neoliberalism.

555 Berthelet pp. 25-26.

556 Cf. *infra* part 2, III, 1, 2.

557 Berthelet pp. 16-17.

558 Cicero, De divinatione II, XXXIII, 70; Santangelo pp. 748, 752-753; Szelmer p. 107. There were of course exceptions when a priest reached a significant enough degree of *auctoritas* to be singled out (cf. *supra* Attus Navius, who became a quasi-mythological figure among the

than individually when religion was concerned. It is for this reason that one of the main components of civic religion was public ceremonies, which were more than today's public displays of religiosity, for they involved the entire Roman society. In addition to priests and "average" Romans, these ceremonies also involved magistrates and senators, reaching a high societal and political dimension and strengthened the bonds between all Roman citizens. Consequently, these collective ceremonies asserted their place in Roman history and tradition, augmenting their authority along the way[559].

Auspicium was not construed much differently than its secular counterparts as priests were also heavily involved in politics, in particular through the plebeian assemblies[560]. The main blocks used to build an *auctoritas* are considered virtues in the very vast majority of cases and this did not change with *auspicium*: prudence, loyalty, good faith, trust, being industrious, giving wise advice and being capable of sound judgement[561].

To be clear, *auctoritas* is incredibly versatile and variable, which is why the virtues involved in its inception and actualization change depending on people, society and the overall context. The relativity and variability of this notion are exemplified by Cicero, who placed a great deal of emphasis on the authority of rhetoric and the importance of arguments[562]. The capacity to argue, to explain, to help make sense of past and current events is something often associated with jurists and people of experience, hence held in high regard by Cicero, but not by Arendt who considered persuasion antithetical to authority[563]. This flexibility of *auctoritas* is what allowed

Roman clergy). In addition to those exceptional individuals, there was an entire dynamic inside the clergy between each individual priest. Contexts at the highest level of politics such as these are always very murky, so the only constant we can extract is that *auctoritas* took many shapes and forms, with an extremely context sensitive dynamic.

559 Berthelet p. 17.

560 Cf. *infra* part 2, II, 4.

561 Hellegouarc'h p. 298; David pp. 191-192; Berthelet, Différence p. 129 and all references therein.

562 Cf. Cicero, Brutus LVI regarding the example of Popillius, who was able to quell a mutiny against the senate through his eloquence and his authority.

563 Cf. *supra* part 1, I, 2, B to see that ancient Greeks were of the same opinion as Romans: in both ancient Rome and Greece, arbitrators were people of experience and a certain age, able to decide wisely and convince parties of their choices' fairness. Arguing and persuading were thus important in both societies (Santangelo p. 753). While Cicero might have had a professional bias regarding the importance of rhetoric, this does not mean he was wrong. As we will see in part 3 *infra*, arguing is how arbitrators build up their *auctoritas*. Being able to understand a legal problem, laying out a solution and convincing both parties that this

it to seep into all aspects of Roman life, serving as the cement that bound everything together. This nature of *auctoritas* is reminiscent of Law, which exists in every single human relation and serves as the proverbial glue sticking all parts of society together, with *potestas* occasionally used as the deterrent to *auctoritas*' more ethereal form.

While Arendt rightfully opposed *potestas* and *auctoritas* in regard to their respective purposes[564], this does not mean that they were not complementary. In Rome, this was very apparent as *potestas* had to emanate from *auctoritas*, with the link between them very often being the *auspicium*, which served as a vessel for authority in order to justify the actions taken by power[565]. To be very precise, *auspicium "consistait en une simple demande à Jupiter d'accorder son* auctoritas *à un acte public de* potestas, *ponctuellement – pour un seul jour, en général – ou temporairement – pour la durée de la magistrature dans le cas des auspices d'investiture* […]."[566] *Auspicium* was therefore a link, probably the main one, between divine (thus sacred) *auctoritas* and *potestas*. It was used to confer *potestas* the necessary *auctoritas*, whether the act of *potestas* was *cum* or *sine imperio*, military or civil[567].

Said otherwise, *auctoritas* (through the *auspicium*) constituted the basis, the essence of the weightier, more important actions of the state: legal actions with an official dimension to them (e.g., trials, a magistrate's actions, etc.), the consequences of which often belonged to the realm of *potestas*. Understanding this sequence is absolutely essential, because it allows us to understand where Law has been standing to this day in regard to these two concepts: power was never the basis of Law, authority is. This means that during a trial, acts of power are derived from

solution is the correct one is no small task, something those practicing Law (jurists, attorneys, judges, etc.) like Cicero are well aware of. Cf. *infra* part 2, III, 4 concerning Arendt and the disagreements we have with her on this matter, as well as all those reutilizing her arguments.

564 Cf. *infra* part 2, III, 4, B.

565 Berthelet pp. 220-221; Berthelet, Différence pp. 132, 134-135, 140. Magistrates did not often directly use *auctoritas* in their line of work, as their task mainly consisted in keeping the peace, which involved the use of coercion, *potestas*, which they could activate at all times (Berthelet, Différence p. 139). However, their *potestas* derived from a source of authority (Jupiter, Augustus, etc.), which is what would be commonly called nowadays as a "legitimate use of power". As such, and in a bit of a roundabout fashion, magistrates would exercise a *potestas* based on *auctoritas*, which was in itself an act of *auctoritas* augmenting the common good of Rome through peacekeeping.

566 Berthelet p. 185.

567 Cf. *infra* regarding the notion of *imperium*.

authority, whose legitimization is needed prior to the actualization of an act of power.

Moreover, acts of power resulting from an application of the Law only exist in a minority of cases, when parties face one another in court and a judge's decision is applied through power because the loser refused to heel. Even court decisions applied without power can still be considered a mix between power (the threat of law enforcement) and authority (application of a fair judgement, or at least an "un-unfair" one). In the end, all judiciary acts of power derive from authority, in the minority of situations where they are needed.

Having a clear mind on the nature and place of each concept in the elaboration and materialization of Law allows us to understand that the foundation of Law in the Roman paradigm was authority and not power, contrary to what many might think about a historically powerful empire. Even more so, by understanding that the main source of *auctoritas* (Jupiter's) needed *auspicium* to translate into applicable Law and *potestas*, we can see that the origin of Roman Law is, more than religion, sacredness. By imbuing sacredness into Law, Romans conferred it an authority which made it extremely efficient. More importantly, doing so granted a sacred dimension to public political action, Law in particular, which is the main means of action in politics. Let us not forget that the very foundation of Rome was based on the interpretation of divine signs by Remus and Romulus, the latter witnessing the more favourable signs.

According to Magdelain: *"Dans le tracé de ces frontières la notion d'*auctoritas *joue ici et là un rôle fondamental. L'*auctoritas *sacerdotale définit et délimite le sacré. Elle préside aux échanges qui se font entre l'humain et le divin. Le rôle essentiel du sacerdoce est de régler ces passages qu'entoure la technique minutieuse de l'exactitude rituelle. De même les pouvoirs publics et les chefs de groupes familiaux organisent dans leurs sphères respectives les rapports du droit et du non-droit, ils tracent les frontières du légitime et de l'illégitime. Toute la vie de la cité et de la famille dépend de la reconnaissance qualifiée de ce qui est juridiquement valable. L'établissement du sacré est l'œuvre du sacerdoce. Le même mot désigne ces deux fonctions*: auctoritas."[568]

[568] Magdelain, Rerum pp. 685-686.

4. The secular *auctoritas*

Auspicium was strictly religious, but as we have seen, secular forms of *auctoritas* could also be based on sacred foundations, to lesser degrees. Under the Monarchy, the *auctoritas patrum* for instance belonged to the highest ranked senators, those who hailed from patrician families, which had received the *auspicia maxima* from the king and whose dignity and authority were thus situated at the highest level. Originally, the senate's role was to act as a check to the monarch by balancing his *imperium* with its *auctoritas*, by counselling the king through the voice of the most eminent Roman *patres*, the senators[569]. The *auctoritas* of these patrician senators was called *auctoritas patrum*.

These *patres* received their authority from the king who drew it from Jupiter, a clear indication that its source was of a sacred nature, meaning that in institutional cases, both religious and secular *auctoritas* were rooted in sacredness. Unlike all other magistrates however, *patres* did not need individual official ceremonies and were thus the proverbial exception to the rule of the *auspicium*[570].

If the starting point was indeed one of sacred nature, the *auctoritas patrum* was never exercised by clergymen or in any religious context, because it was directly linked to a triple status of senator, patrician and *pater familias*. Just like the *auctoritas tutoris* (a legal guardian's validation of his ward's actions), the *patres* granted their *auctoritas* to popular elections and votes[571] to render them legally effective[572]. In other words, just like *auspicium, auctoritas* granted actions with a "*potestas* nature" the necessary authority and acceptability to move from potential to actual. And so, the difference between secular and religious *auctoritas* was not so much their source but the place where they applied.

The *auctoritas patrum* belonged to members of the highest patrician families who were also senators. The consequence was that it was not very widespread and remained a privilege tied to a senator's blood. On the other hand, the *auctoritas senatus* belonged to all members of the senate, plebeian or patrician, and while it remained inferior to the *auctoritas patrum*, it acquired more importance as time

569 Bur p. 66.

570 Magdelain, Senatus p. 389.

571 Until the entry into force of the *lex Hortensia* in 287 BC, which equivocated plebiscites to laws.

572 Magdelain, Senatus pp. 389-391; Berthelet pp. 210-211. Cf. also *infra* part 2, V, 2 regarding the notions of legitimacy and effectivity in the three-dimension theory of Law.

went by under the Republic[573]. Eventually, both types of senatorial *auctoritas* merged into the single *auctoritas senatus*.

The reason for this change was that under the Republic, the high nobility's role was somewhat lessened compared to the previous monarchical regime. While the nobility retained an aura for some time under the new regime, its *auctoritas* in the senate diminished over the centuries to the point where it became indistinguishable from the *auctoritas senatus* held by all senators, their social origins notwithstanding. During the latter half of the Republic, the *auctoritas* of the Roman *patres* was incorporated into that of the senate, further solidifying the *auctoritas senatus* and political weight of the institution and all its members[574].

Historically, the senate's *auctoritas* therefore had two aspects. The first one, the *auctoritas patrum*, borne from the old royalty and closely tied to the etymology of authority, corresponded to the augmentation of a person's action through the *auctoritas* of another. Namely, the *auctoritas patrum* granted the necessary authority to popular resolutions for them to acquire a legal validity. The *auctoritas senatus* came later and was at first secondary to the *auctoritas patrum*. It was subsequently raised to a higher rank and became vested with a moral component difficult to contest without breaking a certain harmony among Romans, who held the *auctoritas* of the senate in very high regard[575]. The abbreviation "SPQR" is one still used nowadays as coat of arms of the Roman municipality and means *senatus populusque romanus*, "the senate and the Roman people", a testimony to the lasting authority of this institution.

The senate's *auctoritas* was not ready-made from the start, but something built by the behaviours and actions of its members. By choosing the elite of the burgeoning Roman society (noble *pater familias*), Romulus chose those whose deeds and actions were inspiring and models to follow[576]. According to Bur, *"A la différence de l'*imperium, *qui était en quelque sorte un costume prêt à l'emploi permettant*

[573] Berthelet pp. 209, 212-213; Magdelain, Senatus p. 401-402.

[574] Magdelain, Senatus pp. 401-402.

[575] Hellegouarc'h pp. 311-312; Magdelain pp. 386, 403.

[576] It is important to note that *auctoritas* was the essence of nobility and not the other way around. Being of noble birth could strengthen the feeling and impression of authority, but it was definitely not the essence of nobility (Bur p. 89; Mantovani pp. 285-286). This is proven by the role censors had as they surveyed senators to ensure that their *auctoritas* was maintained to a decent enough level. This is why its maintenance was based on continuity and not on isolated episodes such as birth. This continuity was of course that of a person's behaviour, but also that of previous authoritative figures, the ancestors and founders.

*d'agir à sa guise, l'*auctoritas *était une construction de longue haleine. Elle n'était pas associée à une magistrature, mais dépendait largement de l'image publique née des actes et de la conduite de l'individu. Tout aristocrate savait qu'il devait se comporter d'une certaine manière pour acquérir, puis préserver son rang et ensuite pour exercer une certaine influence*."[577] This aspect of *auctoritas* has been constant hitherto and even today, authority is something that must be regularly nurtured through one's deeds. If not, it can collapse frighteningly quickly. More precisely, a person and their authority must reach a certain degree of acceptability, which is done through the aforementioned deeds[578].

This is something Romans understood well as proven by the *lectio senatus*, a legitimacy test of sorts. In the course of this procedure, censors would investigate current and potential senators in order to determine whether their behaviour was worthy of a seat in the senate. This would in turn ensure that sitting senators were indeed Rome's *optimi*, further enlarging their *auctoritas* and that of the institution. Following the etymology of authority, the senators' optimal behaviours had to follow in the footsteps of the founders, further augmenting Rome and her sacred essence, the common good, the *res publica*[579].

Concerning the secular components of *auctoritas*, they broadly imitate those of the religious *auctoritas*, but because the secular context is much broader, they are more numerous. Indeed, given how sensitive to context *auctoritas* is, the more contingency we have, the bigger is the diversity of characteristics we have to factor in. Said otherwise, what is constitutive of authority in a certain context may be its downfall in another[580]. While phrasing this may seem exceedingly obvious, a surprising number of scholars vested in the study of authority have failed to understand this in their search of a monolithic definition[581].

[577] Bur p. 68.

[578] Baudry p. 209. Interestingly enough, senators shouldered the heaviest political responsibility because their capacity to act depended on their *auctoritas*, something more difficult to gain and easier to lose than any type of *potestas* (Benoist pp. 71-73).

[579] Bur pp. 69, 73, 75-76; Baudry p. 217.

[580] For instance, what is considered authoritative in Israeli politics nowadays will probably be the opposite of authoritative in Lebanese or Palestinian society.

[581] Cf. Mantovani pp. 285-287 and the mentioned references for a comprehensive expose on why many authors ultimately fall prey to their prejudices. Such authors include Hellegouarc'h pp. 294-299; Revault d'Allonnes pp. 54-55; Arendt, Authority p. 104 and Raz pp. 7-37.

For Roman legal practitioners, *auctoritas* involved a minimal degree of rhetorical skills, which is one of the reasons why Cicero held it in such high regard[582]. In Law, the purpose of *auctoritas* is to foster acceptancy and not force it. Ironically, the authoritative skill that is rhetoric was used in Roman court to discredit the *auctoritas* of the opposing attorney and client[583]. Rhetorical skills may not be the hallmark of a great banker, but there are other fields in which they shine and often mark someone as an authority i.e., politics[584].

Another facet of *auctoritas* in Law is one surprisingly absent from many writings: the circumstantial one. In many trials, the key to solving a case often lies in testimonies. Each witness will enjoy a different degree of credibility, and by the end of the proceedings, the court will usually side with the most authoritative one, something that has not changed since then. This circumstantial authority can be opposed to that of the legal practitioners, whose authority is not so much based on circumstances as it is on their knowledge: an epistemic authority[585]. Among the many virtues required to be an authoritative jurist, we can quickly mention the following ones: *consilium* (the capacity to give wise and prudent advice), *sententia* (the capacity to form an intelligent opinion) and *judicium* (the capacity of good judgement)[586].

Regarding the links between *potestas* and *auctoritas*, religious authoritative figures are not the best to analyse this dual relationship in Rome[587], which is why the tandem *auctoritas-potestas* is more understandable through the prism of secular figures of authority than their religious counterparts, high-ranked magistrates in particular.

582 Cicero, Brutus LVI.

583 Hellegouarc'h p. 302; Mantovani pp. 291, 308. Cf. also Guérin.

584 Cf. *infra* part 2, IV with the example of Nelson Mandela, whose first widely acclaimed authoritative act was the plaidoyer he made during the Rivonia trial. Cf. also the importance of debates in the Greek (Vernant pp. 56-57) or Roman political arenas (Julius Caesar has often been acclaimed as a legendary public speaker).

585 Mantovani pp. 282-284. Cf. also *infra* part 2, III, 4, C regarding this notion of epistemic authority.

586 Hellegouarc'h p. 303; David pp. 191-192. All of these criteria are still very relevant nowadays, which shows that the decorum of Law may evolve, but not its practice and its actualization.

587 If only for the good reason that clergymen seldom exercised *potestas* while being active members of the Roman clergy. If going through the religious establishment was part of the *cursus honorum*, magistrates usually used it as a stepping-stone to reach positions where one could exercise *potestas*.

According to Cicero, the Republic had achieved a nigh-perfect balance between the aristocratic, royal and democratic governments, which were respectively the senate, the consuls and the plebeian tribunes (who presided over the people's assembly)[588]. However perfect he deemed the Roman governance, Cicero was also of the opinion that it was not enough and that in times of peril, Rome needed a single person who would take charge of all governance in order to restore Rome to safety[589]. We may think that such persons were dictators (Caesar or Cincinnatus for instance), but Cicero used the term *"princeps"*, a word regularly used when evoking Augustus.

The distinction between dictators and *principes* was what they wielded in order to exert their influence. The first ones clearly made use of *potestas* as their role was mainly that of a supreme military commander tasked with the defence of Rome. The power of dictators superseded all others, which is why it had a moniker indicating a more extreme form of power than *potestas*: *imperium*[590]. *Imperium* was a form of absolute power with a strong military core and wielded by a fraction of the highest-ranking magistrates (consuls, dictators, praetors). *Potestas* was another form of power, more widespread but not as extensive as *imperium*, it was held by all magistrates and heads of families (*pater familias* and their *patria potestas*)[591]. It was also sometimes used as a general term and in such cases, *imperium* was a form of *potestas*.

Principes were leaders whose *auctoritas* was freely consented to, they could not impose nor enforce their decisions but gave advice. Their *auctoritas* was not attached to their title, but to themselves as persons, even though their social rank could emphasize it[592]. What made people listen and often apply what the *princeps* said was based on his personal prestige, virtue and merit. A *princeps*' capacity to manoeuvre thus depended on his *auctoritas*, a "soft" skill which compelled people to do the bidding of its wielder without forcing them or even having the means to force them[593]. An interesting point of convergence between *princeps* and dictator was that *potestas* was granted to them because they had the necessary amount of *auctoritas* beforehand, not because of the validity of their status.

588 Cicero, De republica Book 1, XLV, XLVI and Book 2, XXXII.
589 Cicero, De republica Book 6, I.
590 Cf. *infra* for more details regarding *imperium*.
591 Youni p. 38.
592 Ryan pp. 682-683.
593 Magdelain, Auctoritas p. 2.

"[A]uthority precludes the use of external means of coercion; where force is used, authority itself has failed."[594] *Auctoritas* was the foundation of the *princeps* according to Cicero. A *princeps*' role was therefore not to create enforceable rules, but to be someone standing at Rome's apex and guide her with his ideas, initiatives and suggestions, never by force. In a very Aristotelian manner, Cicero used an example to illustrate what he thought was someone who embodied *auctoritas*: Pompey.

Bearing in mind that Pompey was the one who ended Cicero's exile from Rome a few years before *De republica* was published, it is clear that Cicero viewed Pompey as the very manifestation of *auctoritas*. According to him, the *auctoritas* of Pompey was based on his exploits and the official honours he received. His exploits included a drop in the price of wheat simply for being named commander for a naval battle, ensuring Rome would win, which in turn meant that agricultural trade would not be disturbed anymore. Among his official honours, let us just mention the win against Mithridates VI of Pontus, a staunch and hateful opponent of Rome. Accomplished in various ways, these exploits all resulted in an increase of *auctoritas* in the Roman political arena. Indeed, while Pompey made a clear use of *potestas* as a military commander, the rewards he reaped augmented his status. At home, Pompey could not summon his armies to slay political opponents, but his many victories conferred him an aura of authority which he used for political purposes as a consul and as a member of the first triumvirate[595].

Overall, the building blocks of *auctoritas* are as sensitive to context as *auctoritas* itself, which is why certain blocks will be cardinal in some situations and dead weights in others. Among those building blocks, virtues were and still are the most important ones. Other than being constitutive to the idea of "Good", virtues can be developed or infirmed throughout a person's life, meaning that one is never condemned to being virtuous or unvirtuous *ab initio*. Certain factors can augment or diminish our faculty to be virtuous, but nothing is set in stone[596]. We have already gone through a few of these virtues and qualities used to construct an *auctoritas* for jurists (eloquence in particular), we would like to list a few more in order for us to see just how variable and flexible the concept of *auctoritas* is[597].

[594] Arendt p. 92.
[595] Magdelain, Auctoritas pp. 4-5.
[596] Cf. Hellegouarc'h who considered *auctoritas* to essentially belong to the noble cast, something we have already refuted.
[597] David p. 192.

Indeed, *auctoritas* could depend on one's *constantia*[598], *ingenium*[599], *aetas*[600], *fides*[601] or *sapientia*[602]. These were but a fraction of all the qualities capable of elevating an *auctoritas*[603], and again, we find ourselves heading towards the same conclusion as Mantovani regarding the Roman *auctoritas*: it is variable to the point where each person will have their own vision of what is constitutive of *auctoritas*, which is why it is such a hard concept to pin down, and why so many authors fall in the trap of attempting to create a universal (or even simply general) theory on authority[604].

5. *Imperium* and *potestas*

As we have seen so far, the definitions, contexts and conceptions of *auctoritas* are legion, which is the reason why understanding the concept has proven fairly tricky up to now. Oftentimes, grasping a concept is more easily done by knowing what it is not than what it is. In this case, *potestas* was the natural opposite (yet complement) of *auctoritas*, in ancient Rome already.

In Law and to this day, power has never been anywhere near as essential as authority, even more so in international arbitration, but understanding it makes it easier to comprehend authority. We will not dive too deeply into the concept of power, for it is one of the most overanalysed in academia and would side-track this dissertation. What we will do however, is look at the Roman *potestas*: not only because scholars expressly tied it with *auctoritas* (something seldom done in the 21st century, and mostly by mistaking authority and legitimacy), but also because the concept itself has not fundamentally evolved over the course of two millennia, which is why studying it now (albeit briefly) will allow us to proceed more fluently with the concept of authority *infra*.

Until now, this dissertation has mainly revolved around the Roman *auctoritas* in its most significant forms. More than once, we have established that *auctoritas*' counterpart, *potestas*, could not be actualised without *auctoritas* rendering it

598 The capacity to be constant, reliable, not volatile.
599 Intelligence, one's ingenuity and resourcefulness.
600 One's age, which is an important factor on one's life experiences.
601 Faith in someone, loyalty.
602 Wisdom, moderation, prudence, carefulness.
603 Cf. also *supra* part 2, I, 2, B with *dignitas* for instance.
604 Cf. *infra* part 2, III, 2 and 3.

acceptable and legitimate enough beforehand. *Auctoritas* was also a *sine qua non* condition for acts of *imperium* to be considered respectful of the *mos maiorum*, the architectonic customs of Roman society. Summarily, one of the roles of *auctoritas* was to balance the violence that *potestas*, but *imperium* in particular, could unleash[605].

The term *"potestas"* is the general Latin word for "power". Unlike our contemporary notion of power, *potestas* and its application were clearly outlined and less far-ranging than ours for a good reason: *auctoritas* was much more clearly defined. Hence, not only did *auctoritas* properly circumscribe *potestas*, but the two also did not overlap like they often do nowadays. There were quite a few subcategories of *potestas*, but we will only focus on the most important ones, starting with *imperium*, the military and most violent form of *potestas*.

A. *Imperium*

Imperium was a particular type of *potestas* held by superior magistrates and mainly linked to the field of battle *(imperium militae)*, the defence of the city rather than daily civil life within Rome *(imperium domi)*[606]. One would be hard-pressed to understand *potestas* in Rome without grappling with *imperium* beforehand. For instance, praetors usually wielded *potestas*, but could also wield *imperium*, albeit to a more limited extent than other superior magistrates, as outlined by the reform brought about by the Licinio-Sextian rogations of 367 BC, and always within the frame laid out by the Senate[607]. The distinction between *imperium* and *potestas* waned over time. At the beginnings of the Roman Republic however, there was a sharp difference between the usages of power inside and outside of Rome[608].

This geographical separation was made by the *pomerium*, a sacred boundary defining what was inside or outside of Rome and people who were conferred *imperium* were not allowed within the *pomerium*. The *pomerium* was thus a boundary separating civil and military matters, what was considered inside or outside the city, what required protection and what did not[609]. It was based on the sacred ritual of the plough and without it, the *pomerium* would lose its very essence

605 Bur p. 84.
606 Nicolet pp. 394 ss.
607 Piganiol pp. 194-195, 611.
608 Youni pp. 37-38; Mommsen, Droit public pp. 70-71.
609 Drogula, Potestas p. 435; Nippel p. 20; Magdelain, Pomerium pp. 155-156; Mommsen, History p. 86; Nicolet p. 417.

and be nothing but an administrative delimitation[610]. The sacredness featured in the creation of the *pomerium* is eerily reminiscent of the role of *auctoritas* in the validation of *potestas*, and for good reason: the creation process of the *pomerium* involved the heaviest form of *auspicium* as it was literally inaugurated[611].

Hence, the *pomerium* was yet another manifestation of sacredness in Roman politics. *Auctoritas* deriving from the sacred was used to keep Rome's own armed forces at bay from herself, probably in order to avoid army commanders overthrowing the civil institutions[612]. The main impact of the *pomerium* on *imperium* (and *potestas*) was to place limits as to where people wielding *imperium* could go. As we will see, *imperium* was mostly an enhanced military form of *potestas* and granted powers that were more extended, without reliable checks. In order to keep a certain balance within the city, those with *imperium* were allowed within the *pomerium* only on specific occasions and under strict conditions. Such happenstances were clearly exceptions to the general rule: *imperium* without and *potestas* within the *pomerium*[613].

"While *potestas* conferred the authority necessary for a magistrate to perform the functions of his office related to civil governance, *imperium* was [mainly but not limited to] the military authority a general needed to exercise martial law over the citizens in his army."[614] *Potestas* was thus the power exercised by magistrates to maintain harmony inside the city, among civilians, whereas *imperium* conferred broader, very often military, powers, in particular the one to execute summarily, because more than harmony, it was about maintaining order and ultimately, a matter of life and death. It was through *imperium* and not *potestas* that Caesar executed the mutineers in his army, the same way Mark Antony killed over 10% of his army for cowardice[615].

Not as elusive as *auctoritas, potestas lato sensu* remains a concept that is both tricky and complex to define. From what we have laid out *supra* regarding the importance of *auctoritas* and sacredness in the actualization of *potestas*, we

610 Magdelain, Pomerium p. 159.

611 From *inaugurare*, which designates the fact that a ritual was used to inaugurate (sic) a place. The root of this word being *augur*, it is quite clear that the idea behind inaugurations was to ask divinities to protect the inaugurated place (Magdelain, Urbs p. 15).

612 Drogula, Command p. 50; Liou-Gille pp. 94-95.

613 Drogula, Command p. 55; Magdelain, Pomerium pp. 159 ss.

614 Drogula, Command p. 81.

615 Drogula, Command pp. 83, 92 and the references therein. These 10% are what gave birth to the verb "to decimate".

already know that *potestas* could not be exercised without the prior legitimization of *auctoritas* without sinking into pure violence. Often considered the main prerogative of magistrates, *potestas* was used to guarantee order and safety in the daily life of Romans. Unlike *auctoritas, potestas* did not depend on who wielded it, but was attached to positions in the Roman hierarchy. In other words, *potestas* was an instrument immediately and directly usable by any who acceded to a position of power[616]. This instrument's final cause was and remains the coercion (to various degrees) of those going against the established order[617].

For better or for worse, axiology does not come into play just yet, but eventually always does so, for values always determine what order is in a society. Determining the final cause of *potestas* does not however require any understanding of a system's values. These values will only determine when *potestas* is actualized and thus its occurrences, not what it is fundamentally.

Compared to *imperium, potestas* was much less exceptional in the sense that it did not need exceptionally dire circumstances such as war to exist. In the direst cases, most types of *potestas* allowed its wielders to pronounce death sentences, the most extreme form of coercion[618], which was more than enough for magistrates to carry out their duties inside Rome[619]. Other than the death penalty, *potestas* also granted them the power to set watches to prevent arsons, to assemble shifts of armed guards, to mobilize one's retainers, to grant rewards to informants or even to free another man's slave if he denounced the crimes committed by his master[620].

Given that the spectrum of *potestas* was already quite consequent, *imperium* was not a necessity inside Rome as it was too sweeping and without real check. Only in rare instances could one of its beholders be allowed inside the *pomerium*: the triumph after military victories, dictators and the *senatus consultum ultimum*. All of those instances were very rare and conditioned by the senate's approval (dictators were not chosen directly by the senate, but the consuls naming the dictator needed the senate's permission beforehand)[621].

616 Bur p. 89; Hellegouarc'h p. 310; Berthelet, Différence p. 134.
617 Drogula, Potestas pp. 424-425.
618 Youni pp. 44, 51; Thomas pp. 165 ss. Cf. *infra* for more examples.
619 Drogula, Command p. 63 and footnotes 46-47. Cf. Drogula, Potestas pp. 423-424 regarding the list of such magistrates.
620 Nippel p. 24; Youni p. 41.
621 Drogula, Potestas pp. 442 ss.

We can see that having someone wielding *imperium* set foot inside the city walls was not dependant on magistrates with *potestas*, but on the one institution known for its *auctoritas*[622]. Indeed, when decisions of serious consequences such as allowing an army (even if it was Rome's very own) were concerned, it was not a matter of knowing whether a magistrate with *potestas* could help in case of a problem, but whether the decision was a good one. Someone or an institution with *auctoritas* will very often acquire this authority by repeatedly taking good decisions, which is why the Roman senate, the highest human *auctoritas* in the land, was considered the only legitimate entity to take such risky decisions. One *potestas* was therefore not the limit of another *potestas, auctoritas* was.

Ultimately, *potestas* and *imperium* were actualized in very different contexts and locations, and their separation was deemed sacred by Romans. That being said, both notions were incarnations of the same concept: power. Power to coerce, to force and enforce, to impose something to someone against one's will. Should one resist what *potestas* or *imperium* tried to impose, that person would suffer consequences of a high magnitude: a sanction which often consisted in imprisonment or the death penalty[623]. Given that the separation between *imperium* and *potestas* was strictly Roman, both ended up merging into the sole *potestas* after the fall of Rome. Their underlying idea, however, remains the same: the capacity to curb behaviour against one's will through the threat of sanction[624].

Sanction is one of the fundamental differences between power and authority, *imperium*/*potestas* and *auctoritas*. While someone with *auctoritas* could make others do something against their volition, it did not have any option at its disposal should the person refuse to oblige. The only "weapon" to which *auctoritas* had access was a contextual moral superiority[625]. Through this moral superiority, people would not feel compelled to do something, but would see the indications given by the one with *auctoritas* as the best possible choice. In Rome, the senate was widely

622 Benoist p. 73. *Cum potestas in populo auctoritas in senatu sit* (Cicero, De legibus 3, XII).

623 Valerius Maximus, V, 8, 1-5.

624 Although it very often manifested itself in a military setting, *imperium* was not limited to military commanders as its most overarching purpose was the defence of Rome, to act as the "guardian" of the city. This is why certain magistrates like praetors also wielded *imperium*, but in more specific and controlled circumstances.

625 This is but the briefest introduction to the concept of authority and we will see *infra* that it entails much more.

revered as the political institution with *auctoritas*: *Cum potestas in populo auctoritas in senatu sit*[626].

While *imperium* was the most extreme form of *potestas*, there were others. These were obviously not as formidable as *imperium*, but their importance cannot be understated because they gave *potestas* an importance beyond that of the "do or die" *imperium*.

B. *Patria potestas*

There were more instances of *potestas stricto sensu* than instances of *imperium*, but violence (its degree notwithstanding) was always a factor. In Greco-Roman culture, many myths depict acts of violence leading to an increase in power. The most fundamental of all was the war between Zeus and his father, Cronos. Right before Ouranos was defeated at the hands of his son Cronos, he predicted that he would also be toppled by his own son. In order to avoid that, Cronos ate his children as soon as his wife Rhea gave birth to them. Refusing to let her last son be eaten, Rhea fled and gave birth to Zeus in secret, who grew up far from his father's gaze. As soon as he came of age, Zeus freed his siblings from their father's entrails and united them in the war against the titans and Cronos. In the end, the Gods were victorious and crowned Zeus as their king, granting him power over all forms of life[627].

The most widespread form of *potestas* was the *patria potestas*, the power belonging to the male head of the family, an ironic follow-up to the Greek myth of Cronos' death at the hands of his children. The *patria potestas* was aimed at those living under the rule of the *pater familias*. This *potestas* was the most important for two reasons: the material and temporal extents to which it went.

The most noticeable aspect of the material extent was undoubtedly the right to kill or let live the *alieni iuris* slaves and children (this did not extend to the wife of the *pater familias*) and had the right to inflict any corporal punishment onto them, although this prerogative was attenuated under the Empire[628]. Other elements of the *patria potestas* included the following actions, all of which could not be accomplished without the consent of the *pater familias* (who was always *sui iuris*): marriage, to be party to a trial outside of the XII Tables, the right to acquire

626 Cicero, De legibus 3, XII.
627 Graves pp. 55-58.
628 Gaius *Institutes* 52, 55; Girard pp. 150, 152.

ownership of goods (another element which softened under the Republic and the Empire), etc.[629]

These were never considered an abuse of power, for *potestas* was inherently void of any potential abuse, void of any internal limit restraining it[630], to the point where the *pater familias* had what was called "an absolute power" over the other members of his family[631].

Alieni iuris could not hold any *patria potestas* themselves[632]. They were also not free to exercise their rights based on private Law[633], although this did not prevent them from holding office as the example of Fabius Maximus *infra* shows. On the other hand, those *sui iuris* (often a *pater familias*) were legally autonomous, authorized to dispose freely of their rights within the frame of the general Roman laws[634].

The temporal extent of the *patria potestas* was the length of time during which it applied: it generally disappeared when its beholder died or through emancipation, meaning that depending on the circumstances, Romans could remain *alieni iuris* from birth to death, under the *patria potestas* of their father, grandfather, etc[635].

We know that the etymology of *auctoritas* referred to *augeo*, to augment[636]. We have also seen that augmentation implied the notion of foundation, of building upon what was before, implying in turn that the transmission from the past generations to the future ones is an important part of the essence of *augeo* and *auctoritas*. The relationship between a father and his children thus not only reflected *potestas*, but *auctoritas* as well, despite the fact that the exercise of the *patria potestas* was much more private than public. Even more so, when pitted against one another, *auctoritas* would prevail over *potestas* as the following anecdote illustrates.

Plutarch tells a story about the *gens Fabia* where an *alieni iuris* held a prestigious office, but whose father wanted to test him by forcing him to make a choice between doing his duty to Rome or showing respect to his father, legally still his

629 Girard pp. 149 ss.
630 Thomas p. 165.
631 Girard pp. 149.
632 Mackelden p. 80.
633 Gaius, Digest 28.1.6.
634 Gaius, Digest 1.6.1.
635 Ulpian, Digest 1.6.5; Girard pp. 205 ss.
636 Cf. *supra* part 2, I, 2, A and C.

sui iuris guardian. The son, Fabius Maximus, was a consul at the time and was working in his office in Rome. Defying an order not to approach on horse, his father rode to meet him, but his son swiftly asked his guards to make him dismount. The father obeyed and ran to his son to congratulate him for putting Rome ahead of his guardian, telling him that Rome was founded and grew by putting her honour before that of one's family[637]. Consciously or not, Fabius Maximus' father ended up testing both his and his son's *potestas*, which enhanced their *auctoritas*: the father by inciting his son to protect the honour of Rome and the son by aptly responding to this incitation. That being said, the *patria potestas* was a real form of power, despite the prevalence of *auctoritas* on the rare occasions they were opposed.

We will expose *infra* that Law is made primarily of *auctoritas*, but that the *potestas* component is not entirely cast aside, especially when sanctions come into play as in criminal law for example[638]. The ability to let someone live or die was one of the hardest-hitting sanctions, the ultimate show of *potestas*, and the fact that the *pater familias* had this right over all people under his "jurisdiction" except for his wife is a vivid reminder of this *potestas*[639].

The most famous examples of a father killing his children happened at the very beginning of the Roman Republic after the expulsion of the last king of Rome, Tarquin the Proud, in 509 BC. One of the main actors in the downfall of Tarquin was named Lucius Junius Brutus, who became one of the first consuls of the Roman Republic. Lucius Brutus had two sons, Titus and Tiberius, who took part in a conspiracy to restore the Roman Monarchy. After dismantling this conspiracy, Lucius Brutus asked his sons to defend themselves and in the face of their silence, condemned them to death. The death sentence was not pronounced by the father but by the consul. In doing so, Lucius Brutus immensely augmented his own status by proving that the well-being of Rome was more important than the lives of his sons or his father status. This story ended in a tragic yet ironic manner: through the ultimate show of *potestas*, Lucius Brutus augmented his *auctoritas*, keeping in mind that *auctoritas* implies a foundation, something to be built on and transmitted. Though he died a few months later on the field of battle, Lucius Brutus was

637 Amyot p. 105; Fabius Maximus XXIV, 2-25.

638 Cf. *infra* part 2, V, 2.

639 Cf. Valerius Maximus, V, 8, 2-5 for crimes severe enough to warrant the death penalty and 9, 1-3 for crimes that were not quite so, showing that if death could be pronounced, it was only in the direst circumstances, usually the ones involving treason. Cf. Youni pp. 56-58 for more examples.

considered to be one of the fathers of Rome as his legacy and *auctoritas* lived on for generations[640].

This last example was different from those mentioned before, because the condemnation was pronounced in a public official capacity rather than as a *pater familias*. However, it encapsulates beautifully both the distinction and the link between *auctoritas* and *potestas* among ancient Romans: an act of supreme violence in the name of general interest, of the *polis*, of generations to come and of Rome, conferred on its author an *auctoritas* which lasted for centuries[641].

As mentioned before, the paternal figure is not just one of *potestas*, but also one of *auctoritas*[642]. While there may exist a stereotypical vision of the father unable to do anything but lord over his family through strength and violence, the paternal figure is one of protection and support, which is where *auctoritas* is borne of. Through his acts of protection and support, a father educates his children and hopefully also serves as a moral compass for them[643]. This is very apparent when looking at daily situations: demonstrations of power do not happen in a majority of cases, but in the most "extreme" circumstances i.e., when children do something problematic and grave enough that severe measures have to be taken. Roman *pater familias* did not kill their kids on a regular basis, but only in the most extreme cases (treason). In our contemporary occidental society as well, fathers do not (in the majority of cases) sanction their children on a constant and daily basis, rather try to educate their

640 Valerius Maximus V, 8, 1. While these little stories might seem somewhat trivial, their importance lies in the fact that they were easy to remember, *fabulae*, fables recounting the deeds of people worthy of being emulated, which is exactly what Valerius Maximus had in mind. Moreover, these fables were overwhelmingly centred around magistrates i.e., those dedicated to the *res publica*. Interestingly, a great number of these magistrates were trained in Law, who were depicted as guarantors of stability, those who enshrined the *mos maiorum*, the most important customs (Bur pp. 72-73). See also Le Doze (pp. 99-100, 116-117) regarding the importance of classical tales and their staging in the transmission of the substance of authority.

641 Caesar's adopted son, Marcus Junius Brutus, was part of the same *gens* and this was often highlighted by those pushing him to kill the new "king" of Rome. Cf. Cicero's De claris oratibus.

642 Or at the very least, it should be. While we are keenly aware that father figures are too seldom real figures of *auctoritas*, we will not go into any details regarding this matter. Our objective is here to underscore the relation between power and authority, common points and divergences, not to explain how the paternal authority has evolved over thousands of years.

643 Bilhéran pp. 52-53.

children by showing them how to act and behave[644]. The notion of *patria potestas* thus regrouped both *auctoritas* and *potestas*.

6. Conclusion to the Roman genealogy

With these few explanations concerning *patria potestas* and *imperium*, we now have a better understanding of what *potestas* was and more importantly, what *auctoritas* was not. Despite the fact that *potestas* was always founded on a type of *auctoritas*, its essence was and remains the capacity to sanction unwanted behaviour or to prevent them from happening through the threat of a sanction. In both cases, *potestas* implies coercion and a certain degree of violence, both of which are absent from *auctoritas*. More importantly still, *potestas* without *auctoritas* was not conceivable in the Roman public sphere, and even in the private sphere, *potestas* was often used in order to further the purposes of *auctoritas*.

On the other hand, *auctoritas* was a matter of perception: how was a person perceived by his fellow citizens based on his actions, words, demeanour, etc. The strongest instances of Roman *auctoritas* were directly tied to the augmentation of the *res publica*, the common good inherited and transmitted from one generation to the next. This does not come as a surprise given that the sacredness of *auctoritas* manifested itself when Rome was involved as a community, when the matter of the *res publica* was touched upon.

However, this does not mean there was no personal dimension to *auctoritas*, which was found in people who did not act in a public context. In such cases, it was not so much a matter of sacredness or common good than moral superiority[645]. The personal component of *auctoritas*, did not only concern one's aura, but also the perception of said aura. As we have seen, legal practitioners did not require the same qualities as a military chief or a political strategist. Moreover, two legal practitioners are never identical, hence why they have different conceptions of *auctoritas* from one to the other.

This sensitivity to context is something we will analyse more specifically *infra*. We have seen with the judiciary process that authority could be epistemic or

644 Children imitate adults surrounding them, which is why many parents will try setting a good example for them to follow. By doing so, the parent displays a certain aura of authority which the children can use as a compass of sorts throughout their lives (cf. Grusec/Abramovitch).

645 E.g., attorneys, senators or scholars did not have the same *auctoritas*, which varied individually depending on their personal makeups. Cf. Baudry's article on this matter.

circumstantial, the former being stronger but obviously not as widespread as the latter[646]. Even so, individual accomplishments, despite their obvious importance in the construction of each person's *auctoritas*, were above all measured in light of the benefits Rome gathered from said accomplishments.

Ultimately, *auctoritas* was more of a collective affair than an individual one. In the construction of *auctoritas*, the first steps could very well be individual. However, the final cause of Roman *auctoritas* was the augmentation of the collective good, the *res publica*. It suffices to imagine the case of someone with a high moral character acting against the best interests of Rome, the sacred common good. We somewhat doubt that such a person would conserve his *auctoritas* very long. Even more so, if such a person did not brazenly act against Rome, but simply only cared about his own personal interests as we very often witness nowadays, he would only reach a very localized level of *auctoritas*, one limited to the domain of his expertise and the people of this domain.

Moreover, placing himself above the *res publica* (albeit passively), would probably deter many of those attracted by this person's *auctoritas* in the first place. Going a step further, we could ask ourselves whether someone unconcerned with the common good, not only in Rome but nowadays, can really maintain their authority in the long run. If the answer to this riddle is not clear-cut, such was not the case in ancient Rome, for the common good was sacred and thus left but little space for individualistic behaviours, at least in the field of *auctoritas*.

Auctoritas' substance is very strongly tied to its sacred roots, of which the *res publica* was an emanation. In other words, the collective identity of Rome derived from what was sacred to Romans and thus something in which they not only believed but placed at their core. This sacredness transpired from all institutional moments of Rome's existence: Romulus' foundational augur, the general Jupiterian authority granted to magistrates at the beginning of their mandates that imbued all their actions, the destitution of magistrates when the divine signs were inauspicious, the augurs military officers had to take before launching an assault, etc.

[646] David p. 190. On a sidenote, this author gives a definition of *auctoritas* which largely excludes morality from it. He uses the example of the disgraced Verres who retained a certain *auctoritas* in spite of his public disgrace. However, one page later, the same author associates *auctoritas* with a list of moral qualities acting as an extension of *auctoritas*. Given the many instances where *auctoritas* was resolutely identified as belonging to someone morally superior, we are not convinced by David's demonstration here.

This sacredness, incarnated in the *pomerium*, was the heart of the *res publica*, that for which Romans worked in order to ameliorate what had been founded by their ancestors. The idea was to leave Rome in a better state than she was when one entered it. Very simple, this idea was philosophically very astute, because it gave an immediate and direct purpose to all Roman citizens, a place to belong and a final cause that revolved around the concept of *auctoritas*, a concept which incited people to strive for the "best possible" of the common good. As such, the essence of *auctoritas* was resolutely more collective than it was individual.

Extremely broad, *auctoritas* encompassed all domains of Roman society and was therefore not limited to legal practitioners or magistrates. In Law and as we will see *infra*[647], authority belongs to the interpreter. Whether it is a judge, an attorney, a prosecutor, an arbitrator, a scholar, a court clerk, an intern in a law firm or a jurist working in a public administration, all can be depositaries of a legal authority to varying degrees. This obviously does not mean that every single jurist is an authority, but like in ancient Rome, authority is an integral part to the way they function. Being far less understood nowadays than in ancient Rome, contemporary jurists will often talk about authority without knowing so. "What does X. say about this?" "Has Y. made any comment on that case?" "Go ask Z. for anything on that matter, she's the best." These remarks and questions are daily made thousands of times by jurists all over the world and they all point to one concept: authority. We will not go into further details for the time being. We only wished to draw a simple parallel between ancient Rome and the contemporary Occident to show that authority is still very much alive in the legal world[648].

Authority and our knowledge of it has declined ever since the Roman era, a fall accentuated by the movement of the Lumières and the Aufklärung. More precisely, this decline's acceleration roughly coincided with the rise of positivism, legal positivism in particular, individualism and the alienation of customs. In a doctrine where the only relevant authority is the text of law, where the spirit of analogy is replaced by univocity, the very concept of authority suddenly becomes very hard to grasp. Indeed, if one voice stands so much above the others that it become the only

647 Cf. *infra* part 2, V, 5 and part 3, III.

648 Cf. *infra* part 2, V, 2, C, D regarding the effectivity pole and the role played by the doctrine's authority in the legitimacy pole of Reale's three-dimension theory of Law; e.g., art. 38 of the Statute of the International Court of Justice, which mentions "the teachings of the most highly regarded publicists."

relevant one, and if said voice is a text of law, a human interpreter's role becomes nigh-inexistant in the application of Law, as shown in normative hermeneutics[649].

Establishing an exhaustive genealogy of authority is not the objective of this doctoral dissertation. This is why we were focused on the birth of authority, which happened in a place and time where it historically thrived the most and was thus most salient. In light of this, the following section will be dedicated to explaining why authority is perceived differently nowadays than it was in Rome. However, given that this "fallen" vision of authority is not the one ultimately used in our conception of legal philosophy and understanding of international arbitration, we will not dwell on it too long. Instead, we will use this opportunity to initiate the transition to the analysis *stricto sensu* of authority, which is the necessary preamble to the last section on this part on authority: authority in legal philosophy through the prism of international arbitration in particular.

[649] Cf. *infra* part 3, II, 2, B, *a*.

III. The fall of authority during Modernity and the contemporary questioning of the modern conception of authority

1. Introduction

Before continuing the genealogy of authority, we would like to underline certain methodological aspects. First and foremost, authority is far from monolithic, as are all notions in legal philosophy. Taking concepts and shedding a light on their purest form is often done for two main reasons. The first one is when someone firmly believes that a concept is pure, void of any residue and thus existing without relation to other matters, it allows them to present an absolute conception of said concept[650]. This is something we are wary of, because it fundamentally alters one's critical capacity by inciting one to envision philosophical concepts as pure manifestations of the intellect.

The second reason is for pedagogical purposes: explaining a concept while considering the entire contingency surrounding it is extremely difficult to achieve, even more so in a work like this which does not focus on one single legal-philosophical concept. In order to manipulate authority in legal philosophy, we think it more important to look at it within various contexts. Given how Daedalian authority is, we are convinced that grasping its essence is the only path to any further manipulation of the notion[651].

[650] From the Latin *ab-solvere*. *"Ab"* means off, away from and *"solvere"* means to detach, to loosen. In other words, what is absolute is detached from everything, unrelated to anything.

[651] That being said, toying with authority further than its essence, its substance, very quickly falls into the realm of analytical philosophy. As explained *infra* part 2, V, 3, analytical philosophy is far from offering the ideal methodological tools with regard to authority. The reason is simple: authority is too protean a concept to isolate components beyond its essence, and hope to use them to define it.

We have already brushed over the difference between power and authority here and there, especially under their Roman coating. The reason being that it is nigh-impossible to make any mention of authority without balancing it out with power: one cannot properly understand the first without at least a basic idea of the latter. Unfortunately, the frontier between them, which was extremely clear during the Antiquity[652], has blurred to the point where a dizzying number of scholars do not distinguish one from the other[653]. Among jurists, one only needs to think about the oft-used term of "competent authority" to see that the term has acquired a meaning far removed from its original contraption.

This murkiness is something we owe mainly to Modernity (chief among which the French Lumières), which was in a hurry to pick up Descartes' methodology, grounded in physics and mathematics and apply it to humanities such as Law[654]. This is why we will look at Modernity: to understand why power and authority got conflated, and why distinguishing them is so important in regard to international arbitration, and even Law as a whole.

We would first like to take a look at one of the fathers of modern philosophy: René Descartes. Part of his remaining philosophical influence resides in his attempt to remove morality from truth, to render Science void of prejudices, to reach objectivity without subjectivity. While it is indeed important to not let ourselves be too wary of our prejudices and be critical of them (or at least open to critics), Descartes' and Modernity's great error was to think that we could be free of them and the tradition they incarnated. As a figure epistemologically rooted in tradition, authority suffered as a result of this haste to reach what was thought as intellectual independence[655].

652 Cf. *supra* part 2, II, 3-5.

653 Kerneis p. 111. We do not intend to establish an exemplative list of scholars doing this very mistake, because it would be endless. Those mentioned in this dissertation are those who manage to avoid it, admittedly a small number.

654 Papaux, Introduction pp. 118 ss; Arendt, Authority p. 100. Please note that the assimilation of power and authority was not made overnight and singlehandedly by the Lumières. The process took a long time coming and originated under the Church, especially its greediest members, which is something we will quickly explain *infra*. We will not, in spite of that, make a full analysis of the Church's role, preferring instead to focus on modern philosophers, who impacted the notion and influenced our contemporary situation more directly and more pervasively.

655 Gadamer p. 448.

The source of this error can be found in a certain penchant for binarity: something is either true or false. The very idea that one can only approach (and never reach) truth and have to limit one's self to what is most plausible was rejected by Descartes. For this reason, he overlooked the philosophical foundations of natural sciences as they were, supposedly, too shaky for an enterprise aiming to uncover truth itself [656].

Intentionally or not, through this rejection of both relativism and the notion of likeliness[657], Descartes essentially cut himself from the past, traditions and the figures of authority which ensured their transmission[658]. This is where the modern intellectual project became abstract, ironically separated from reality[659]. Amusingly or tragically, this was the starting point of authority *(auctoritas)* becoming something to be wary of [660].

Not one to be satisfied with half-measures, Descartes not only ambitioned to separate himself from tradition and authorities, but from his very own prejudices[661]. Willing to question everything to the extreme, he considered that proper research should be conducted from ground zero and with a mind critical of everything, including ourselves[662]. This is something that shall be developed *infra* in part 3, but at this point, we will simply say that this arrogance is what caused him to think that

656 Descartes, Méthode p. 38.

657 This includes, obviously, the overarching intellectual analogous reasoning, which is perhaps the most underestimated, yet perverse, effect of this impossible quest for objectivity. Cf. Bezat/Papaux for a more detailed account on this matter.

658 Given how influent Modernity has been on jurists and how it led to them wanting to build a *Rechtswissenschaft* instead of an *ars juris*, it is important to ponder what Descartes wrote to understand why the constant obsession with legal technique rather than justice, which is how we got to the current absurd degree of legislative inflation. Unlike sciences, truth is not at the centre of Law, justice is. And given that truth can be unfair, it is not an equivalent of justice. Moreover, truth is something so hard to reach and establish that what matters most for justice is plausibility (cf. Papaux, Introduction for a detailed account on the matter). Establishing a "true" legal science in the Cartesian way implies discarding traditions in order to build back from the ground up. As a consequence, jurists forget the purpose of Law, a purpose that any student of legal history knows: to do justice, not to lay out a perfectly coherent and logically flawless legal system.

659 Gadamer p. 451.

660 To be sure, the downfall of the concept itself started earlier, with the Roman Catholic Church, that elected to combine power and authority for purposes of simplification and an increasing lack of *auctoritas*, to which Luther participated immensely (cf. *infra*).

661 Descartes, Méthode p. 55.

662 Descartes, Méthode p. 49; Gadamer pp. 446 ss.

he could be perfectly objective and not subject to his very own existence[663]. Funnily enough, this absolutism was continued by the philosophers of the 17th and 18th centuries, the very thing they accused (and they were not entirely wrong about that) the Church of[664].

Further adding to the irony of the situation, what Descartes advocated had already been discussed at length by scholars of the 13th century. Thomas of Aquinas in particular was very fond of hearing counterarguments to whichever thesis he advanced. Even more so, he considered doubts to be an integral part of the reflexive process, and those unburdened by them to be unable to make any sort of relevant progress[665].

Descartes' belief in objectivity and his systematization of how to reach it implied a *tabula rasa*, which effectively cuts him from past intellectuals who, like Thomas of Aquinas, had tested their theories through errors and doubts. In doing so, Descartes also cut himself from the tradition and authority of past sources and authors, from their intellectual continuity, all for the sake of an objectivity suddenly sounding more subjective than ever[666].

We do not contest the importance of disputing established theses and questioning prejudices, as not doing so is indeed the best way to be blind-sided. What we do dispute is discarding them completely, an impossible feat which renders those who think themselves capable of doing so not only impervious to critics, but also convinced that they have reached objectivity, one where only the truth is supposedly left. Blindly believing an authority is clearly something to avoid, but in no way does it mean that listening to it is unreasonable.

663 This is his famous first rule, which consists in only accepting what we assert to be the truth (Descartes, Méthode p. 49).

664 Papaux, Introduction pp. 123-129. Cf. the opening quote of the book from Hugo Grotius's De Jure Belli, which beautifully encapsulates this absolutism: *"En vérité, je le reconnais ouvertement, comme les mathématiciens considèrent les figures séparément des corps, ainsi en traitant du Droit j'ai détaché mon esprit de tout fait particulier."*

665 Marmursztejn p. 81.

666 When thinking about it, a field where a *tabula rasa* is operated implies that the person doing the rebuilding is alone, or at least very isolated: all previous thinkers are gone. Nowadays, *tabula rasa* is a very efficient method to increase or decrease artificially the importance of certain targeted thinkers, which, again, does not sound very objective. This is typical of analytical philosophy, whose propensity to ignore history is directly inherited from the Cartesian *tabula rasa*.

Our perception of authority is somewhat more balanced, and because we are fervently opposed to any form of binarism, we strongly believe that a nuanced approach is possible[667]. In the end, by rejecting all matters of authority, Descartes laid out the groundwork over which subsequent intellectuals would trip.

Another reason, undoubtedly more logical, for this dismissal of authority was the fact that wielders of power of the epoch used authority and tradition to justify their actions, despite said actions heavily failing the common good and thus lacking in authority[668]. High-ranked clergymen, lords and tribunals used authority and tradition to justify what had become an unacceptable form of politics and justice (cf. *infra*). This is probably the most important reason why they were directly targeted by modern intellectuals, and with them the administration of justice.

However, because these actions were unacceptable, they were already void of authority. This is something modern authors failed to understand as a whole: official institutions without authority become bearers of quasi-pure *potestas*, the only remaining tool to keep them at the proverbial top of society. By failing to dissociate power from authority, modern intellectuals hence definitively enshrined the confusion purposely created by greedy and unauthoritative clergymen (cf. *infra*).

Additionally, the objectivity fantasies of science were bleeding into Law, which is why Modernity tried to reduce the importance of authority and tradition in Law through the use of "objective" legal texts, hence crowning legal positivism.

This was probably their biggest mistake as far as legal philosophy is concerned. Any student of legal history understands the importance of customs and traditions in the developments of Law. In order to render Law objective, void of archaic traditions, modern authors vehemently promoted the use of texts, which were supposed to replace customs through a *tabula rasa*. The effect was that they cut Law from its past, its traditions, and most importantly, its authority.

This is the very reason why, although it is not the central topic of this dissertation, it is nonetheless critical to point out the many flaws of text sacralisation i.e., legal positivism (or, in its most extreme forms, legalism). The parallel evolution between authority and legal positivism is quite striking: the more the latter and its pretention to objectivity and scientificity without tradition progresses, the more authority is left

667 Cf. *infra* part 3, III.

668 Krieger pp. 148-150.

behind. Law was gutted from its authority in order for it to reach objectivity, the truth, to the detriment of justice, which is incidentally its final cause.

Before moving on with Modernity and the concept of authority, we would like to seize this opportunity to lay down the definition of a historically cardinal legal-philosophical doctrine: legal positivism. Considering how often we use it to contrast many of the concepts used herein, it is important that its definition be properly laid down in order to understand what we refer to when mentioning it.

First of all, let us note that positivism is not limited to Law, spanning instead every field of academia, from sciences to humanities. The general positivist doctrine essentially took birth during Modernity, with researchers from various fields rethinking the object of their research as external to them, in other words, their researches became guided by objectivity, an objectivity only the scientific model they thought could reach. As a consequence, positivism has imported the "value-neutrality of the scientific method"[669].

"*La pensée se débarrasse de toute considération métaphysique de cause première ou finale et, plutôt que de spéculer sur la* raison d'être *des phénomènes, se contente d'établir leurs* conditions d'existence. *Le phénomène ne peut être expliqué que par le phénomène*."[670] In other words, positivism is more concerned with "how" rather than "why", with its purpose being to produce accurate descriptions of systems (legal or otherwise)[671].

A subcategory of positivism, legal positivism fully embraced this objective mindset. Although legal positivism rose to prominence during Modernity through the modern developments of science as mentioned *supra*, its roots can be traced back to Ockham's nominalism, Augustine regarding the commands of *jus potestas*, even Plato for the top-down intellectual matrix[672]. While mentioning these distant ancestors may seem unnecessary, doing so is actually extremely important. The reason is that unlike the vast majority of scholars[673] who wrote about legal

669 George, Preface p. vii.

670 Maulin pp. 1171-1172.

671 George, Preface p. vii; Bobbio p. 28. A consequence of placing the interpreter outside of a phenomenon is the prevalence of univocity over the analogical reasoning, as we will see *infra* part 3 in more details.

672 Grzegorczyk pp. 34, 37; Papaux, Introduction pp. 29-42, 70-78, 103-113. Cf. *infra* part 2, III, 2 regarding the definition of Ockham's nominalism.

673 Cf. Dyzenhaus for instance, whose genealogy of legal positivism will be mentioned more lengthily *infra* in part 3, III, 2 along with a few others. Typically, these authors do not trace back the roots of positivism further than Hobbes, usually Austin and Bentham. As a

positivism and ignore these metaphysical and theological roots, understanding said roots shows us that the evolution of positivism in Law has not stopped, all the way to contractual positivism[674].

Positive Law refers to the applicable Law *hic et nunc*. According to specialists on the matter, it is of human origins, not an ideal Law deducted from fair and just principles[675]; *lex lata*, not *lex ferenda*. Positive Law is not incompatible with the divine will, simply that divine will must be translated into an accessible form by humans in order to become positive Law, which is why some contemporary positivists consider that moral judgement and legal criteria are intertwined[676].

Positive Law derives from the medieval Latin *jus positivum*. The notion of "positive" implies that the Law is *"posé"*, that it stays put, meaning that positive Law takes a written form. However, the written form is not enough for Law to be positive. To become so, Law needs to respect the pre-established formal prescriptions of the legal order it aim. It is those formal prescriptions, borne from the will of the state, which establish or dismiss the positive quality of Law by setting what are the validity criteria[677]. In turn, positive Law is viewed by legal positivists as exhausting the definition of a valid Law, meaning that they consider positive Law as the only valid Law[678]. That being said, positive Law itself does not suffice to define legal

consequence, nominalism, the opposition between *jus auctoritas* and *jus potestas*, the notions of divine command and sanction as well as the top-down intellectual matrix are barely mentioned, if ever. By forgoing such foundational characteristics, many scholars limit their analysis of legal positivism, meaning that they often propose solutions to extract ourselves from legal positivism without addressing all of these deeper problems. The top-down matrix and nominalism are particularly ignored in such instances.

674 Cf. *infra* in part 3, III.

675 Maulin p. 1174; Greenawalt p. 16. According to Bobbio, the mindset of legal positivists implies the rejection of that which is not validated by a formal prescription such as justice, the common good, etc. (Bobbio p. 26)

676 Greenawalt p. 17. It is very interesting to note, that, contrary to the opinion of contemporary positivists, non-positivists analysing legal positivism are widely convinced that this doctrine involves the suspension of moral judgement, implying that positivist officials apply formal laws whether they are just or not, "just because they are the law." (Schauer, Positivism p. 32)

677 Maulin pp. 1174-1175: *"Le positivisme juridique comme définition du droit ne se contente cependant pas de présenter le droit comme un* droit en vigueur d'origine humaine, *mais il ajoute, d'une part, qu'il n'est de droit que statué ou posé et, d'autre part, que les formes dans lesquelles il est posé ou statué suffisent à établir son caractère de droit. Pour ces raisons historiques, impérieuses mais contingentes, comme le souligne N. Bobbio, le positivisme juridique s'est affirmé au travers des doctrines qui posent que le droit résulte de la* volonté *d'un souverain, en qui s'incarne l'appareil étatique."* Cf. also Soper p. 216.

678 Grzegorczyk p. 34.

positivism, as the former is simply the vector through which the latter materialises itself.

> *"Ces considérations expliquent le caractère puissamment formaliste du positivisme juridique: c'est finalement un ordre d'habilitations et de compétences à produire des prescriptions, plutôt que le contenu de ces prescriptions, qui retient l'attention d'un juriste progressivement attaché à décrire l'ordre juridique comme un ordre d'imputation des volontés à un titulaire souverain. Sur le contenu d'une prescription, en effet, le positiviste ne peut rien dire sinon qu'elle est voulue par l'autorité souveraine. En procédant de la sorte, le positivisme juridique réduit considérablement la signification du droit pour le constituer comme objet d'une analyse objective et scientifique."*[679]

In accordance with this frame of mind, legal positivism's main purpose is to describe positive Law in an objective system, following the model of natural sciences[680]. The desire for objectivity often translates into the desire for exhaustivity, and both are reasons why legal positivists promote the idea that legal interpretations are above

[679] Maulin p. 1175.

[680] Grzegorczyk p. 33. "[L]*a montée en puissance des sciences de la nature et la rationalité fonctionnelle qui leur est rattachée paraissent devoir imposer une conception objective de la nature radicalement séparée de toute considération axiologique*." (Maulin p. 1172) Consequently, legal positivism mistakes the properties of legal rules with those of nature: legal exceptions do not a legal rule invalidate, but exceptions to a scientific rule often do so. This epistemological error is perhaps one of the most prohibitive aporias of legal positivism alongside objective univocity. The consequence of such an error is that the *ars iuris* has increasingly been perceived as *Rechtswissenschaft*, completely upending the epistemological nature of Law, which, as a result, now makes use of deductive reasonings to craft legal reasonings, instead of using abductive reasonings (cf. Papaux, Introduction pp. 137-219). The choosing of the main characteristic of legal positivism varies depending on the scholar, but this desire for objectivity is the most overarching criterion specific to legal positivism, under which other criteria are regrouped. Some consider that the separability thesis, according to which morality and Law are separate, is the most typical aspect of legal positivism. This would explain why and how the objectivity chimera was birthed: morality varies from person to person, and if one considers that morality is the sole subjective component of Law indeed, this would mean that a Law without morality is a Law without subjectivity i.e., *Rechtswissenschaft*, objective legal science. Likewise, the rule of recognition is another often mentioned characteristic of legal positivism. According to this rule, there is a necessary normative social practice specifying the conditions under which a norm becomes part of the Law (Coleman p. 287). However, this is not limited to positivism because this is also the case in oral customary Law, which is not part of what legal positivism considers to be Law.

all univocal[681], to the point where interpretation's main purpose is to solve "accidents" of the legislative process, reflections of human mistakes[682].

This penchant for univocity has given birth to some of the more recent legal concepts such as the notion of universal rights[683]. More overarchingly, legal positivism uses the Platonic top-down intellectual matrix, along with some of the most influential theological doctrines of the Roman Catholic Church[684].

This means that Law is created (the top) and applied to individual cases (the down); the solution to a case is thus deduced from the Law. This is contrary to the bottom-up matrix developed by Aristotle according to which concrete cases (the bottom) are used in order to create Law (the up); Law is thus induced from concrete cases.

The main vector used by legal positivism to materialize Law are commands, which we are obligated to perform lest we suffer sanctions[685]. These commands emanate from the will of those at the top (will of God, will of the legislator) and are applied to the down (mortals, concrete cases). Although legal positivism is not intrinsically individualist, its latest offshoot, contractual positivism, anchors this dimension into the positivist doctrine because of the overwhelmingly individual nature of its main vector: contracts[686]. Given its structure (written and striving for univocity), legal positivism does not allow for much legal and interpretative evolutive flexibility when compared to other currents[687], which probably explains why arbitration resisted it longer than other legal fields. Indeed, arbitration being specifically conceived to be as close as possible to the concrete case and as unrestrained by the *jus positum*, it is only logical that legal positivism would be most incompatible with it[688].

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681 Ouedraogo p. 523. Given how legal positivism functions on a metaphysical level i.e., by erasing the subjective axiological differences between each legal interpreter, it is oriented towards univocity before the interpretative process has even begun.

682 Bobbio p. 33.

683 Wyler p. 348.

684 Cf. Papaux, Introduction pp. 1-134.

685 Bobbio p. 28; MacCormick p. 170.

686 Cf. *infra* part 3, III, 2.

687 Interestingly, and a bit ironically, the very idea that the word "interpretation" may have multiple meanings is itself rejected by well-known positivists: "The boundaries of the proper use of the term are too fluid, and language is too tolerant of what the intolerant might regard as deviant uses to make the enquiry into 'interpretation' in the raw philosophically – as opposed to lexicographically – rewarding." (Raz, Intention pp. 250-251)

688 Cf. *supra* part 1, VI.

2. Modernity's error

Before digging deeper into the twists and turns of Modernity's vision of authority, it is important to know that this dissertation and this section in particular are not meant as a critique of Modernity as a whole. There are indeed numerous brilliant and extremely thought-provoking ideas which hailed from this era, especially from some of the thinkers whose vision of authority we will criticize hereafter. As in every philosophical era since the dawn of mankind, there are positives and negatives in Modernity. However, for our themes (authority and, to a lesser extent, legal positivism), Modernity's take is quite lacklustre, which is why, following the overview of Descartes' fondness for objectivity, the reader might reach the conclusion that we are plotting the intellectual assassination of Modernity: such is not the case at all.

Modernity was an incredibly profuse epoch from an intellectual and documentation standpoint. Associated with notions, namely laicity and individual freedom, it was not as monolithic as often depicted. Lasting well into the 19th century, there were indeed many lesser-known descendants of the scholastic tradition, some of which widely refuted the conception of authority set forth by the liberal current. We would like to stress the importance of distinguishing between the philosophy and the political visions of these "counter-moderns". The latter are often less interesting than the former in addition to being irrelevant to our topic.

In order to avoid straying too far from the main topic of this section, we will only mention one of these philosophers: Joseph de Maistre, particularly because of his analysis of authority. A high-ranked politician, nobleman and lawyer from the duchy of Savoy in the 18th and 19th centuries, Maistre is considered the earliest figure of counter-Enlightenment. Accordingly, he often challenged the ideas of Bacon, Locke and Voltaire from the side of tradition and Catholicism[689].

Maistre was sceptical of the absolutist vision of mankind peddled by the Lumières. He considered that any one person inserted themselves in a historical process, rendering them incapable of severing their bonds with the past: human nature being inherent to history[690]. Acknowledging the weight of tradition through history and being very submissive to the Roman Catholic Church, Maistre was naturally more

[689] Garrard p. 97.
[690] Brahami p. 141.

open to the Roman distinction between power and authority, even though by then, it had already been emptied of the common good that characterized it[691].

In other words, Maistre understood the profound historicity of authority, that it revolved around augmenting the foundations laid down by our forefathers. Despite that, the fact that the Roman Catholic Church, the one whose authority he vehemently defended, had shown too many times over the past centuries that its authority did not serve the common good, but that of a small clerical elite, eluded Maistre. Between 1516 and 1790, 90% of French bishops were nobles and their

691 We would like to use our reference to the Roman Catholic Church to warn the reader about its role in the genealogy of authority. The Roman *auctoritas*, obviously, did not transform overnight under Descartes' tutelage. It was simply under Modernity that the notion took the last and most decisive step in its transformation. Likewise, contesting tradition did not come out of nowhere: the opposition, founded or not, to authority and tradition was the consequence of centuries of abuse of both by the Church. The first element of authority to be transformed was its collective nature. Although it still represented the common good, authority was incarnated in the individual figure of God and his earthly messenger, the pope. Furthermore, God combined both power and authority more intensely than any human being ever had before. Despite that, it was not until the 13th and 14th centuries that power and authority started to merge, in the terrestrial plane, under the supervision of the greedy upper echelon of the clergy. "The change tended to blend the meanings of the idea in the spiritual and temporal realms of Christian society, and to produce a simplified version of authority as the basis of coercive power. Because spiritual authority within the Church became disunited and disputed during this period, Papalists and Conciliarists alike resolved the ecclesiastical ambiguity of authority and power in favour of the more manageable idea of power, with the idea of authority adduced simply to add the connotation of rightful origin to the rightful title already inherent in the idea of power." (Krieger pp. 147-150) This way to subvert authority remains to this day, particularly with politicians, through the use of beloved symbols and common memories in attempts to justify, legitimize their (ab)uses of power. Although it would be fascinating to do so, the exceedingly complicated theological debates regarding authority, religion and sacredness during the 1000 years of medieval history prevent us from seriously analysing this period of authority's genealogy. Furthermore, while a "Church chapter" on authority would definitely be useful to better understand how the confusion between authority and power began, the most definite steps in legal philosophy have been taken by the modern scholars mentioned hereafter. Although certain doctrines such as Ockham's, Duns Scot's or Augustine's unequivocally participated in the creation of the current positivistic *jus potestas*, the confusion was not as undisputed as we know it until legal philosophers tried importing the – supposed – methodology of natural sciences and apply it to Law. Similarly, the atomization of society was started by Ockham but concluded by Descartes and his heirs. Given how more direct the influence of modern philosophers on contemporary legal philosophy is, when compared to the Church, we have elected to underscore the former rather than the latter, in order to properly illustrate the fracture between antiquity and our times. Additionally, comprehension of modern authors is essential, whereas apprehension of clerical theory is "only" important, which is ultimately why we decided to focus on Modernity and positivism to explain the power-authority conundrum.

revenues were tenfold that of their direct inferior echelon in the clergy. Moreover, let us not forget that the Lutheran reformation was catalysed by promises of salvation in exchange for money[692].

The case of Joseph de Maistre is interesting because it shows that Modernity was more diverse than often thought, as well as illustrating how rocky authority's genealogy is. It also shows that even among its defenders, it was misunderstood and already deprived of its substance by that point in history, in addition to showing how much time it would take to properly analyse the modern evolution of authority. From here on, we will therefore focus on some of the most preeminent actors of the movement, whose influence is still felt nowadays, those to which Maistre and his cohort eventually lost the battle of ideas within the general public.

During the early period of the Enlightenment, Thomas Hobbes, along with John Locke, had a tremendous impact on how both contemporary Anglo-Saxon scholars and modern European thinkers conceived legal positivism and authority. Bathed in Ockham's nominalism[693], his vision of humanity as a collection of individuals, his consideration for individual liberties which he opposed to the collective virtue of the ancients and the way he brought *potestas, auctoritas* and *imperium* under the single banner of "authority" are all hallmarks of Modernity's most influential thinkers[694].

692 Pranchère pp. 277, 279, 283-284; Poncet pp. 300-301; Sesboüé pp. 65-73.

693 Ockham's nominalism essentially consists in the decomposition of universals in individual entities (Panaccio, Ockham p. 186). For instance, a forest is not a group of trees but an addition of individual trees (1+1+1), the word "forest" being generally used for semantical convenience when in fact, according to Ockham, each tree is an individual entity, different from all others (de Libera pp. 454-455). He therefore viewed universals as simple creations of the mind, without any concrete existence (de Libera p. 479). As such, in Ockhamist nominalism, there is no existence superior to that of individuals, there are no universals, no structures and no natural Law (Villey p. 227). Widely underappreciated in its impact on legal theory and philosophy, this theory laid out the fundamental groundwork for the very notion of subjective rights that we still use nowadays, typically in the field of international human rights (Villey pp. 222-223, 240 ss). More importantly, it is one of the cardinal sources of legal positivism as under it, Law is not conceptualized as a relation between people anymore. Instead, we find ourselves facing absolute rights deriving from an infinite will (whether God's or the legislator's), which in turn, amplifies the commutative contractualist logic apprehended *infra* (Grzegorczyk pp. 36-37; Papaux, Introduction pp. 104-110). Indeed, the only limit to absolute individual rights are other absolute individual rights, and in order to avoid pandemonium, individuals must negotiate with one another and accept restrictions to their absolute rights imposed by others' absolute rights.

694 Cf. Loiret. The reasons why this confusion between power and authority first came into existence are not clear. Although, by the end of this section, we will understand how said

Hobbes has routinely described authority as sovereign: its main purpose is to command those who willingly restrain their private liberties in order to live in a society[695]. In this regard, Hobbes' conception of authority was top-down to the extreme, because he considered authority's essence to be the imposition of law and order through the monster he named "Leviathan". Even more so, this sovereign authority has the capacity to univocally determine the moral and political truth[696].

While there may have been a bottom-up aspect to how Hobbes constructed authority (through the legitimacy of individuals acquired via self-restrictions), the way it materializes (through commands, strength, sanctions and univocity) reflects all the critical points of *potestas*[697].

Furthermore, the sole aspect of common good involved in Hobbes' conception of authority is self-preservation, a rather shallow vision compared to the ancient Roman one that encompassed all facets of society. By divorcing authority from the common good, Hobbes dissolved the Roman *auctoritas* into a sweeping version of *potestas* whose legitimacy stems from individual wills rather than the authority of a shared sacred foundation[698].

Proponent of a contractualist commutative justice, Hobbes combined his miscomprehension of pre-modernity authority with a fondness for legal positivism[699]. This fondness is seen through his use of individual contracts as the basis of his politico-legal system, conveniently grouped under the banner of a

confusion happened, we can only hazard guesses as to why it did. Referring to what we wrote a few paragraphs *supra*, the Church is the only influential institution bridging the gap between ancient Rome and Modernity which used and understood the concept of authority. We have also seen that by the 16th and 17th centuries, the Church was using its authority to justify acts of power void of authority. As such, intellectuals from this era may have taken an opposite stance, consciously or not, to what they considered abusive i.e., what the Church was trying to pass off as authority. Verifying this hypothesis would require going through ecclesiastical archives of this era, as well as working knowledge of medieval Latin to compare writings of the intellectuals and the Church and verify whether their evolutions match this hypothesis.

695 Hobbes pp. 339, 345-346; Lewis pp. 45-46.

696 Duke pp. 616-617.

697 Cf. Hobbes pp. 326-329, 345-346 who divides wielders of authority along the lines of victors and vanquished, the latter submitting to the former who hold absolute authority in the relation.

698 Strugnell pp. 149 ss. See also Lewis p. 53 who draws the same conclusion as we do.

699 Hobbes pp. 248-250, 339, 509-511; Baraquin/Laffitte pp. 186 ss. Many have designated him as the father of positivism. Though Hobbes was undoubtedly a fierce positivist, the foundations of the positivist doctrine are far older. Moreover, both the French Lumières and

social contract, a text of law, at the apex of society. In parallel, Hobbes considered that laws operated through commands, rendering the contract's application dependent on strength, which is the antithesis of what an authoritative contract or law should really be[700].

Often considered rationalist, Hobbes' ideology is much closer to idealism. Indeed, if his foundational contract, the one where individuals impose limitations on themselves, is supposed to be the reflection of an empirical process, the reality is much different. The reason is that such a contract is never signed, nor negotiated nor performed, quite simply. Therefore, through his doctrine of the Leviathan, Hobbes not only reinforces the idealism he was supposed to fight, but does so by sacralising power, thus draining authority of its sacredness to inoculate it in power[701].

Hence, quite logically, Hobbes became the first to effectuate fully the merger between *auctoritas* and *potestas*, exclusively defining authority through authorizations, a pure *potestas* operation. The Leviathan is thus the combination of a society's every individual's authorization, which become the Leviathan's very authority[702]: "an actor, by being authorized, acquires his authority."[703]

Enshrining legal positivism and furthering Ockham's nominalism, Hobbes eviscerated the notion of common good by construing it as the simple addition of individual interests, with the only thing common to all being the emotion of fear *("Homo homini lupus est")*[704]. This makes direct use of the coercive aspect of

the German Aufklärung did more to promote legal positivism than he did, which is why we think he deserves a nod, but definitely not the entire accolade.

700 Hobbes pp. 249-250, 290-291, 305 ss; Martinich, entry "law" p. 177. An authoritative law or contract is based on the effectivity and legitimacy poles of the three-dimension theory (cf. *infra* part 2, V, 2) rather than the validity pole as legal positivism, Hobbes' legal doctrine, suggests. Legal positivism is underlined by power rather than authority, whereby Law manifests itself in top-down commands rather than in the multiple channels and networks of authority. Furthermore, and most overarchingly, a Law downgrading citizens to individuals, transforming the common good into a nominalist addition of individual goods, is antithetical to authority.

701 Papaux, Introduction pp. 121-122).

702 Krieger pp. 151-152. The propensity to divide a "whole" into a multitude of individualities is a very clear reflection of Ockham's nominalism. This doctrine was ultimately the one upon which individual rights were philosophically based, violently discarding any thought of commonality (for instance, Ockham considered a forest to be an addition of individual trees rather than an entire, single organism).

703 Martinich, entry "authorization" p. 38.

704 This evisceration thus happened through the use of legal positivism. By using contracts, Hobbes thought he could discard tradition and use a contract as societal foundation.

power to induce certain behaviours, discarding the common good foundational to Roman *auctoritas*, something magnificently written by Eco: "Homo homini lupus, *et que le meilleur gagne. Pourtant cette loi ne peut être généralisée, parce que si je tue tout le monde je reste seul, et l'homme est un animal social*."[705]

Another famous thinker of the British Enlightenment was John Locke, often branded with the wide accolade of father of liberalism. On the specific topic of authority, Locke was very much in line with Hobbes: deeply confused about what belonged to authority and what belonged to power[706]. He considered, indeed, that authority's use was simply to validate the use of power (if transferred by the people). This places him in league with Hobbes, as both considered authority as manifesting itself through the *potestas* notion of authorization[707].

Like Hobbes, his approach was centred around contractualism, whereby individuals were required to submit wilfully to an authority for it to become legitimate[708]. In exchange for people guaranteeing that power, said authority had to represent their interests using Law, with the very existence of the latter two based on sanctions[709].

Given that, for Locke, a person's individual liberty was the purpose of a good society, and that said liberty was guaranteed by his own misguided conception of authority and Law, this would make freedom guaranteed by sanctions, which were therefore the basis of Locke's entire vision, reaching the stage of quintessential *jus potestas* made of individual freedoms based on sanctionable commands. By placing sanctions at the crux of both Law and authority, Locke associates a core emanation of legal positivism to his vision of authority. However, true authority does not rely on sanctions, for it would simply become power the moment coercion is used. Preferring the opposite concept of *jus auctoritas*, ancient Romans placed authority as the necessary legitimization of power, that without which power simply becomes violence[710].

Hobbes' problem vis-à-vis authority was thus twofold: he cut himself loose from tradition and removed the common good from the equation, both times through contracts, the most individualized prong of legal positivism.

705 Eco, Sens commun p. 31.

706 Locke, Treatises pp. 384-387.

707 Krieger p. 153.

708 Baraquin/Laffitte pp. 237 ss.

709 Locke, Treatises pp. 382-384; Locke, Essays p. 207; Hoff pp. 14, 17-18; Stanton pp. 17-18; Sheridan pp. 44, 46; Grant p. 618; Yolton pp. 120 ss.

710 Cf. *supra* part 2, II, 4 and 5.

Sanctions are typical of *jus potestas*, which imposes itself in a very top-down manner and relies on coercion, showing once more that Locke heavily mistook power for authority. Such a confusion leads to a very legalist vision of authority[711], one where legal texts (including contracts) are the foundation of authority and not the other way around[712]. This is very apparent when Locke gives his partial definition of authority: a power limited by contracts made by individuals to further their own liberties[713].

At this point, the Roman essence of authority, the sacred common good, has been "judicialized" and individualized. To this day, it is still often considered the sum of all individual interests instead of what it was in Rome i.e., something bigger than a sum of mere individual interests, which are definitely not outliving the dead and passed to future generations. Said otherwise, the concept of *auctoritas* has now been entirely subverted by individualism[714].

Given the prevalence of this work and how it has resonated ever since, we would now like to take a look at Diderot's encyclopaedia entry on political authority: *"Si la nature a établi quelque autorité, c'est la puissance paternelle: mais la puissance paternelle a ses bornes, et dans l'état de nature elle finirait aussitôt que les enfants seraient en état de se conduire. Toute autre autorité vient d'une autre origine que de la nature. Qu'on examine bien, et on la fera toujours remonter à l'une de ces deux sources: ou la force et la violence de celui qui s'en est emparé, ou le consentement de ceux qui s'y sont soumis par un contrat fait ou supposé entre eux et celui à qui ils ont déféré l'autorité."*[715]

Although he was very moderate compared to other figures of his movement such as Voltaire, Diderot was quite frontal regarding this entry, in particular vis-à-vis the Church, all the while channelling the ideas of Locke[716]. Diderot fully assimilates

711 Sheridan p. 39.

712 Strugnell pp. 149 ss.

713 Whereby the legal text (or the contract) is the one setting limits to Locke's – warped – vision of authority. Stanton p. 15; Locke, Treatises pp. 393-398.

714 This is sadly reflected in the writings of contemporary authors specializing in Locke's life work. In a stunning majority of cases, these authors analyse authority without ever laying out a definition of the concept despite Locke's own misconceptions (cf. for instance Hoff pp. 7, 14; Stanton pp. 7, 9-10; Sheridan pp. 46, 48; Maloy; Alzate pp. 226-227 and Grant pp. 629 who lays down the correct distinction yet draws contradictory conclusions). The emergence of generational environmental problems has seriously dented the Lockean conception of the common good.

715 Diderot p. 3.

716 Goyard-Fabre, Idées pp. 95 ss.

authority to strength and violence, while separating it entirely from Reason. According to him, the only natural and legitimate form of authority is the paternal one, which supposedly disappears as soon as children become independent. The lack of precision of the terms *"état de se conduire"* notwithstanding, Diderot assumes that, if not of natural causes, authority has but two sources: violence through strength or agreed upon submission reflected in the supposedly egalitarian structure of the contract.

While the notion of consent is mentioned by Diderot, it is put directly in relation with submission and power, which obviously removes any pretention to equality from the construction. This is quite obvious when reading the next paragraphs of the entry where he states that power comes from the consent of the people[717]. Other than conflating power with authority once more, Diderot considers that the people's consent is an act of submission, an act whereby they give power a certain legitimacy. In doing so, Diderot furthered Hobbes and anticipated Rousseau's social contract[718]. Consent in regard to authority does not, however, imply any form of submission: the hierarchy resulting from authority does not warrant or demand any type of submission. It is instead fully accepted, for the figure of authority is freely accepted, not imposed, does not coerce and depends on how it augments the common good. Authority does not require power, but power needs authority or risks a full rejection.

Justice *lato sensu* was one of the main themes of Modernity (particularly in France), with many authors criticizing the way justice was administered in the *ancien régime* and demanding that judges be extremely submissive to the text of law[719], the very submission Diderot expects from individuals to political authority. In Law, the term *autorité* thus mainly referred to heavily criticized jurisdictions[720], which was combined with an extremely top-down form of political authority. At this point, there was nothing authoritative left in authority.

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717 Diderot p. 4.

718 Goyard-Fabre, Idées p. 97.

719 Cf. Montesquieu's *bouche de la loi* for instance: *"Mais les juges de la nation ne sont, comme nous l'avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur."* (Montesquieu p. 116).

720 The reason they were so critical of the justice system was because they considered it arbitrary, corrupt and the manifestation of a power without authority. Cf. Voltaire's partial account of the Calas trial and his depiction of the justice system for instance (Garnot pp. 30-31).

Until now, we have seen that moderns viewed *autorité* as a manifestation of power, a mere vector through which power is actualized, both in Law and politics, the former usually as a tool of the latter. This confusion is still widely reflected in francophone Laws where *autorité* loosely refers to jurisdiction, which is, incidentally, defined by the Merriam-Webster dictionary as "the power or right to exercise authority", hereby showing that anglophone Laws have also suffered from this conflation of genres and concepts.

Diderot then adds: *"Le prince tient de ses sujets mêmes l'autorité qu'il a sur eux; et cette autorité est bornée par les lois de la nature et de l'État. Les lois de la nature et de l'État sont les conditions sous lesquelles ils se sont soumis, ou sont censés s'être soumis à son gouvernement."*[721] According to this excerpt, laws alone limit the *princeps*' authority, which does not make any sense, because the purpose of human laws has never been to curtail authority; unless we replace authority with power. Indeed, power is very often regulated by laws, even when written by said power: the laws of parliament, the laws regulating the courts of Law's organisation, etc.

However, such is clearly not the case for authority, whose limits are much more flexible and dependent on each case's apprehension of the augmentation of the common good[722]. This capacity of written laws – to curtail abuses of power, and not authority as he mentions – is where their authoritative (as in *auctoritas*) attribute lies according to Diderot. In other words, he viewed legal restrictions to

[721] Diderot p. 5.

[722] This passage from Diderot confirms what was previously said: his approach to authority and Law was essentially legalistic, albeit less so than Locke, Hobbes, Voltaire or Kant. Without going into too much detail, Diderot's approach to Law was generally more measured than that of his fellow intellectuals of the Lumières. Although he conflated authority with power quite extensively, he avoided reducing Law to criminal law as Voltaire did (Voltaire, Dictionary entry "Justice"). He viewed society as a whole, held together by a universal natural law, one where the common good is more important than individual rights (cf. Goyard-Fabre, Diderot pp. 147-148 for more details). Diderot's inclusion of the common good as superior to individual rights shows that he never fully committed himself to liberal legalism, as he understood, unlike Hobbes, the difference between a subject and a citizen, despite his misunderstanding of the concept of authority (Goyard-Fabre, Idées p. 110). This may just show that the disappearance of the notion of citizen was a consequence of the "disappearance" of the concept of authority, meaning that individualism would be a consequence of a vanishing authority, not the cause. This would further underscore the fact that ancient Greeks were just as attuned to authority as ancient Romans given how strongly they considered themselves as citizens of a society and *zoon politikon* (cf. *supra* part 1, I, 2 and part 2, II).

"authority" stemming from a *jus potestas* as the authoritative aspect of a law, hereby further upending both concepts in addition to promoting legalism[723].

Authority was hence increasingly conflated with an unacceptable manifestation of power, one void of the Roman *auctoritas* and prone to arbitrariness. While it is very broadly attested that the justice system in the old French monarchic regime lacked acceptability and commensurability[724], it probably was not as dreadful as depicted by its most famous critic: Voltaire[725]. More problematic still was the legal doctrine he promoted by drawing from the writings of Beccaria, which was the strictest form of legal positivism. According to this doctrine, the sole purpose of any judge is to apply the texts of law to the letter, without questioning anything, without any margin for any form of equity[726].

Perhaps the most well-known figure of the 18th century, Voltaire has a reputation for fighting against what he perceived as an unjust legal system in France. While his philosophical dictionary does not provide any explanation regarding authority (the entry is typical Voltairean sarcasm), it does provide an interesting insight into his mindset. At the entry of *"franc arbitre"*, he considers that liberty is the power to do what one wants[727], hereby illustrating that he inserted himself in an individualistic perspective rather than a societal one, an *"individualisme humaniste"* upon which he based his claim for individual universal rights[728].

723 This approach is part of a more general doctrine, one that has penetrated all the fields of research: positivism. Very briefly, positivism manifests itself in Law under the following terms: if something is not in the legal texts, it cannot be properly considered as being Law. Jurisprudence thus only serves as a way to clarify what is already featured in the base text. Most common Law jurists will – rightfully – scoff at this binary vision of Law, but the same mentality is prevalent in U.S. contracts law, where contracts are sometimes hundreds of pages long, because their originators are hell-bent on anticipating everything to which the contract can apply or not. This vision of Law, contractual positivism, can be considered an offspring of legal positivism (cf. *infra* part 3, III, 2).

724 Figeac pp. 309-310; Porret pp. 107-108.

725 It has been established that his account of judiciary wrongdoings was very certainly exaggerated in order to accommodate his own narrative. Having studied Law without ever practicing it, he was able to craft stories which sounded legally coherent, all the while circumventing the details disabling his narrative (cf. Garnot pp. 26-30). Garnot was criticized by Porret, but ultimately, the latter admits that the examples used by Voltaire were exceptional in their violence. The problem being that these exceptions were used to draw sweeping conclusions in order to fit his narrative which was then used to prop up positivism and downgrade authority.

726 Inchauspé pp. 421-422; Beccaria pp. 52 ss.

727 Voltaire, Dictionary entry "Franc arbitre".

728 Voltaire, Dictionnaire p. 370.

Barely mentioning authority, Voltaire nonetheless assimilated it to power when he did so. Unlike Diderot, he promoted a heavy form of individualism, incompatible with the Roman *auctoritas*. He did so by picking up the ideas of Locke[729] and categorizing customs as something to be disposed of because of their lack of uniform interpretation, thus heavily promoting univocity[730].

By denying the importance of a culture's inheritance and using Descartes' *tabula rasa* to rid a legal system of its past, Voltaire showed that the very notion of authority eluded him, that he was not interested in the augmentation of what had been, preferring instead a very top-down *potestas*-like method to rebuild the French justice system, one rooted in a chimeric legal mechanical univocity. It is therefore unsurprising that he never developed any thoughts on *auctoritas* given that it disproved his main argumentation line. This is particularly salient in his conception of Law, which was essentially limited to criminal law, the only legal domain where *potestas* is more substantive than *auctoritas*[731].

Moving on from Voltaire, we would now like to examine an excerpt from Alexis de Tocqueville's *De la démocratie en Amérique*. According to Tocqueville, despotism and arbitrariness are directly linked to the freedom judges have. *"Nulle part la loi n'a laissé une plus grande part à l'arbitraire que dans les républiques démocratiques, parce que l'arbitraire n'y paraît point à craindre. On peut même dire que le magistrat y devient plus libre* […]. *Le magistrat, en cessant d'être électif, y garde d'ordinaire les droits et y conserve les usages du magistrat élu. On arrive au despotisme. Ce n'est que dans les monarchies tempérées que la loi, en même temps qu'elle trace un cercle d'action autour des fonctionnaires publics, prend encore le soin de les y guider à chaque pas*."[732]

729 Voltaire, Dictionary entry "Locke".

730 Voltaire, Dictionary entry "Lois", section 1.

731 Voltaire, Dictionary entries "Lois", "Justice" and "Juste et injuste".

732 Tocqueville I p. 312. What Tocqueville considered as *"électif"* involved a direct, not a semi-direct election process. This is visible when he mentions that the majority of voters is free to let its will known "at each instant" to those governing. However, semi-direct election processes are meant to check the elective capacities of the people, usually under the justification of political stability. This means that Tocqueville was indeed only considering the "unrestrained" will of the people when he was writing about what is *"électif"* (Tocqueville I p. 311). This is even clearer considering that this section of his book uses despotism and democratic republics as extremity poles to justify his appreciation for what he viewed as a less extreme and more reasonable alternative in the *"monarchies tempérées"*, meaning that he would have made use of the fuller form of democracy, direct rather than semi-direct (Tocqueville I p. 310).

There are – at least – two very wrongs assertions in this statement. The first one is that unelected judges pave the way for despotism, because they have the same prerogatives as elected judges, but void of popular legitimacy. This assertion only needs to be put face to face with the U.S. Supreme Court[733] to see how untrue it is[734].

The other problematic statement is that the text of law should guide judges step by step in their action. According to Tocqueville, the only way to prevent unelected judges to bring about despotism, is to have a rigid legal framework restraining any impulse or initiative a judge could have[735].

While not particularly focused on the distinction between power and authority, Tocqueville's penchant for legalism also contributed to the authority-power conflation. In the first assertion mentioned above, Tocqueville considered unelected judges unacceptable because they are harbingers of despotism i.e., manifestations of power without authority. The matter of arbitrators vis-à-vis this statement is quite interesting inasmuch as they do not have any democratic legitimacy as conceived by Tocqueville. As long as there is no proper democratic control over their actions, which is effectively what Tocqueville requires, arbitrators easily fit in Tocqueville's category of "bad" judges.

Furthermore, even if the procedural rules can be decided by the parties, arbitrators will often have much more freedom to conduct proceedings than state judges, the same kind of freedom Tocqueville was criticizing. In any case, he thought that judges could not be trusted unless there was some sort of democratic-political oversight, one that could use its *potestas* to "guide them step by step" as he mentioned in his second problematic statement.

733 These nine judges are not directly elected by the American people as they are appointed for life and approved by elected officials, hereby meaning that they do not fit Tocqueville's definition of "elected".

734 We doubt that any serious scholar considered arbitrary or popularly illegitimate the U.S. Supreme Court decision of Gideon v. Wainwright (372 U.S. 335 decided on the 18th of March 1963), whereby the Supreme Court forced all U.S. states to provide an attorney to all criminal defendants unable to afford one. In the same vein, looking at systems where judges are unelected (the lower tribunals in France or Switzerland for instance), it is clear that these judges do not pilot a dictatorship nor do they lead to despotism.

735 We know that Voltaire, by channelling Beccaria, also defended this vision of a Law unburdened by judges they deemed arbitrary. Such judges were to be replaced by a text of law clear and complete enough to avoid any recourse to said judges in the administration of justice (Beccaria pp. 52 ss).

This second statement is quite emblematic of the lack of consideration Moderns had for authority and their fascination for power and coercion. Since unelected judges are still public officials, Tocqueville considered that their bad influence could be reeled in as long as a text of law *("la loi")* severely limited their freedom of action and their ability to decide. More broadly, limiting a judge's capacity to decide often implies shortening the qualitative gap between Law and case. If one only needs to apply the law to the case indeed, this would mean that the gap between the general and abstract (law) and the concrete and particular (case) is slim to non-existent. A judge's role would therefore only be to select the relevant law and apply it without bridging any gap. In other words, the judge's general equity and the authority stemming from it would be severely hampered, nearly reduced to nothingness by Tocqueville's conception of a text of law.

We will focus more on the authority-equity tandem *infra* but for now, it is cardinal to simply know that equity is the most important legal vector of authority. By substituting authority for power, Tocqueville does not simply conflate both, he dismisses one for the other, and where there was authority for centuries, there is now power inhabiting the notion of judicial authority[736].

This is further confirmed by political authors and actors of the early modern era such as Machiavelli and Robespierre. Without going into too much detail, both are symptomatic of the modern misunderstandings concerning authority. Despite wishing the renewal of the foundations of their respective societies, explicitly using the foundation of Rome as the example to follow, they also conflated this foundation with an idea of authority that was violent. This is ultimately why both of their political projects failed to really materialize, as violence, unlike authority, does not care about acceptability[737].

Last but not least, we would like to take a look at Immanuel Kant, undoubtedly the most prominent figure of the German Aufklärung. More oriented towards

[736] Tocqueville's political and general thoughts on democracy, despite their serious flaws with regard to authority and the judiciary and a small penchant for individualism, are well worth reading. Namely, he was aware of the pitfalls of individualism and the fact that modern intellectuals and governments increasingly relied on it. Without questioning the notion of *contrat social*, he already saw the rupture between past and present Arendt was so critical of i.e., the very rupture of the chain of authority. This concept, however, never appears under its Roman traits in Tocqueville's writings, showing just how much it had been subsumed under the label of power, even for someone aware of mankind's individualism and lack of empathy (cf. Tocqueville II pp. 143 ss; Baraquin/Laffitte pp. 385 ss).

[737] Ricoeur, Pouvoir p. 229.

theoretical philosophy than all aforementioned intellectuals, Kant did not openly conflate power and authority, despite inserting himself in the modern current of thought. However, Kant did pitch Reason and authority via tradition as opposites, something which heavily participated in the intellectual downfall of authority as unreasonable[738].

Probably the Aufklärung's toughest critic in the 20th century, Hans-Georg Gadamer used the following words to describe the Aufklärung vis-à-vis authority and tradition: *"Les concepts de raison et de liberté reçus de l'*Aufklärung *n'empêchaient pas de lier à celui d'autorité le contraire absolu de la raison et de la liberté, l'obéissance aveugle*. […] *Or, l'autorité en son essence n'implique rien de tel*. […] [Elle] *n'a pas son fondement ultime dans un acte de soumission, mais dans un acte de reconnaissance de connaissance que l'autre est supérieur en jugement et en perspicacité*. […] *Ainsi comprise dans son vrai sens, l'autorité n'a rien à voir avec l'obéissance aveugle à un ordre donné. Non, l'autorité n'a aucune relation directe avec l'obéissance: elle est directement liée à la connaissance*."[739]

While it was comparable to that of the French Lumières, Kant's vision of authority was more subtle and perhaps more contradictory as well. He saw morality as the most important component of authority, but his overall vision was one where authority commanded and demanded obedience. Even more so, he considered people under the influence of authority to be unenlightened[740]. Kant saw authority as only legitimate when moral, but he definitely regrouped authority and tradition as opposites to Reason[741].

Kant was probably the closest to Descartes in terms of linking positivism to authority. By positioning objectivity and sanctions at the centre of judgement and Law, Kant drew a clear distinction between a universal objective Reason and authority (and tradition), deemed subjective. This is seen in what he thought was the final cause of Reason: free will, itself the root of individual liberty[742].

We can see the drastic turn operated since the Roman days where *auctoritas* represented the common good first and foremost, with free will not really being

738 Gadamer p. 452.
739 Gadamer pp. 448-449.
740 Enns p. 103.
741 Enns pp. 110, 114; Pfordten p. 192; Axinn pp. 429-430.
742 Kant, Reason pp. 539, 547. Kant also regrouped the immortality of the soul and God's existence in this final cause. However, we set them apart as they do not intervene in the construction of authority.

taken into consideration given that individual will made little to no sense to people who defined themselves through their affiliation to a common structure, a society. This does not mean that there was no place for free will, simply that it materialized differently, with more than self-interest in mind.

Inserting himself in the line of Ockham and as an ancestor of analytical philosophy, Kant methodically isolated elements when studying them, which usually led to fractured and incomplete pictures. When looking at the structure of Kant's critique of pure reason, we can see that concepts are very often studied in their pure or absolute state i.e., separated from other concepts.

For instance, he considered morality as being its own system, irrespective of outside factors[743]. Broadly speaking, Reason was seen as indivisible and universal, capable of philosophically determining what is right or wrong and imperative[744]. More revealing yet is how he defined his own methodology as a transcendental logic. According to Kant, this form of logic, which he used throughout his critique of pure reason, *"fait abstraction de tout le contenu de la connaissance intellectuelle, de la diversité des objets, et ne s'occupe de rien d'autre que de la simple forme de la pensée*. […] [E]*lle n'a pas de principes empiriques*. […] *Elle est une doctrine démontrée et tout doit y être certain complètement* a priori."[745]

Given this tendency to atomize everything, it is unsurprising that authority ended up being removed from its fundamental collective nature[746]. The importance of Kant carried his vision well into the 20th century, where many[747] would carry on most of his state of mind and his methodological approach to philosophy, which

743 Kant, Reason p. 546-547.

744 Kant, Reason p. 561; Comte-Sponville pp. 866 ss.

745 Kant, Reason p. 78. Kant favoured the form in order to analyse a concept, which he assimilated to the essence of a concept. Legal positivism is no different, for as long as a text of law is created according to the applicable procedure, it does not matter whether it is just or not.

746 To be more precise, Kant championed "absolute" and "pure" concepts. His definition of both Law and written laws is a testimony to this penchant: written laws are objective and universally valid, and Law's main concern is to verify the conformity of people's actions with the written laws (cf. Vaysse, entries "droit" and "loi").

747 Regarding the "descendants" of Kant, they split into two categories through the 19th and 20th centuries, the post-Kantians and the neo-Kantians. While the former attempt to go further than Kantianism, the latter are characterized by a return to Kantianism and of which Rawls was typically a part of. Irrespective of their differences, both currents have similarly perpetuated Kant's conflation of power and authority (Bouriau p. 11; Riley p. 293).

has been a weighty factor in the continuation of the conflation of authority with power[748].

3. Ramifications of those modern misgivings

As mentioned, many ideas of modern authors were directly taken up by contemporary authors, mainly their methodology and propensity to atomize concepts. Authority was obviously not spared in this passage to the contemporary era and remained conflated with power. We owe much to Gadamer and Arendt who were among the best at separating the two notions after the war, even if those who have followed in their footsteps are but a minority of the entire field. In particular, Anglo-Saxon scholars have taken up Kant's mantel to an even higher degree, which gave birth to the analytic philosophy current in legal philosophy.

At best, contemporary scholars define authority under the guises of *potestas* and *auctoritas*, but assimilate both concepts to the term "authority"[749]. This highlights the confusion in their reasoning as the basic definitions of both power and authority are further muddied. In addition to this, analytic philosophy has narrowed the way legal philosophy is construed, with analytic scholars focusing on the variations of small details from case to case instead of looking at the general picture, to the point where history is largely cast aside in their constructions[750].

Let us for instance take the following definition of authority as laid out by the anglophone authority on authority: "[…] [P]ower is a special case of authority. Authority is [the] ability to change reasons. Power is [the] ability to change a special type of reasons, namely projected ones. However, […] we should regard authority basically as a species of power […]. Power over others is authority over them."[751] Furthermore, "[t]he very concept of legitimate authority is incompatible with our notion of rationality and morality."[752]

[748] Rawls for one, directly drew inspiration from Kant to model his interpretation of justice as fairness (Rawls pp. 251 ss). More subtle in his general theory of Law, Hegel nonetheless erred similarly to his fellow modern intellectuals with regard to authority by essentially assimilating it to power (Hegel, pp. 116, 140, 452-453, 513-515).

[749] Raz pp. 15-19.

[750] Cf. *infra* part 2, V, 3.

[751] Raz pp. 18-19.

[752] Raz p. 27.

While semantically dissociating power from authority, Raz regroups both concepts under the single banner of authority, furthering the confusion of authors of the 17th century. According to him, the most basic form of authority, the authority over persons, is a type of normative power. Furthermore, "[…] it is of the very essence of the alleged authority that it issues rulings which are binding regardless of any other justification."[753] Additionally, "[t]he authority which all legal systems claim is authority to regulate any form of behaviour of a certain community."[754] Judging from these various statements and claims, it is quite clear that Raz views authority as power. The ideas of binding rules, behaviour regulation and issuing rules as the essence of authority are all markers of *potestas* rather than *auctoritas*, which is a very widespread vision of authority among jurists.

For those perpetuating said vision, power is but a variation of authority, and thus obeys to similar intellectual patterns, the difference between them being so small that power is entirely subsumable under authority[755]. Even then, the reasoning behind this operation could have been presented the other way around. Indeed, considering that the general definition of authority widely corresponds to that of power, of *potestas*, it would have been more befitting to subsume authority under power[756]. In any case, and as already shown[757], this assertion is historically and philosophically questionable, quite in line with the modern confusion and conflation.

Authority is then portrayed as what changes reasons for action[758]. Therefore, authority can change a person's behaviour by giving them instructions and orders[759]. While this could have left the door open for an authority based on

753 Raz p. 51. Authority being "binding regardless of any other justification", this would make authority self-sufficient to the point of being absolute. In Rome, authority's very existence requires relations with humans beings, with their actions, even with ideas (cf. *supra* part 2, II, 4). Authority, similarly to good faith, cannot exist on its own and needs to be attached to something or someone to exist.

754 Raz p. 117.

755 Raz pp. 19-20.

756 This is very salient in pp. 22 ss. Even Raz seems confused about what is subsumable and where. He first states that power is a species of authority before saying that authority is a species of power. This shows the extent to which he considers authority and power to be interchangeable.

757 Cf. *supra* part 2, II.

758 Raz p. 16.

759 At no point is the contradiction between a change of reason and the issuance of commands explained.

rhetoric and persuasion[760], Raz leaves little room for doubt in the sense that he oriented this explanation towards the most basic characteristics of power[761]. In other words, authority can issue commandments to force people to act in certain ways, most likely under pain of sanction, which is the very top-down pattern of the Christian *potestas*[762].

Many years later, Raz acknowledged the notion of epistemic authority, although he classified it as part of political authority[763]. Concerning legal authority, he maintains the claim that legal authority is essentially the power to legislate as granted by the laws, citing customary law as an exception[764].

Overall, the most well-known scholar on authority and Law has pursued the path laid down by modern intellectuals concerning authority with unwavering belief[765]. However, the notion of authority involving the inheritance of a common good is far removed from a core aspect of positivism that is objectivity[766]. Although we have heard quite a few times in informal discussions over the years that "the days of positivism are long gone", the underlying positivist mentality is well and alive[767], whether it is through open positivists such as Raz or through those distancing themselves from positivism despite remaining unable to reverse its most fundamental characteristics such as Rawls and Scanlon.

In any case, the concept of authority has remained entrenched under the banner of power to this day, especially in Law where the term "authority" is nearly always

760 Cf. *infra* part 3, III.

761 Raz pp. 108, 237 ss.

762 Papaux, Introduction pp. 70 ss, 99 ss.

763 Raz, Interpretation pp. 341 ss.

764 Raz, Interpretation pp. 1, 329-330, 341. There are many more blind spots in this presentation, but we would simply like to mention one: at no point the inheritance aspect of authority features in Raz's work. Removing concepts from their context is often seen in positivist circles (cf. *infra* part 3, II, 2, B, b, c and III, 2), which is why concepts allowing us to establish such contexts are frequently misunderstood. Raz is no exception to this observation as he, for example, declared that "it is widely accepted that" contemporary positivism is independent from 19th century positivism (Raz p. 37).

765 This is also confirmed by: van der Vossen pp. 485-486; Rosen pp. 677, 682-683; May p. 29: "For Raz, the obligation to obey authority must be content-independent."; Robertson pp. 448 ss; Rundle pp. 782-783: "De facto authority refers to the capacity to effect authority in fact, while legitimate authority refers to authority capable of justifying that specific claim that an authority makes over a community of moral agents." We will see *infra* (part 2, V, 2) in the three-dimension theory that authority is necessarily legitimate.

766 Cf. *supra* part 2, II, 3-4; *infra* part 2, V, 5, A-B and *infra* part 3, III, 2.

767 Cf. *infra* part 3, III, 2.

used to define institutions with the capacity to create rules, control their application and render decisions with or without link to the rules they create. This is why it becomes all the more important to firmly distinguish power from authority, as not doing so would deprive us of a very fundamental legal-philosophical concept, one allowing us to thwart many debates regarding Law's so-called propensity for domination through strength. Moreover, and we will see *infra* in our general conclusion, establishing this distinction between power and authority sets us on the path to rediscover the sacredness of Law[768].

Dworkin never homes in on authority *stricto sensu* but uses it in tandem with legitimacy. He considers coercive power as requiring a certain legitimacy, a certain moral authority. He thus links state governance with authority, the latter providing the legitimacy to the former when *potestas* is used[769]. In general, Dworkin stays in line with the spirit of the Lockean vision of authority, which lacks the Roman elements of common good, generational transmission and citizenship. He does not however go into more details nor does he provide a comprehensive explanation of the opposition between power and authority, focusing instead on integrity as the core of political legitimacy[770].

Hart as well never tackled authority directly but used the word quite liberally without properly defining it, sometimes with contradictory meanings. Using authority as the basis of commands rather than sanctions and stating that said authority was a matter of respect rather than fear, Hart seemed to be going in the right direction without focusing too much on it[771]. However, as some have pointed out, Hart seemed to navigate freely between the above-mentioned definition and a typically positivist version of it, one which conditions authority to prior formal validity[772], tying it to the validity pole[773].

[768] To be sure, the sacredness of Law is quite removed from the religiosity of Law or religious Law. Briefly, we view it as the supplement Law has over other humanities, one that has very often managed to bring people together to form a society and one we have forgotten in our haste to get rid of religion. To use a common metaphor, we have thrown the baby out along with the bath water (cf. *infra* general conclusion).

[769] Dworkin pp. 190 ss; Finnis pp. 362 ss.

[770] Dworkin pp. 215 ss and the entire chapter 7. We will revert *infra* to the notion of legitimacy and its interactions with authority (part 2, V, 2, D).

[771] Hart p. 20.

[772] Groudine pp. 277-279.

[773] Cf. *infra* part 2, V, 2, B.

Hart considered the ultimate rule of a system to be the one determining the formal validity of legal texts[774], which is where their authority would reside. Considering his earlier assertion that a command is based on a respectful authority, this would mean that authority is a link between the fundamental rule and commands. Although this reasoning is not wrong, the fact that the fundamental rule engenders legal authority by simply determining what is legally valid reduces authority to a simple buffer between the fundamental rule and commands: it does not add anything the fundamental rule does not already grant. Consequently, we could re-phrase Hart's construction by saying that the fundamental rule validates legal texts from which commands are issued. Authority vanishes, yet the logical construction remains intact. This "floating" around the concept of authority might explain how Hart freely navigated between contradictory definitions of authority.

Comparing Hart's thoughts to the present dissertation, if authority is mainly formal, its core (augmentation of the inherited common good) will not be reflected and the foundation of *potestas* rests on a validity granted to it by a fundamental text of law. We will see *infra* in the three-dimension theory that the validity pole is the most removed from the general concept of authority (it is not an accident if ancient Rome, an extremely formal society, did not feel the need to formalize authority). This would mean that in Hart's vision, power is justified as long as it is valid.

In the end, Hart's account of authority is a little uneven, which might reflect the fact that he was not particularly concerned with the notion. By often linking authority to the validity pole, and sometimes to legitimacy or morals, but without defining authority as belonging to either, Hart never displayed a definite confusion between power and authority. However, going by the frequency at which he linked an authoritative rule with its validity, it would seem that he was more inclined to use the notion of authority to describe a legally valid rule.

Max Weber's position on authority was more developed than many scholars of the 20th and 21st centuries. To be sure, there is a confusion between power and authority in Weber's work, if only because he named authority *"Herrschaft"*[775]. More importantly, Weber's conception of legal authority reflects the most formal aspects of legal positivism whereby Law's main criterion of existence are its formal

774 Hart pp. 102-103.

775 Weber 1 pp. 285 *cum* 95-96. *Herrschaft* translates to power. Cf. Revault d'Allonnes who specifies that *Herrschaft* is simply a legitimate type of *Macht* (p. 163). Blau adds that Weber is not extremely rigorous semantically, sometimes floating between terms, already a sign that the distinction was not entirely clear (p. 306).

sources and where customs and traditions are not considered part of Law. Moreover, he defined authority as a subspecies of power i.e., the power to command and the duty to obey, albeit with a minimal degree of free-will, in addition to declaring that persuasion is antithetical to authority as people suspend their judgement when faced with authority[776].

Addedly, he assimilated legal authority to administrative authority, whereby specialized members of the administration dictate to people how to behave, going as far as considering formal rules objective, hereby picking up not only the top-down aspect of modern authority, but also the mindset that led to the rejection of authority and tradition i.e., objectivity[777]. To Weber, domination is the precondition to authority, hereby denying the essence of authority (to leave one's society in a better state than when we first entered it)[778].

Weber, however, went further than this by describing what he called the legitimacy of power. Due to the modern confusion, the notion of legitimacy frequently mirrors many aspects of the Roman *auctoritas*, all the while diminishing its role[779]. Despite a highly bureaucratic vision of legitimate domination, Weber acknowledged that the traditional type of legitimate domination has sacred roots and that power depends on authority, not only to be efficient, but to be effective[780]. Although there is a definite confusion between authority and power in Weber's work, his grasp on authority is more nuanced than most of his modern predecessors[781].

776 Blau pp. 306-307; Weber 1 pp. 285-286. The example used is that of a commanding officer's soldiers who obey him willingly (authority) and enemy soldiers who reject whatever command this officer may emit entirely. This example is, as we remember the Roman *imperium*, not the best of choices because commanding one's soldiers was considered the highest act of *potestas*. For other reasons, we also consider this example to fall somewhat flat, because enemy soldiers, by definition, do not listen to enemy officers. Regarding the false opposition between authority and persuasion, cf. *infra* part 2, III, 4, C with Arendt who makes the same mistake as Weber.

777 Weber 1 pp. 293-310.

778 Revault d'Allonnes p. 174.

779 Weber 1 p. 286.

780 Weber 1 pp. 286-288, 301-302.

781 Cf. *supra*. In this regard, Weber is a by-product of his era. Like Arendt, he used scholarly fields other than his to support his general theories, thus relying on epistemic authorities of other disciplines. Unfortunately for him, these specialists were often wrong on the matter of authority, in addition to riding the wave of legal positivism, which may have led him to certain misconceptions despite knowing that there was much more to authority than its false equivalence with power.

The way Weber puts authority and legitimacy in relation is a little reductive of a concept such as authority because authority is by definition legitimate[782]. The reciprocal variation is not necessarily correct, as what is legitimate is often enough unauthoritative (e.g., a legitimate election often yields an unauthoritative president). According to some commentators of Weber, the type of legitimacy we face affects the type of authority resulting from it[783]. For instance, there is a distinction between legal rational authorities and value-rational authorities. The former typically exists in bureaucracies and draws its legitimacy from the laws defining the "jurisdiction" of the bureaucracy. The latter concerns the upper echelons of governance such as presidents, ministers, members of parliament, etc. and draws its legitimacy from the values they embody. "[I]f legal rational authority is celebrated as an administration of laws, not of men, value-rational authority is a government of principles, not of men."[784]

Ignoring the basic misconception regarding the fact that men are required to elaborate both laws and principles, authority allegedly stems from legitimacy according to Weber. However, this is quite the error when we consider that authority is the foundation of legitimacy[785]. Furthermore, the legitimacy of authority notwithstanding, the way Weber conceived this dual example shows that he should have used the term "power" instead of "authority". The reason is quite simple, laws are never the foundation of authority, unlike *potestas*, which is often based on laws, authoritative ones hopefully. Whether we are talking about laws, principles or *potestas*, they draw their legitimacy from authority, not the other way around[786].

The essence of authority, augmenting an inherited common good, is indeed very often used to justify a new legislation, to legitimize the use of brute strength (warranted or not) or to insert a new principle inside the pre-existent order. As such, not only is authority necessarily legitimate, it has the capacity to legitimize other concepts of governance[787], which is why those bereft of it seek it so intently, often

782 Cf. *infra* part 2, V, 2.
783 Spencer p. 130.
784 Spencer p. 130.
785 This obviously depends on the definition of legitimacy retained: in light of Reale's three-dimension theory, authority is legitimate by definition (cf. *infra* 2, V, 2, D).
786 Cf. *infra* part 2, V, 2 concerning the three-dimension theory and *supra* part 2, II, 5 with regard to *potestas* in Rome.
787 Cf. *infra* part 2, V, 2 regarding Reale's three-dimension theory.

through the use of traditional and beloved symbols[788]. Consequently, Weber's depiction of legal rational and value-rational authorities does not make sense if we stick to authority's deeper meaning, but it does make sense when replaced by the notion of *potestas*.

Moving on to his definition of charismatic *Herrschaft*, Weber recognized the importance of accepting another's authority for it to be actual, which distinguishes it indeed from power. His vision of it is centred around the emotions and veneration felt towards a charismatic figure, but not around their accomplishments as was the case in ancient Rome[789]. He then assimilated authority to charisma, essentially reducing the former to the latter[790].

As we will see through the case of Mandela[791], charisma is but a small and occasional part of authority. One does indeed not need to be charismatic in order to have authority and charismatic people have often proven to be utterly lacking in authority. It is undoubtedly possible for the two to coincide in the same person, but one is not usually the cause nor the consequence of the other. In this context, Weber's exposé is a little misguided, especially when he uses Roman examples to justify this position. Most troublesome is his conception of how authority and charisma are transmitted via the designation of one holding *imperium*. Not only is this historically inaccurate as consuls were nominated by the senate and elected by popular assemblies, but also philosophically, as *auctoritas* was the basis of *potestas* and not the other way around as Weber wrote.

While the historical error might be due to the mistakes made by the specialists on ancient Roman culture of Weber's era's, the philosophical one is more problematic, because it shows that, in the end, Weber's understanding of the difference between authority and power was somewhat deficient[792].

Overall, Weber's thoughts on authority fluctuate, but his importance cannot be understated with regard to the rediscovery of authority. Before Arendt and Kojève, he was indeed the one who exhumed the flexibility of authority without simply conflating it with power. In spite of an understanding of authority that was quite

788 Cf. *infra* part 2, V, 2, D regarding the legitimacy of authority.
789 Cf. *supra* part 2, II, 4 and Weber 1 pp. 321-323.
790 Weber 1 pp. 326-336.
791 Cf. *infra* part 2, IV, 2.
792 Weber pp. 326-329, 334.

clearly a by-product of his era, Weber is very much deserving of praise considering how strongly glued power and authority were in said era[793].

Kelsen is yet another name who contributed significantly to the current state of general confusion. The reason we did not mention him earlier was because his positions would have watered down those of previous scholars' when in reality, all reflect the same understanding of authority. Among all legal positivists, Hans Kelsen is in our view, the most emblematic, heavily favouring formal rules over material Law[794], which is very apparent in his conception of authority.

According to Kelsen, authority was to be understood in the sense of a sanctioned authorization: what is allowed and what is forbidden under pain of sanction. However, adapting to the vocabulary of the past three centuries, we have seen *supra*[795] in Rome that authority does not authorize so much as it legitimizes. For Kelsen, "the creation of a norm is authorized when a second norm requires or permits the application of sanctions […]."[796] In other words, he considered that an authorization, that which is given by an authority, depends on the existence of sanctions, the most basic manifestation of power.

The notion of "authorized" is here understood in a strictly formal sense. There is no augmentation, just a formal validation happening under the guise of an authorization. This is yet another sign that Kelsen squarely regrouped authority and power together because, as we will see *infra*, the validity pole of the three-dimension theory is the least related to authority and the most intricately linked to the *jus potestas*. To be more precise, authority does not require any validity to exist, be legitimate and effective.

At this stage, Kelsen has completely subsumed authority under the concept of power, to the point where the sanction is a condition of existence of authority: what is sanctioned is authorized[797]. Indeed, he considered Law to be imbued with

793 Given the purpose of this dissertation, we will not look at Weber's sociological and political considerations on domination and authority. The quality of these analyses notwithstanding, they do not add anything more regarding the confusion between power and authority.

794 Cf. the crushing number occurrences on this matter: Celano pp. 174-175; J. Harris p. 353; Kelsen pp. 183-184, 206, 439, 482-483; Kelsen, International pp. 121, 123, 178.

795 Part 2, II, 4 and 5.

796 J. Harris p. 356.

797 Paulson p. 178.

"authority" as long as it was authorized, and thus sanctioned, by a norm of superior rank, the sole exception to this theory being the *Grundnorm*[798].

As the quintessential positivist, Kelsen placed the formal and procedural aspect of a text of law above its material ones. A very top-down legal scholar, he considered that it was more important for justice to fit into the "above" text of law than into the "bottom" concrete case, the epitome of the deification of the text of Law which started under Saint Augustine[799].

Kelsen illustrated the link between legal positivism and the confusion surrounding authority, because his theory clearly postulates that authority is a formal permission granted by a text of law to another one of inferior rank[800]. Authority has now been voided of all its content and left as a linguistic substitute for a lower form of power, not one of war, but one which simply allows and forbids through sanctions. Even more so, authority has now been formalized in legal texts, the highest form of enshrinement found in positivism, officially consecrating it as the one univocal form of authority for those preaching it.

John Rawls is another illustrious name whose use of the concept of authority reflected a degree of confusion that was further accentuated by his many commentators who regularly mix legitimacy, power and authority. In his own description of political legitimacy, Rawls flows quite freely between power and authority, calling "power" the illegitimate use of coercion, "authority" the legitimate use of coercion, then the other way around before claiming that both power and authority can be legitimate or not[801].

"Rawls treats political authority as either entirely present when societies are at least nearly just or absent when they are not."[802] According to one commentator, Rawls did not automatically tie authority with authoritarianism and the use of pure power, preferring instead to associate this concept with that of justice[803], although he seems to do so a little binarily, and although this description is closer to legitimacy than authority. An example given is that of apartheid South Africa, which would have

798 Celano p. 187; J. Harris pp. 356-358; Kelsen pp. 169 ss, 299, 482-483. Quite a few of Kelsen's commentators have adopted his vision of authority.
799 Papaux, Introduction pp. 76-78; Kelsen pp. 299-301, 481.
800 Kelsen pp. 100, 169 ss.
801 Rawls, Liberalism pp. 136-137, 143, 222; Wemar § 3.
802 Jubb p. 963.
803 Rawls p. 467.

been called unauthoritative by Rawls according to the same commentator, very quickly using the same example we develop *infra*[804].

Overall, excerpts from Rawls' commentators seem to point to a certain tendency to conflate power and authority, even though it is difficult to know how much is their own distortion and how much is Rawls' distortion. Some indicate for instance that the following tautology on authority is Rawlsian: "One must obey the authority because it is the authority", implying that authority can emit commands and thus exercise the most typical prerogative of power[805].

Rawls does, however, analyse what he calls the morality of authority, although there again, his remarks lack clarity. In order to describe it, he uses the example of the child respectful of his parents' authority. His explanations are somewhat muddled, as he uses a child's feelings of guilt to illustrate the presence of authority. He adds that parents must be objects of admiration in order to become worthy of authority and that loveless relationships do not help in fostering the conditions for authority to bloom[806].

The relationship between child and parent is a very specific and unique emanation of authority, making it very hard to properly exhume the concept of authority, which is why we did not use it as an example. An unasked question shows this clearly: would a child have more esteem for an unauthoritative parent or for an authoritative stranger? More problematic still is the need to understand children's behavioural patterns to comprehend the way they interact with authority. This would require expert knowledge in child psychology and neuro-biology, all of which are far removed from the scope of this dissertation.

Rawls' position on authority is much harder to summarize than that of Raz or Hobbes, in particular because, without ever defining it explicitly, he sometimes dissociates authority from power[807], all the while confusing authority with legitimacy[808]. More often than not however, Rawls deems authority to have binding capacities and the ability to force and enforce[809]. While he can be sometimes right, his use of authority is always reductive of the concept and its essence.

804 Jubb p. 967.
805 Jubb p. 964.
806 Rawls pp. 462-467.
807 With confusions on both semantical and conceptual levels.
808 Rawls pp. 466-467.
809 Jubb p. 961.

Authority goes indeed much further than the simple legitimization of power, serving in particular as the bridge between generations and the constant augmentation of society, primarily focusing on the common good. The fact that authority serves as the basis of legitimacy[810], and him not understanding the profound meaning of authority would explain why he so often accentuated the political legitimacy of power. To him, somewhat unknowingly, legitimate power is – partly at least – synonymous with what the ancient Romans saw as authoritative power[811].

His general confusion is clearly visible when he states that "[t]he prized virtues are obedience, humility, and fidelity to authoritative persons; the leading vices are disobedience, rebellion and temerity. We are to do what is expected without questioning […]."[812] What he describes are virtues of *potestas* at least, of *imperium* at most[813]. As stated *supra* in the very definition of "authoritative", a constant esprit critique is required in the face of authority, to avoid abuses for one, but also because authority implies a constant evolution to avoid stagnation. As such, an unchecked and unchallenged authority, one requiring "obedience", is much closer to an unauthoritative power than any form of authority.

Taking a look at the broader picture to consolidate our compilation of clues, Rawls was a contractualist[814] whose general theory rested on individuals contracting with each other under the veil of ignorance[815]. These ideas are difficult to conciliate with a conception of authority other than the modern one, because it is the only conception allowing any place for the individual in lieu of the citizen, for one to be ignorant of another's source of authority, in addition to favouring the concept of will to the detriment of reason (the will of the parties, the will of the authority)[816].

Summarily, the Rawlsian concept of authority is confused and confusing. There is little doubt in our mind that Rawls, on some level, understood that authority and

[810] Cf. *infra* part 2, V, 2 in our analysis of Reale's three-dimension theory of Law.

[811] Wemar § 3.1-3.4.

[812] Rawls pp. 466-467.

[813] Cf. *supra* part 2, II, 5.

[814] "[T]he contractual nature of justice." "Thus justice as fairness is able to use the idea of pure procedural justice from the beginning." "The procedure of contracts theories provides, then, a general analytic method for the comparative study of conceptions of justice." "The arbitrariness of the world must be corrected for by adjusting the circumstances of the initial contractual situation." (Rawls pp. 116, 120-121, 141).

[815] Rawls pp. 139 ss; Ost/van de Kerchove pp. 505-506, 510-511.

[816] Cf. *infra* part 3; Baraquin/Laffitte pp. 315 ss; Ricoeur, Juste 2 p. 123; Méda pp. 293-296; Ost, Temps p. 218.

power were antithetical, as shown in his definition of moral authority, which did not involve power in any capacity indeed. At the same time, he unquestionably did not know what was the essence of authority, partially explaining why he lingered so often on the notion of legitimacy. The many confusions regarding power, authority and legitimacy also attest to that. Additionally, from a quantitative perspective, his use of the term "authority" was done in a way to mean "power" more often than not[817].

Parallel to this great confusion, the notion of authority has been picked up over the past decades by certain authors such as Gadamer, Arendt, Kojève or Revault d'Allonnes. While Gadamer uses it for his bigger hermeneutical theories, the other three tackle it more frontally, yet remain unable to develop a fully coherent theory around authority. The collective aspect of authority, which is part of its essence, is generally ignored by these authors. This collective aspect of *auctoritas* is the result of relatively recent research in ancient Roman culture, and as stated *infra*, such an element would have supported Arendt's political and philosophical theories even further. We therefore do not think that these authors are really at fault, although it is regrettable that those elements of ancient Roman knowledge were only recently exhumed, for it would have been fascinating to see what these famed authors would have done with it.

Moreover, and as we will see shortly, certain aspects of authority remain misunderstood, the capacity to persuade for instance. Given the ubiquity and high quality level of Arendt's essay on authority, we will briefly analyse it and oppose certain counterarguments to what we deem insufficient in her reasoning. While Arendt is obviously central in this debate, the other above-mentioned scholars have also authored very interesting books from which we will draw certain ideas in order to contrast or underscore our own thoughts.

These authors are perhaps the most notorious ones given that they understood authority better than any we have analysed so far, although their number is dwarfed by those who misunderstand authority. While a fair number of contemporary academics can see the opposition between power and authority, the modern confusion generally remains to various extents. Consequently, the link between authority and tradition, the sacred common good and the augmentation

[817] For instance, "Similarly, we assume obligations when we marry as well as when we accept positions of judicial, administrative, or other authority." (Rawls p. 113) "The primary social goods that vary in their distribution are the rights and prerogatives of authority, and income and wealth." (Rawls p. 93). Unlike power, authority has no prerogatives.

of inherited foundations are barely mentioned, if ever, by modern and contemporary authors, who clearly lost sight of the essence of authority[818].

4. Hannah Arendt, the first open critic of Modernity's authority and the partial comeback of the Roman *auctoritas*

A. Introduction

Before going into more details about Hannah Arendt, we would like to first emit a disclaimer regarding the scope of our research. While we are indeed aware of the importance of political philosophy in the apprehension of authority, Arendtian authority in particular, we will not, for time and space constraints yet again, dive into the depths of political philosophy. In addition to this dissertation not being one belonging to political sciences, it is also centred around arbitral authority, which is why we will limit the scope of our research to what we deem necessary. Furthermore, political philosophy has greatly expanded since the Lumières, and encapsulating political authority would most definitely be any political scholar's *opus dei*.

The notion of authority is incredibly hard to pin down, with many different facets. It can be legal, moral, professional, scientific, etc. It can be construed as a positive or a negative concept and is something people can abuse or ignore entirely depending on the setting and, most importantly, on the meaning one attaches to the word "authority". The genealogy of authority is also much murkier than other philosophical concepts, which have evolved more steadily[819].

In order to analyse what authority is, and while a complete political take would prove too lengthy, we also think that forgoing anything political would be a little simplistic and quite frankly, inaccurate. When one thinks of power and authority, the political context often comes first in mind (a government, a parliament, a mayor, a representative, etc.), which is also where *auctoritas* was born in Rome[820].

[818] Cf. for instance Fox-Decent, Panaccio, Lukes, Beran, Garthoff, Hoff, van der Vossen, Green, Young and all cited authors, Ladenson, Lefkowitz, L. Green, Wolf, Schweitzer, Audard, Autorité (who nearly broaches the heart of authority, but ultimately fails to capture, probably due to a lack of understanding of what Law is, the research domain she chose to illustrate authority), etc.

[819] Cf. Kerneis' short yet well thought out definition of authority.

[820] Cf. *supra* part 2, II.

Politics is the first entry door to the distinction between *potestas* and *auctoritas*, all the while providing a cohort of examples, both extreme and basic.

Studying the various ways in which power is born and applied would be very interesting, but it is not the topic of this work. Politics and sociology concerning authority and power are topics too broad to be properly analysed in a single doctoral dissertation in Law. Understanding the various categories of applied power such as gerontocracy, democracy, plutocracy, oligarchy, tribalism, nepotism, royalty, etc. and their respective authoritative cores would take a phenomenal amount of time and focus that would deviate this work from its original purpose. In addition to this, many sociological definitions conflate power with authority and vice-versa[821].

For the above-mentioned reasons, we will limit ourselves to what we consider to be the most illuminating case of authority in the recent political landscape: Nelson Mandela. Before taking this small journey down South African history however, we will look at the Arendtian conception of authority. Arendt's essay on authority still reverberates to this day, which is why its analysis remains important decades later.

B. The Arendtian presentation

a. In general

Despite boasting a high number of specialists and despite the importance of both power and authority in human societies, scholars have only recently taken an interest in authority. Furthermore, until the mid-19th century, only a few of them had directly tackled it[822]. In this context, the importance of Arendt's essay cannot be understated: she was the one who truly brought *auctoritas* into the modern era, and made the most decisive distinction between authority and power since the Lumières butchered it. Given her personal history and academic affinities, she does not analyse authority in the light of Law but of politics, with the ghosts of Nazi Germany ever so close.

[821] Cf. *supra* Weber 1 pp. 285 ss who jumps from *"domination"* to *"authority"* to *"power"* without making any distinction between them in the entire chapter dedicated to power. Unlike many other authors such as Revault d'Allonnes, we are not willing to interpret Weber's words so loosely to the point where authority can be used to describe *potestas* and *auctoritas* at the same time.

[822] Kojève pp. 49-50.

The Romans understood the distinction between authority *(auctoritas)* and power *(potestas)* well enough that they did not feel the need to discuss it at length. Indeed, while both concepts interacted regularly, the people and institutions they inhabited were different and so was the application of both concepts[823]. As often in Rome, Cicero said it best: *"Cum potestas in populo auctoritas in senatu sit."*[824] However, the distinction between power and authority waned as intellectuals started conflating them, and as the people governing society, politicians, began thinking that wielding power and having the capacity to impose their will was akin to having authority.

Historically inclined, Arendt's essay essentially consists in a genealogy of authority. As she advances, she comments and compares the state of authority to with the general political state of affairs at her time (right after World War II). Given that we took a similar path, using the genealogy of authority to understand the concept, we share quite a few common opinions. For this reason, and insofar as our findings converge, we will not repeat in full what she wrote on those aspects as we went further than she did on genealogical elements.

Arendt divides her essay into six parts. The first one starts with a warning: "authority has vanished", and as a consequence, totalitarian regimes were able to step into the void left behind by this vanishing act (let us remember that this essay was written in 1954 and first published in 1961). She also affirms that we are no longer capable of knowing what authority is, for the simple reason that "it is commonly mistaken for some form of power or violence."[825] She then states that authority is intimately linked to tradition, and that the loss of one has spurred the loss of the other and vice versa[826]. Before starting her own genealogy, she opposes authority to tyranny to dissociate authority from authoritarianism (she makes no substantial distinction between tyranny and authoritarianism). She then briefly criticizes modern liberal and conservative political ideologies, both of which fail to bring forth any convincing answer to the loss of authority and tradition[827]. At this point, our sole question mark concerns the common good and its augmentation, of which tradition is a part of, and which is not mentioned by Arendt.

823 David/Hurlet, Introduction p. 9.
824 Cicero, De legibus 3, XII.
825 Arendt, Authority p. 92.
826 Arendt, Authority p. 100.
827 Arendt, Authority pp. 91-104.

The second and third sections of her essay concern the Greek genealogy of authority. However, she concludes that "[n]either the Greek language nor the varied political experiences of Greek history shows any knowledge of authority and the kind of rule it implies."[828] She spends some time deciphering Plato's thoughts on politics, the concept of Good and his sky of Ideas. Here, Arendt squarely focuses on the political part of Plato's dialogs and transcripts to justify her opinion that Greek politics were indeed void of authority. The most interesting takeaway for us is that Plato "was looking for […] a relationship in which the compelling element lies in the relationship itself and is prior to the actual issuance of commands; the patient became subject to the physician's authority when he fell ill, and the slave came under the command of his master when he became a slave."[829]

She then brushes on Aristotle, albeit more quickly, stating that the only way he managed to inject authority into society was through education: "[i]n education, conversely, we always deal with people who cannot yet be admitted to politics and equality because they are being prepared for it. Aristotle's example is nevertheless of great relevance because it is true that the necessity for "authority" is more plausible and evident in child-rearing and education than anywhere else."[830]

Overall, the ancient Greek genealogy of authority conducted by Arendt led her to believe that authority had not been integrated into the *polis*: Plato could not find what preceded the command in politics, while Aristotle could only insert authority in extra-political relations. We will address this shortly *infra*. She also asserts that neither despots nor tyrants could be viewed as political examples of authority in ancient Greece: the tyrant because he was a "wolf in human shape", and the despot because "his power to coerce was incompatible not only with the freedom of others but with his own freedom as well"[831].

Her focus then shifts to ancient Rome for the fourth section of her essay, conducting a similar analysis to ours with regard to the etymology of authority, the role of the founders, the Senate and religion. She essentially insists on the importance of

828 Arendt, Authority p. 104.

829 Arendt, Authority p. 109.

830 Arendt, Authority p. 119. She also states (Arendt, Authority p. 118) that: "There can be no question that Aristotle, like Plato before him, meant to introduce a kind of authority into the handling of public affairs and the life of the polis, and no doubt for very good political reasons. Yet he too had to resort to a kind of makeshift solution in order to make plausible the introduction into the political realm of a distinction between rulers and ruled, between those who command and those who obey."

831 Arendt, Authority p. 104.

tradition to the Romans, underlining how they were bound by the deeds of their ancestors[832]. Little time is spent on the notion of augmentation, despite an accurate etymological analysis. According to her, the augmentative aspect of authority was squarely located with the ancestors, which is why ancient Romans were so intent on obeying them, hence the reason why the ancestors' deeds were binding[833]. Arendt also does not mention the common good, but if we read her closely, the concept nearest to said common good in her essay would be the traditions inherited from the ancestors[834]. Again, according to her, these traditions are the ones augmenting rather than being augmented.

After briefly stating that the Roman *auctoritas* endured after the destruction of Rome thanks to the Church, Arendt moves on to the final two sections of her essay. According to her, unguided individual judgements, like those promoted by Luther at the time of the schism, could not have left tradition and authority unscathed[835]. The reason is that Christian theology gave standards to Europeans and taught them how to enforce said standards. Once the Church had collapsed, the new secular political order moved in to rescue violence from the smouldering ashes of the previous order to safeguard itself, leaving behind authority and tradition[836].

She concludes by stating that "[…] the famous "decline of the West" consists primarily in the decline of the Roman trinity of religion, tradition, and authority, with the concomitant undermining of the specifically Roman foundations of the political realm, then the revolutions of the modern age appear like gigantic attempts to repair these foundations, to renew the broken thread of tradition, and to restore, through founding new political bodies, what for so many centuries had endowed the affairs of men with some measure of dignity and greatness."[837] She then adds that, "[f]or to live in a political realm with neither authority nor the concomitant awareness that the source of authority transcends power and those who are in power, means to be confronted anew, without the religious trust in a sacred beginning and without the protection of traditional and therefore self-evident standards of behaviour, by the elementary problems of human living-together."[838] She then closes her essay by linking her thoughts to that of other political thinkers

832 Arendt, Authority p. 123.
833 Arendt, Authority p. 122.
834 Arendt, Authority p. 121.
835 Arendt, Authority pp. 128, 131.
836 Arendt, Authority p. 134.
837 Arendt, Authority p. 140.
838 Arendt, Authority p. 141.

such as Machiavelli or Robespierre and confirming that authority has indeed vanished because it "has nowhere been re-established"[839].

In the end, for Arendt, the disappearance of Roman authority and the Roman Catholic Church was what lead to the European totalitarian regimes of the first half of the 20th century[840]. While we cannot speak directly to this tragedy, we do think that the Roman *auctoritas*, which was much more profound than what is currently commonly viewed as authority, has largely dwindled in occidental civilization, even though authority certainly never vanishes entirely[841].

Throughout her essay, Arendt combines history, philosophy, politics and theology to explain what authority is, before developing why we find ourselves in the eponymous crisis. Understanding the importance of both context and genealogy, Arendt spends quite some time developing her vision of the Greco-Roman nature of authority. This rehabilitation of ancient authority in lieu of modern authority is undoubtedly her greatest achievement in this essay, in particular the Roman part[842].

Arendt also showed how the Church took the – more individualistic – notion of authority to integrate it in its doctrine[843]. Although the influence of Thomas of Aquinas was immense in the Church's doctrinal history, it was the vision of Saint Augustine's inheritors which prevailed at the time when authority's meaning started to deteriorate (William of Ockham, Duns Scot, etc.). This vision was top-down to the extreme, with the notion of sanction placed at the heart of Law. Concretely, this translated into an accrued use violence by the Church, all in the name of authority.

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839 Arendt, Authority pp. 140-141. According to her, authority is left in abeyance the moment violence rears its head, with the only example of an authoritative foundation void of violence being the American Revolution. This example, for lack of further detail on her part, actually solidifies her original argument because it is one of the bloodiest, most violent of all attempts at an authoritative foundation of the last centuries: the genocide of native and indigenous populations and slavery. Even more so considering the exceedingly high toll paid by people throughout the world for the maintenance of the U.S. empire (cf. Immerwahr, *passim*).

840 Arendt, Authority p. 91.

841 Cf. *infra* part 2, V, 2 and 5 regarding international arbitration's own crisis of authority, to use Arendt's words, as well as the three-dimension theory.

842 This is both a little ironic and tragic, because Arendt's political essays focus a great deal on the importance of the collective. Had she been able to firmly establish authority's collective nature, we do not doubt her essay featured in Between past and future would have been more consequent, and her political philosophy even more well-rounded.

843 Arendt, Authority pp. 132 ss.

Modern intellectuals were unable to draw the full lesson from the failings of the Church, which is why, according to Arendt: "It certainly is not surprising that all these attempts at retaining the only element of violence from the crumbling edifice of religion, authority, and tradition, and at using it as safeguard for the new, secular political order should be in vain."[844]

The general idea guiding Arendt throughout the essay is the following: due to Modernity, we now find ourselves in something she famously called the crisis of authority. According to her, the essence of authority has disappeared, absorbed by power and coercion and has henceforth become indistinguishable from them[845].

b. The modern confusion leading to the crisis of authority and excesses of power

"Authority has vanished from the modern world." Such are the famous words uttered by Hannah Arendt in her introduction to her 1961 essay on authority[846]. At this point in history, the concept of authority is murky to say the least. The World War II chapter had indeed left a mark whose effects are still felt today, and Arendt was directly implicated in the events that unfolded during the 1930s and 1940s in Europe. In a few words, she went into exile from Germany as she was targeted for being Jewish before settling in France for a few years. When the Nazis attacked France, she was imprisoned before escaping to the U.S.

Nazi Germany was unquestionably at the centre of both her political and intellectual lives. It is therefore in its wake that the notion of authority, or lack thereof according to Arendt, should be understood: "Behind the liberal identification of totalitarianism with authoritarianism, and the concomitant inclination to see "totalitarian" trends in every authoritarian limitation of freedom, lies an older confusion of authority with tyranny, and of legitimate power with violence."[847]

In this small excerpt, Arendt succinctly underlines how the philosophical defect of Modernity affected our era. The consequence of which has been the loss of the essence of authority, because a great number of scholars are not capable of making the distinction between power without authority (Nazi Germany in Arendt's case)

[844] Arendt, Authority p. 134. What is vain is not the fact that violence was not retained, but that it could be used to secure a new secular political order. We wholeheartedly agree with her statement: a political order based on violence, by definition void of authority, is bound to be vain as nothing can be built: there is no foundation.

[845] Arendt, Authority p. 92.

[846] Arendt, Authority p. 91.

[847] Arendt, Authority p. 97. This assertion could have benefitted from a more enlightening explanation.

and power with authority (Nelson Mandela once he was in office)[848]. She also mentions how any constraint to individual freedoms is now associated with abuses of authority, showing she understood the excesses of individualism, although she did not know of authority's collective dimension[849].

While there are aspects of Arendt's description of authority with which we disagree, she clearly understood the confusion surrounding authority, which emanated from the Modernity as we have seen before[850]. This critique of Modernity, where people have – supposedly – infinite absolute rights and thus no need to worry about the context in which they feature (if our rights are absolute, why bother with those of others?), is a stalwart of Arendtian discourse[851].

This is probably why she was so drawn to ancient philosophers: they all saw themselves as part of something greater than their individualities: their *polis* or *patria*[852]. Her analysis thus revolves around the ancient Roman (and Greek to a lesser extent) concept of *auctoritas*, all the while explaining said concept through the analysis ancient Greek philosophers made of *auctoritas*[853]. It is based on what she perceives as the disappearance of *auctoritas* that she emits the crisis diagnosis.

Quite frankly, we do not entirely share Arendt's dreadful diagnosis for a simple reason: if authority had indeed vanished, people all over the world would revolt much more often against institutions without authority in order to re-found their societies (cf. the French Revolution). Moreover, there are still some cases proving Arendt wrong in that matter, as shown by Mandela or Malcolm X. From an

[848] This is typically an aspect of authority we would have loved to develop, but given the extremely political nature as well as the minefield that is such a discussion, we purposely set aside our musings and considerations concerning the state of contemporary western democracies. A good number of them could easily be considered legitimate political regimes, but whether their power is authoritative remains in question, quite broadly might we add. This point, as political as it is, is one more reason for which legitimacy and authority should never be confused: they are distinct existences. Moreover, if authority often implies legitimacy, the same cannot be said for legitimacy vis-à-vis authority, because such were the case, why would democratically elected governments all over the world resort to lying at such a breakneck frequency? Why do they use symbols of – perceived – authority to attempt to unify people behind them so frequently?

[849] Cf. *infra*, next section.

[850] Arendt, Authority pp. 103, 128.

[851] Roviello pp. 324 ss.

[852] Cassin p. 48; Arendt, History p. 63.

[853] Cf. Cassin, who explains how important ancient Greeks were to Arendt's philosophical and political constructions.

academic standpoint, the transmission of knowledge would be incredibly difficult if authority had entirely vanished as well: every student would have to verify everything they come across, as Descartes thought we should.

That being said, we also think that there is more truth than falsehood in Arendt's claim. If authority still exists, it has all but disappeared from the works of scholars, who have no excuse for letting authority vanish the way they have i.e., by not seriously questioning the consequences of the loss of historical tradition[854]. In other words, and ironically, they rendered themselves guilty of what Descartes warned them[855].

This is probably why we owe Arendt much for unearthing the Roman *auctoritas* and rehabilitating it. In our eyes, the crisis of authority she mentioned is very real given its widespread ignorance among intellectuals. The claim that authority vanished could probably be argued to a certain extent, although a full disappearance seems very unlikely[856]. All in all, we do not think one can contest the fact that the concept of authority is indeed in crisis, if only because its meaning has been lost.

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854 Cf. *supra* part 2, III, 2 and 3.

855 Once again, we would like to underscore the fact that we will not dig into the political philosophy aspect of authority, despite a strong urge to do so. Moreover, understanding the authority people can invest in their institutions would prove incredibly difficult for quite a few reasons: what people think they know of their institutions' activity and said institutions' real activities are usually very different, authority varies from one person to another and from one culture to another, authority varies with time and one single story is enough to destroy permanently the credibility of an institution (e.g., Watergate), etc. Furthermore, analysing something in the light of a common good in the era of individualism is far from an easy task, and we doubt many people would be able to conduct such an analysis without letting their prejudices get the better of them at some point or another, particularly when individual freedoms are curbed for the common good. Proof of this resides in Arendt's essay when she states that of all the modern attempts to establish political authority, only the American founding fathers were able to establish successfully a peaceful foundation for society. Given that the U.S. was literally founded on the genocide of native and indigenous populations and that its entire economic model revolved around slavery, we highly doubt that this foundation could ever be considered peaceful.

856 An overview of high-level politicians all over the world easily suffices to show how little authority they have, how little they care for their people, their *polis*' common good. The Covid-19 crisis of 2020 onwards illustrates this beautifully. If we were indeed "all in this together", why did occidental countries stubbornly refuse to share the patent to vaccine formulae to southern countries? Why are financial institutions constantly bailed out for their mistakes, and when people try to play the financial game according to the rules in force, they get forced out of said game (cf. the 2007-2008 financial crash or the GameStop episode of January 2020)? Why do the highest-ranked elected leaders regularly cash in in morally dubious ways, during or after, their time in office (cf. Joseph Deiss, Jérôme Cahuzac, Nancy

Easily the most important author on authority of the past decades, Arendt understood that authority and power are two very different notions, that authority descends from *auctoritas*, not from technical legal jargon and power. It is not synonymous with oppressive political regimes, but with tradition, a sense of self as belonging to something bigger than the individual and the need to bequeath a better world for future generations. Authority often manifests itself on an individual level but necessarily with a resolutely collective essence.

When looking at other works authored by Arendt, we can extract more information concerning her vision, in particular regarding certain aspects of authority such as its collective nature, which seem to have been forgotten by Arendt. Doing so shows that she was genuinely attached to the idea of a collective society, which further accentuates what has been very quickly hypothesized *supra*: her not linking authority to the common good was due to the state of scholarly Roman knowledge of her time, not because she wilfully ignored it[857].

Another aspect of authority, of which Arendt was well aware, is the idea of augmentation, creation even. One of the advantages of *auctoritas* is the necessity to understand the past in order to improve the future. This means that Romans needed to understand their history and traditions so they could keep building on them. The apparent loss of tradition is something Arendt laments frequently[858], and is one of her chief explanations concerning the crisis of authority[859]. Interestingly, she widely blames the importation of natural sciences methodology in humanities as the reason why tradition, and with it, authority, has steadily vanished[860]. In other words, she viewed positivism as the main source of the crisis of authority.

Pelosi, Donald Trump, Nicolas Sarkozy, Barack Obama, Silvio Berlusconi, Tony Blair, George W. Bush, Jacob Zuma, José María Aznar, David Cameron, Hillary Clinton, Benyamin Netanyahu, etc.)? Why do such people, directly tasked with the augmentation of the common good, not act authoritatively at all?

857 Cf. for instance Arendt, Tradition pp. 22 ss; Arendt, History p. 51; Arendt, Imperialism pp. 287 ss. Cf. in particular Arendt, Imperialism pp. 255 ss regarding Arendt's plaidoyer for the inclusion of stateless people in their community, where she underlines the disaster of not belonging to any community.

858 Arendt, History pp. 43, 48-51.

859 Arendt, Authority pp. 93, 128.

860 Arendt, History pp. 50-51.

C. The defects of the Arendtian vision

Without going into the political aspects of Arendt's theory, there are certain flaws in an otherwise well-constructed presentation that we would like to examine[861]. In particular, and from our perspective, Law and legal philosophy are sadly left aside in Arendt's essay. As understandable as it is – she was neither a jurist nor a legal philosopher – it does not make it any less regrettable, for Law would have certainly enabled her to rethink some parts of her essay.

Namely, she mentions that "where arguments are used, authority is left in abeyance"[862]. Following Arendt's exposé, she first mentions the incompatibility between coercion/arguments and authority, then uses coercion and arguments as poles repelling authority, arguing that the latter is somewhat located in the middle. According to her, coercion forces people into submission, while persuasion requires an egalitarian setting between all parties, with those being the two "repelling magnetic poles" authority never touches. Given that we fully agree with her on the repellent aspect of coercion, there are thus two arguments made by Arendt we would like to dispel here: the fact that arguments only exist in an egalitarian setting and the incompatibility between arguments and authority.

As the case may be, any jurist knows Arendt's reasoning on this matter to be shaky, because when thinking about persuasion, the archetype is that of an attorney trying to persuade a judge. The hierarchy is here quite clear between judge and attorney, with the former giving a decision the latter not only needs, but is also bound to. Moreover, those chosen for the position of judge or arbitrator are, historically, older members of the community, usually benefitting from more wisdom and authority, which allows them to better pursue justice. The same can be said about a witness testimony, whose very authority is decided by the judge in charge of the case[863].

This is typically a situation where Arendt's penchant for political philosophy would have benefitted from another perspective, such as one provided by Law or legal philosophy. Without, again, going into too much detail, we can understand where

[861] We shall not dwell on the historical mistakes such as writing that the concept of authority was absent from ancient Greece, which has already been counterargued *supra* in the Roman section of *auctoritas* (part 2, II, 1). Likewise, we shall also not dwell on the fact that, in spite of a broad transversality, Arendt unfortunately skirts around Law, the domain most important with regard to authority, if only because it makes use of all other domains in one way or another.

[862] Arendt, Authority p. 92.

[863] Cf. *supra* part 2, II, 4.

Arendt comes from when she states that arguments and authority are not compatible in political philosophy wherein the notion of authority often alludes to a leader-like figure, hence the hierarchy. Likewise, the possibility to argue and persuade in politics implies a society where people are on a level of strength similar enough that they have to talk their differences out, without the possibility to impose their will as in the Nazi regime, which durably marked her.

In Law however, the capacity to persuade is necessary for any authoritative jurist: be it a lawyer's oral skills, a judge's capacity to justify their choices, how well constructed a professor's doctrine is, etc. The importance of interpretation and persuasion is further developed *infra* in part 3, but it is already very apparent that it is essential to a jurist's authority, the existence of a hierarchy notwithstanding[864]. Overall, not only are arguments compatible with authority, but their use is possible whether there is a hierarchy or not between the parties.

Even without using the most accessible counterexample, jurists, it is easy to imagine situations where arguments are important to one's authority. In general, if people could simply be authoritative, without the need to promote their opinion as the prevalent one, we would have but a handful throughout history who could be considered wielders of authority. There is a high number of people who owe, to various degrees, their authoritative status to their capacity for argumentation: scholars, politicians, activists, theologists, military strategists, diplomats, etc.

To be clear, we fully understand that the use of arguments is not itself sufficient to construct an authority. Jurists and politicians are probably those for whom arguing is the most important in the construction of their authority, but even then, it is not enough to rely solely on arguments to do so. In many instances, actions do speak louder than words, in particular if said actions contradict what the person argues. Furthermore, it is essential to always remember that authority is a collective concept, and it does not matter whether it manifests itself through an individual or not. As such, a politician or jurist with great persuasion skills can never be truly authoritative as long as the augmentation of the common good is not their greatest priority.

The authority archetype we will examine *infra*, Nelson Mandela, founded much of his authority in a testimony delivered in front of a tribunal, the most obvious place to

[864] This importance has already been demonstrated through and through by some of the best legal philosophers of our time: cf. in particular Frydman pp. 543 ss and Ost/van de Kerchove pp. 385 ss.

argue and debate. A leader of the black civil rights movement in the U.S., Malcolm X essentially based his entire authority on his sharp perception of society and a phenomenal capacity for argumentative discourse[865].

In general, if not through arguments, how would authority be conveyed? How would masters develop any authority in the hearts of their disciples? According to Arendt[866], violence stood furthest from authority, so it wouldn't be through force. Charisma can only get one so far and even then, in a vast majority of cases, it shines through speeches and other acts of discussion. Most importantly, a person's ideas are part of their most intimate layers and cannot be dissociated from one's personality. Both ideas and personality are direct components of a person's authority, for without them, authority would only be based on outward signs such as actions or physical appearance.

Among all the tools designed to promote one's ideas, argumentation is the most wide-spread and efficient one. The example of Malcolm X skewers the theory according to which authority disappears once arguments come into play. Before he became the most efficient advocate of the U.S. civil rights movement, he described himself as a thug, a very individualistic and hedonist one at that[867]. Following a litany of ordeals, he rose to international fame, through nothing but an immense talent for argumentation and a widely shared vision of the common good, to the point where he was able to move the hearts and minds of millions of people[868].

Even more than Malcolm X, the case of Nelson Mandela disproves Arendt's argument entirely. As we will see *infra*, he resisted apartheid within a wide organisation, before singling himself out when he spoke at the Rivonia trial, conveying and arguing his thoughts and the reasons for which he acted in the way he did. This speech is widely considered one of the most important of the 20th century[869]. The very location in which it was made, a court of Law, is the place where argumentation is given its highest importance and authority. This speech was Mandela's official testimony regarding the events for which he was being judged, he was therefore literally arguing his case.

865 Malcolm X pp. 215 ss.
866 Arendt, Authority p. 92.
867 Malcolm X pp. 137 ss.
868 Marable pp. 479 ss.
869 Sebag Montefiore pp. 147-148; d'Almeida p. 52; Brown chap. 14 p. 9.

Furthermore, Mandela's actions as the leader of the African National Congress' sabotage branch can also be considered a form of argumentation. Indeed, as the U.S. Supreme Court noted on multiple occasions, freedom of speech includes non-verbal actions, which can be considered forms of political speeches and argumentation[870]. Mandela's actions therefore could arguably be considered a form of speech, whose core would be arguments in favour of the cessation of apartheid. Authority was not left in abeyance by Mandela, quite the contrary: arguments strengthened his authority to the highest level[871].

Overall, authority is not something one can impose upon someone like power. It has to be conveyed, and in this regard, persuasion is the most efficient and more importantly, the most accessible way to do so, and rhetoric is the art of persuasion. Rhetoric requires both an item serving as the base of the persuasion, and a vector, which will convey said item to people listening to or reading us[872]. The item is often an idea being emphasized or discredited, whereas the vector is the language. Conveying authority through arguments therefore requires both idea(s) and language, which is yet another reason why hermeneutics could help us comprehend and apprehend international arbitration's authority crisis[873].

The next set of arguments put forth by Arendt that deserve a clarification concern both elements of her vision of Roman *auctoritas* and her view that there was no authority in the Greek political space. As we have seen *supra*[874], *auctoritas* manifested itself differently according to each person, but the bigger picture it painted was that of a common memory, an augmentation of the foundations with each passing generation, for the good of Rome herself. In the most extreme cases

870 Cf. Texas v. Johnson, 491 U.S. 397 (1989) which considered the burning of the American flag part of the free speech protected by the 1st amendment of the U.S. Federal Constitution.

871 There are many similar examples throughout history, some of them happening at this very moment (history may prove us wrong, but we are convinced that the Assange trial follows a similar authoritative construction). Socrates' and Galileo's trials are probably the most important historically speaking and were both shining examples of the importance of arguments in authority. Both cases ended with wrongful convictions, but in both cases, the convict made use of arguments to augment the common good (Athenian society, astronomy), with Socrates going as far as refusing a lavish lifestyle far from Athens to engrave his arguments in the most definitive way, by dying (cf. Minois pp. 25, 96 ss regarding Galileo).

872 Ost/Lenoble pp. 102 ss; Breton pp. 89-93.

873 This is a point developed *infra* in part 3 of this dissertation, but we wanted to make sure that, for the time being, the reader understood how essential rhetoric and arguments were, not only for the construction of authority, but for its conveyance.

874 Part 2, II.

and in the rarest instances, the foundations were created rather than augmented, which only happened twice in Rome's history with Romulus and Augustus. This common foundation is not something that can easily be implemented in our contemporary society where individualities are more important than the *polis* itself[875].

While Arendt traces indeed the parallel between *auctoritas* and tradition, her conception of its application is somewhat reversed. Indeed, she considers that Romans needed to respect scrupulously the teachings of their ancestors and that doing so granted *auctoritas* to a Roman's actions[876]. Her vision, however, was disproved by Augustus when he renewed the foundations of a Roman society that was collapsing under its own weight[877]. Said otherwise, the ancestral foundations were not adequate anymore and were hence in large part discarded. More fundamentally, what Arendt failed to see was that *auctoritas* reflected a constant movement of augmentation. The ancestral foundations were unquestionably an exceedingly important starting point, but they were just that: a starting point. How would we otherwise explain the passage from the Monarchy to the Republic to the Empire? If Arendt is right, would it not mean that Rome would have remained a kingdom until the very end? As such, Arendt may have underestimated the dynamicity of *auctoritas* and the way it helped Rome survive for more than a thousand years.

Regarding her opinion concerning the lack of authority in ancient Greece, we already know that this argument is not historically valid[878]. The fact that ancient Greeks did not have a specific word for authority is irrelevant, but even then, we saw that this lack was not as clear-cut as she may have thought according to the recent developments in ancient Greek linguistic[879]. Aristotle himself considered that humans were intrinsically finite beings, to the point where their words could never hope to fully reflect everything and every concept in this world. This is, incidentally, one of the fundamental reasons why laws (necessarily made of words) can never hope to capture the factual contingency with which they are faced[880].

875 Cf. *supra* part 2, III, 1-3.
876 Cf. *supra* part 2, III, 4, B, *a*.
877 Cf. *supra* part 2, II, 2.
878 Cf. *supra* part 2, II, 1.
879 Cf. Bur, *passim*.
880 Papaux, Introduction pp. 57 ss; Cauquelin pp. 22 ss.

Arendt states that authority in ancient Greece only manifested itself in familial or artistic settings. According to her, authority is necessarily hierarchical, which is why a democracy using arguments i.e., a structure supposedly possible only between equals, was not a fertile ground for authority. We have already debunked this claim *supra*[881] but addressing Arendt's argument in a "less meta way" leads us to similar results.

Indeed, according to her, Plato and Aristotle could not establish the existence of authority due to their use of examples drawn from family or artistic life, because of the lack of such examples among their political experiences[882]. The problem with her analysis is that she discards the most Greek of all political concepts: the Greek *polis*. Given that the conception of the *polis* was very similar in that regard to the Roman *res publica* (its shape notwithstanding: monarchy, republic or empire), ancient Greek cities were the central part of the ancient Greek common good, where traditions and successive societal augmentations crystallized through the generations.

Her argument of the lack of political experience, in our opinion, holds little value given how all aspects of ancient Greek daily life, including the family, revolved around the *polis*, the city, hence politics. In ancient Rome as well, family relations ("extra-political") were an important trove of examples of *auctoritas*[883]. Moreover, it seems to us that a political system revolving around the notion of citizen advantageously compares to other political systems as far as involving people goes, nudging them to fulfil their nature of *zoon politikon*, hereby showing just how the political structure of ancient Greece could very plausibly have participated in the authoritative process of augmenting each ancient Greek city's common good. The reason is that being a *zoon politikon* implies putting society above ourselves as individuals. Given how individualism precipitated the downfall of authority, which in turn accelerated the passage from the citizen to the individual, having a political structure centred around the *polis* that lasted during the entirety of the ancient Greek era shows that there was an authoritative movement of preserving and augmenting the *polis*. The notion of augmentation may or may not have been as prevalent and

[881] Cf. our example with the judge and the witness where, despite the judge's superior hierarchical position, authority belongs to the witness for the duration of their testimony. Moreover, her argument supposes that all citizens are perfectly equal, but an authority in a certain domain may not be so in another: complementary through differences in order to maximize what each citizen can do for their society.

[882] Cf. *supra* part 2, III, 4, B, *b.*

[883] Cf. *supra* part 2, II, 4 and 5, B.

cardinal as it was in Rome, or even visible through conquests, but this did not make it inexistent.

Arendt's dismissal of ancient Greek authority is all the more implausible given how the modern passage from the citizen to the individual has been a driving force behind the transformation of authority, and how central to ancient Greek philosophy the *zoon politikon* was, which is something she admits herself[884].

The problem is that doing so implies that historical figures of ancient Greek politics such as Solon or Pericles were not authoritative and did not lay down the foundations for future generations. Furthermore, she also states that Plato was looking for the element of a relationship "prior to the actual issuance of commands."[885] Given the relationship Plato had with his master Socrates and his many disciples, the argument according to which he was constantly looking for a relational element that was both foundational and frequent throughout his entire life is hard to accept.

This is where Arendt's characterization of authority becomes incomplete to the point where it causes her to trip over her own definitions. Indeed, by largely omitting the common good, Arendt restrained the scope of authority to the extent that it becomes difficult for concepts and ideas to be authoritative, to the point where ancient Romans were, *a priori*, the only ones with the necessary societal structure for the implementation of authority. If ancestral validation plays indeed a certain role in the maintenance of traditions, not augmenting them invariably renders them lacking in commensurability to latest societal developments, impeding the apprehension of new proportions, of what is new, to the point of hampering the analogical reasoning itself[886].

884 Cf. *supra* part 2, III, 4, B, *a*; Arendt, Authority p. 117. One of the best examples of modern individuality remains human rights which give each of their beholders the opportunity to have as much individual freedom as possible, to the point where it is sometimes seen as the common good. The post-World War II order was based on the very belief that all humans are created equal, and that the human individual was the source, the pre-condition, of morality (Freeman p. 25). The very notion of "individual" freedom is quite telling, and although the environmental crisis has forced the notion of collective rights back into the debate, the conversations are more about finding a remedy to what limits our individualities than finding a new common foundation for our civilization (Papaux, Introduction pp. 226-235; see also the references *supra* to all the mentioned modern authors). For a caricatural essay on the matter, cf. Friedman pp. 10-11, 79-84, 197-202.

885 Cf. *supra* part 2, III, 4, B, *a*.

886 Cf. *infra* part 3, II, B, *d*. The analogical reasoning is the key reasoning in Law. It makes use of clues, past experiences and the figure of analogy to develop reasonings in the apprehension of new facts and cases.

In spite of all these flaws, the general sense of Arendt's account is more important than its historical (im)precision, if only because she played a significant role in extracting authority from its conflation with power. She grounded her reasoning in the work of Mommsen[887], and both works were authored before certain major discoveries in Roman culture were made, in particular regarding *auctoritas*[888]. This could help explain why the deeper collective significance of authority eluded her. Given the circumstances, we do not blame Arendt for this misstep, which was mainly historical, despite the fact that she used it to support her claim regarding arguments incompatible with authority. This confusion appeared when she contradicted herself by trying to dismiss authority from Greek political culture: while openly admitting to the importance of the *polis* for each Greek citizen, she says that attempts to find authority floundered because ancient Greeks had no political awareness of authority, unlike in artistic or private circles[889]. This is all the more unfortunate considering that a more complete definition of authority would have further supported the political philosophical theories she defended throughout her career.

Before moving on to the Arendtian conclusion, we would also address Arendt's quote mentioned *supra*: "Authority has vanished from the modern world." This is a point we have already very quickly touched on in the introduction of part 2, and requires closer scrutiny at this stage of the discussion. Authority has never vanished from the world and, in our view cannot, because the consequences of this disappearance would be swiftly disastrous.

In this context, let us look at the notion of epistemic authority, which is the most useful example to differentiate power from authority and illustrate how the latter

887 Cf. Arendt, Authority p. 122.

888 Cf. David/Hurlet, Introduction.

889 Arendt, Authority pp. 116-119. "The grandiose attempts of the Greek philosophy to find a concept of authority which would prevent deterioration of the polis and safeguard the life of the philosopher foundered on the fact that in the realm of Greek political life there was no awareness of authority based on immediate political experience. Hence all prototypes by which subsequent generations understood the content of authority were drawn from specifically unpolitical experiences, stemming either from the sphere of "making" and the arts, where there must be experts and where fitness is the highest criterion, or from a private household community." In general, ancient Greeks defined themselves through the city to which they belonged as citizens. Cf. Socrates' death to see how important political and societal (which derives from the ancient Greek, *polis*, the city, the society) foundations were to them. Given the collective nature of their societies, how they valued the common good and that the most recent authors found that ancient Greeks had their own conception of *auctoritas* (Bur pp. 21-23), one cannot say that *auctoritas* was purely Roman anymore.

has survived up until now. A very modest reflection of the overarching concept of authority, epistemic authority is but an occurrence of said general concept. It is squarely located in the field of knowledge, the academic kind mainly[890]. In its present, commonly used conception, an epistemic authority is not necessarily required to augment their field. Indeed, one currently simply requires a vague acknowledgement from peers to be deemed an epistemic authority. Whether this acknowledgement is deserved is another matter entirely[891].

However, contrary to this – partial – conceptualization, an epistemic authority is not an authority because it knows, but because it augments[892]. In other words, one can be at the peak of their field's knowledge yet only use said knowledge for extremely egotistical and individualistic purposes thus acting unauthoritatively. This means that being simply knowledgeable is not enough to be deserving of the "epistemic authority" moniker on a fundamental level[893]. The object of this augmentation is multiple, but the first that comes to mind is the augmentation of the field itself. An authority on ancient kanjis elevates the field through superior skills, and other specialists then benefit from said skills, either by drawing inspiration from them, or by avoiding having to repeat what has already been established by the epistemic authority[894].

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890 Such is as much the case in natural sciences as it is in humanities like Law (cf. Bricmont p. 179 regarding the "hardest" of sciences, mathematics and physics).

891 Cf. *supra* part 2, III, 1-3 for instance.

892 If such was the case, all specialists would be authorities in their field. Therein lies the main difference between what is generally accepted as an epistemic authority, and what is an epistemic authority in correspondence with the broader concept, involving inherited foundations and their augmentation, a combination creating the very core of the common good as we conceive it in this dissertation.

893 For instance, publishing a book on the philosophy of private international law under the guise of a prestigious university is probably sufficient to be called an epistemic authority on the matter at the present. However, if such a book does not question the most fundamental aspects of private international law, can we seriously say that it augments legal philosophy? Without going as far as an augmentation of the field, can we even brand such a book to be epistemically authoritative in the commonly accepted version of the concept? More debatable still, when the bulk of a compilation of articles merely comments on famous authors, serving as a useful summary without adding any new element to the general discussion, can said compilation pretend to any degree of epistemic authority? Very often, specialists are called "authorities on the matter", despite never adding anything worthwhile to the field where they are supposed to be leading figures.

894 This validates the hermeneutical theory of Hans-Georg Gadamer, as we will see *infra* in part 3 regarding the importance of authority in the interpretative process and vice-versa. From an academic perspective, scholars of all fields build on what has been laid down by their predecessors. This allows them to test and establish new reasonings, which would have

Other relations where authority is still visible nowadays, albeit to very variable degrees, include the relation between a parent and their progeniture, between an artisan and their apprentice, between a basketball team's best player (or captain) and their teammates, etc.

Given that authority has not vanished from our world, it is not our aim nor our purpose to "re-create" it, to establish new intellectual foundations upon which it would hopefully prosper. Rather, we are simply attempting to rehabilitate its most basic definition in order for us to better seize what it is and what it is not.

We understand that the canonical conception of authority has changed since the era of ancient Romans. However, the way we are currently conceiving it is extremely close to power and strength, which leads to frequent confusions between the concepts[895]. We thus wish to highlight the difference between power and authority, if only to indicate that it is indeed here and not to revive something gone extinct.

Authority still lives among us, but our miscomprehension of it prevents us from manipulating it freely. Instead, we are tied down by a conflation whose debunking is easiest done by drawing inspiration from those who had established a firm limit between power and authority. In all honesty, the idea of augmenting inherited foundations was also developed in philosophical hermeneutics[896], but the miscomprehension (or partial comprehension) of the concept of authority means that many interesting links between authority and interpretation cannot be envisaged[897].

In legal philosophy, a proper understanding of authority would allow us to better grasp the essence of Law and what makes it somewhat sacred, even marginally so. Being able to qualify certain aspects of Law, not through a specific new concept,

been otherwise impossible due to the time spent exploring and discarding previous implausible reasonings. Plainly, this is how an academic discipline evolves over time, and is part of what makes it so often frustrating: we must accept the fact that most of our time is spent exploring false trails rather than straightforwardly dashing towards "true" knowledge. An epistemic authority, in other words, allows future generations to start on the second floor rather than having to begin their research from the ground floor. This obviously depends on the quality of the foundations laid down by the epistemic authority: if they are not sound and strong, the entire edifice collapses sooner or later. This is why it is important to revisit periodically the work of epistemic authorities, for their work on the ground floor might need a new coat of paint (cf. *infra* part 3, II, 2, B, *c)*.

895 Cf. *supra* part 2, III, 1-3.

896 Cf. *infra* part 3, II, 2, B, *c*.

897 Cf. *infra* part 3, III, 2 and 3.

but through something accompanying us on a daily basis, presents the undeniable advantage of rendering the philosophical aspects of Law more commensurable. In Reale's three-dimension theory of Law, authority reinforces both the effectivity and legitimacy poles[898].

All in all, Arendt's vision of the state of authority was probably too pessimistic. Rather than saying that authority has left this world, it would have been more accurate to say that it has been absorbed by power, that its collective essence has been strongly diluted by the modern individual and that its roots to the past have been hidden by the space taken by totalitarianism.

D. The Arendtian conclusion

In the end, Arendt's conception of authority was undoubtedly more subtle than that of many of her predecessors. She clearly understood the distinction between authority and power, as well as the crisis in which this concept found itself due to a lack of understanding. While she did not mention outright the duality of the collective essence and individual manifestation of authority, she understood that authority plays a role in a society's maintenance and was far removed from being an instrument of domination.

Even more than its philosophical reach however, her essay's importance lies in its historical dimension. The first to tackle authority so frontally after the holes the Lumières punched through it, Arendt was able to rehabilitate the nobility of authority through its Roman roots. She also added some flesh around the concept by showing how politically important authority is, and how a lack of it could severely unbalance entire societies and institutions[899].

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[898] Cf. *infra* part 2, V, 2 for more details on the three-dimension theory. Very briefly, this theory lays down three poles (validity, legitimacy and efficiency) which supposedly produce the phenomenon known as "Law". By making use of this theory, we will see that authority is not Law per se but a source of Law, upon which we can build both legal and legal-philosophical reasonings.

[899] Arendt, Authority p. 141. We know full well that Kojève's work preceded that of Arendt, but Kojève's analysis, in addition to being historically flawed, is philosophically fairly inaccurate. Very quickly, the historical flaws of Kojève are more about what he eluded than what he wrote, which then impacts his philosophical reasoning. Skipping the entire ancient Roman timeline means that Kojève struggles to differentiate power from authority, as both his portrayal of Platonic and Hegelian authorities will show shortly. The best way to understand the philosophical underpinnings of authority is to go through its genealogy because it is in ancient Rome that it really shone. Indeed, authority's profound nature, which is intricately linked to the mindset it instils i.e., constantly seeking to improve one's society's

Some of her explanations on the matter remain, however, somewhat unpolished. In particular, the collective aspect of Roman *auctoritas* recently discovered by Romanists. Arendt's work on Roman culture was probably based on the uncontested authority on the matter at the time, Theodor Mommsen, whose work is still used today, about 120 years after his death. She would thus not have been able to fully develop the collective aspect of authority, which would have supported her theories even further, given that Mommsen's writings never mentioned it. As such, given the available material at the time, Arendt's vision was fairly accurate, with the exception of her take on language and persuasion (cf. *infra* part 3).

Moreover, her point of view as a political thinker may have blinded her to the fact that authority manifests itself in all walks of life, Law included. Given the

traditions and through them said society's common good, does not appear in Kojève's writings. Authority can be said to be an extremely flexible concept, capable of existing in any given society seeking improvement, but despite this, Kojève divides authority into four rigid theories of authority: the theological, the Platonic, the Aristotelian and the Hegelian. Not conceiving authority as such would explain why Kojève had a rigid conception of authority: *"De cette façon, l'analyse métaphysique 'justifie' l'analyse phénoménologique en ce sens qu'elle explique pourquoi il y a nécessairement* quatre *types irréductibles d'Autorité et quatre* seulement." (Kojève p. 130) Among these four types of "authority", the Hegelian authority described by Kojève uses the example of a slave and their master, underlining that the slave willingly submits to a master without any sort of resistance (Kojève p. 70). However, authority is not akin to submission, especially in this case where the submission most probably originated from the fear of sanction, which could be the pain of death (cf. *supra* part 2, III, 5). Another of these four types of authority is the Platonic one, which corresponds to the authority of the judge. According to Kojève: *"D'une manière générale, la* potentia *de l'impartialité, de l'objectivité, du désintéressement, etc*. [of a judge], *engendre toujours une autorité*." (Kojève p. 81) This means that for Kojève, power was the basis of a judge's authority, which is something we have thoroughly disproved throughout this dissertation: authority is the basis of a judge's power. It is mainly for these reasons that we decided not to emphasize the writings of Kojève to the same degree as those of Arendt. On a sidenote regarding the term *potentia* and unfortunately for us, the English language does not provide a better translation for *potentia* than "power", the same as *potestas*, whereas in French, *potentia* would be translated by *"puissance"* and not *"pouvoir"* (i.e., *potestas*). Where the distinction between *potestas* and *potentia* truly resides is in the idea that the former is closer to the notion of "ability", the capacity to do something, while the latter simply describes strength, without purpose or any notion of morality, hence without link to *auctoritas*, contrary to *potestas* (cf. Negri pp. 293-294 who states that *potestas* is the orientation brought about to *potentia* in an analysis unfortunately silent on *auctoritas*). This means that the notion of *potentia* does not add anything noteworthy to the *auctoritas-potestas* relation: *potentia* is simply a tool of *potestas*. This is why we did not deem any further inclusion of *potentia* to be helpful to this dissertation: the key conceptual distinction resides between *auctoritas* and *potestas*, with *potentia* simply being a neutral descriptive item at the end of the chain of reasoning.

prevalence of argumentation in Law, we do not think she would have made the mistake to dissociate it from authority had she taken a look at it from legal philosophy's point of view.

Although we have already seen a few examples as to what constitutes an authority, especially in ancient Rome, we would like to introduce what we consider to be the arch-example of an authority in our contemporary era, one that will allow us to further support our claims regarding both our criticism and agreements with Arendt. If there were boxes to fill in order to become an authority, this man would tick nearly every single one of them. This is even more impressive given that in an individualistic culture such as the dominant occidental one, it is very difficult to find proper examples of authority. The man in question is Nelson Mandela, a towering authority known throughout the world. We consider this example to be cardinal, mainly because it illustrates authority very well, its two main components above all – augmentation/creation of the foundation we inherit and the common good. Furthermore, in good Aristotelian fashion, it is important to have concrete references to which we anchor ourselves, even more so when examples reach the status of archetype like the one we are about to see.

IV. A concrete case of authority: the dread of South African apartheid and Nelson Mandela

1. An Afrikaner point of reference: Daniel Malan

Before diving in our South African example, we would like to mention a few points worth keeping in mind for the duration of this section. We do not consider said section to be one of political philosophy for we do not analyse the political system of apartheid South Africa, merely one man's authority, how it was built and why it endures. We view concrete examples as the best way to grasp what is difficult to define. The idea here is to lay out the archetype, the current leading case if you will, of what authority is.

Our choice of South Africa is not innocent, because it shows how different the authority of two people occupying the same position can vary. In our case, we will analyse the difference between Nelson Mandela and Daniel Malan. The first became a global icon as both a political resistant and unifier, while the second is remembered as the first head of government to officially implement apartheid laws in South Africa, both serving as heads of South Africa for similar durations. Before analysing Mandela's authoritative existence, let us first take a look at Daniel Malan, prime minister of South Africa from June 1948 to November 1954.

During Malan's tenure as head of state, he used his power to oppress the vast majority of the South African population (all non-white for sure, but all non-Boer to a certain extent as well). While we are not disputing the fact that Malan may have had a certain authority amongst Afrikaners[900], the way he governed made an outcast of roughly 90% of the South African population.

[900] Which is a definite possibility given that the economic indicators traditionally used to measure a country's wealth were very positive from 1948 to 1958, despite the fact that such indicators are very partial (Coquerel p. 177).

The way he did so was not through soft power or skills of persuasion, but through laws voted by his political party such as the South African Citizenship Act[901], which was designed to render access to South African citizenship harder for immigrants of the Commonwealth[902]. The most representative legislative acts under Malan's tenure, were the racist texts which became cornerstones of apartheid South Africa: the Group Areas Act[903], which severely limited the rights of South Africans depending on the racial category to which they were assigned[904]; the Population Registration Act[905], which gave broad powers to political authorities to classify people as belonging to a certain racial category[906]; and the pass laws in general, which allowed white rulers to control the flux and influx of people on the entire territory[907].

Daniel Malan was considered more of a pragmatic than an ideologue, unlike his two successors, Strijdom and Verwoerd. While not as closely associated to apartheid as they were, he was nevertheless responsible for forging and implementing this ideology at the highest level of South African politics. Moreover, he nominated both Strijdom and Verwoerd to key positions of power and gerrymandered the country in order to favour regions with strong Afrikaner presence. When naming the inaugural members of his government, he had no qualms selecting people who had officially supported the Nazi ideology during World War II. His reign marked

901 No. 44, assented to on the 29th of June 1949.

902 Afrikaners had traditionally opposed anglophones and still remembered the second Boer War that raged from 1899 to 1902, and at the end of which the Afrikaners were soundly defeated by the British.

903 No. 50, assented to on the 24th of June 1950.

904 Those rights included but were not limited to the acquisition of real estate and the freedom of movement. In effect, the Minister of Interior and the Governor-General could create geographical areas specific to certain groups of people. Those groups were divided according to a person's race. In effect, it was used as a tool to uproot people of colour from entire areas and reallocate said areas to white people, usually Afrikaners. The consequences were far-ranging as, for instance, businesses had to get the approval of the Minister of Interior without which they could not function (Mandela pp. 174-175).

905 No. 30, assented to on the 22nd of June 1950.

906 This text of law was, according to Mandela (pp. 175-176), "one of the most pernicious examples" of inequality in South African codes of law.

907 Cf. Coquerel pp. 178 ss, 185, 187 ss. Cf. Savage for a detailed account of the pass laws spanning seven decades. There is no doubt that many more texts could be mentioned on this unenviable list such as the Reservation of Separate Amenities Act (no. 49, assented to on the 5th of October 1953) which divided public amenities such as buses according to race, the Bantu Authorities Act (no. 68, assented to on the 27th of June 1951), which reduced the few political rights non-whites had to ashes, etc.

the beginning of South Africa's isolation on the international stage and the harsh repression of civil liberties nationally[908].

It is interesting to note at this stage, that Malan's stint at the top of South Africa was marked by the adoption of a great number of laws, which were instrumental to his reform of South African politics. The judiciary power acted as a check for some time, but was ultimately transformed into an extension of the ruling National Party when it realized that its political philosophy was not as widely adhered to as it may have thought[909].

Severely lacking in authority outside of his political base, Malan resorted to power to implement his political vision, a tale that repeated itself throughout the era of apartheid: a political programme unpopular with the vast majority of the population, overly reliant on formal aspects and the general positivist mindset to be applied.

2. The sharp contrast of Nelson Mandela

Nelson Mandela was a member of apartheid's most noteworthy opponent: the African National Congress (hereafter, "ANC"). Although the actions of the ANC were much more diverse than depicted here, they first engaged in what could reasonably be considered peaceful and lawful protests, and even calmed down crowds when they thought a situation could become dangerous[910]. Despite the efforts of the ANC to keep their protests civil, their actions led to the first of Mandela's two landmark trials, the so-called "Treason Trial" that began in 1956, in which the prosecutor tried and spectacularly failed to prove that the ANC had become a communist organisation, which would have signified its dismemberment according to the Suppression of Communism Act[911].

> "[T]he consequence of the government's humiliating defeat was that the state decided never to let it happen again. From that day forth they were not going

[908] Coquerel pp. 177, 179, 182, 189, 200, 202, 210.

[909] In 1952, South Africa's highest court of Law invalidated a law enacted by the parliament (the Separate Representation of Voters Act, no. 46, assented to on the 15th of June 1951). According to this law, coloured people were to be represented by white people in parliament. Following this episode, Malan and his party enacted a bill allowing them to circumvent judiciary control, which ended up being invalidated by the judiciary once more.

[910] Mandela pp. 180-181. "For fifty years, the ANC had treated non-violence as a core principle, beyond question or debate" (Mandela p. 324).

[911] No. 44, assented to on the 26th of June 1950.

> to rely on judges whom they had not themselves appointed. They were not going to observe what they considered the legal niceties that protected terrorists or permitted convicted prisoners certain rights in jail. During the Treason Trial, there were no examples of individuals being isolated, beaten and tortured in order to elicit information. All of those things became commonplace shortly thereafter."[912]

In the wake of the South African government's subsequent violent actions, chiefly the 1960 Sharpeville massacre[913], Mandela led the charge to push the ANC towards a more intense form of resistance, which resulted in the creation of the ANC's armed division, Umkhonto we Sizwe[914]. Umkhonto we Sizwe mainly committed acts of sabotage for the short period of Mandela's leadership before his imprisonment: "Our intention was to begin with what was least violent to individuals but most damaging to the state."[915] In turn, the South African government reacted by capturing Nelson Mandela, as well as other prominent members of the ANC between 1962 and 1963[916].

This sequence of actions led to the second of Mandela's landmark trials, the Rivonia trial, which resulted in a guilty verdict and had him shipped off to prison for more than 27 years. However, the trial itself proved to be the best political showcase as it allowed Mandela to make his most famous speech, one that reverberated many years after he was shipped off to Robben Island. At the time of the trial, the defendants' legal team decided to let Nelson Mandela make a statement instead of testifying, which would prevent the prosecutor from cross-examining him in exchange for his words having less legal weight than if they had been said in a testimony[917]. After speaking for more than 4 hours, Mandela concluded by saying that:

912 Mandela pp. 309-310.

913 Coquerel pp. 224 ss; Mandela p. 280.

914 Mandela pp. 320 ss; Simpson pp. 19 ss.

915 Mandela p. 325; Woods p. 29. Even when put at the head of the ANC's armed division, and despite belonging to the "young and brash" wing of the ANC, Mandela still viewed violence as a measure of last resort, and not something to be used directly. "[…] [S]ince the ANC had been reluctant to embrace violence at all, it made sense to start with the form of violence that inflicted the least harm against individuals: sabotage. Because it did not involve murder, it offered the best hope for reconciliation among the races afterwards. We did not want to start a blood-feud between white and black." (Mandela p. 336) This piece of information is interesting because, as we have seen with Arendt, violence is what stands furthest from authority. Mandela, while having ample justification to seek revenge through bloodshed, was always aware of the importance of a movement's reputation, which could be both harmful or helpful with regard to its authority.

916 Mandela pp. 340, 373 ss.

917 Mandela pp. 429-430.

> "Above all, we want equal political rights, because without them our disabilities will be permanent. I know this sounds revolutionary to the whites in this country, because the majority of voters will be Africans. This makes the white man fear democracy.
>
> But this fear cannot be allowed to stand in the way of the only solution which will guarantee racial harmony and freedom for all. It is not true that the enfranchisement of all will result in racial domination. Political division, based on colour, is entirely artificial and, when it disappears, so will the domination of one colour group by another. The ANC has spent half a century fighting against racialism. When it triumphs it will not change that policy.
>
> This then is what the ANC is fighting. Their struggle is a truly national one. It is a struggle of the African people, inspired by their own suffering and their own experience. It is a struggle for the right to live.
>
> During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die."[918]

This speech, made on the 20th of April 1964 in front of the Transvaal Provincial Division of the Supreme Court of South Africa, is to this day considered as one of the most important of the 20th century[919].

The trial was scrutinized worldwide as it gave international visibility to the struggle against apartheid and cemented Mandela as the recognizable symbol of the aforementioned struggle. The accused were nearly all sentenced to lifelong jail sentences, but in their legal downfall, they became symbols of resistance, repeatedly used to put pressure on the British and U.S. governments to stop protecting South Africa from international sanctions[920].

The Rivonia trial magnified Mandela's stature by giving him the best stage an attorney like him could dream of: a courtroom of law. The trial was heavily scrutinized around the world, so much so that the United Nations Security Council adopted resolution no. 182 (S/RES/182) on the 4th of December 1963, which heavily targeted the interests of the apartheid government and tried to set

[918] Mandela p. 438.
[919] Sebag Montefiore pp. 147-148; d'Almeida p. 52; Brown chap. 14 p. 9.
[920] Brown chap. 13 p. 9.

the stage for a somewhat fairer trial. The manoeuvre partially succeeded, as the worst outcome (the death penalty) was avoided. Over the course of this trial, Mandela had become the symbol of resistance against apartheid and the number one enemy of the state[921].

"Absence makes the heart grow fonder" is a saying that is often validated in politics, and this is what happened to Mandela when he was on Robben Island, especially after the Soweto uprising of 1976 and the 1977 murder of Steve Biko. In the aftermath of both events, the free remnants of the ANC were able to corral angry young Blacks and rally them to their organization. The political prisoners were ever-present in the mind of ANC members, and the growing anger among young South Africans meant that the ranks of Umkhonto we Sizwe grew, as they became increasingly open to the idea of violent retribution, in particular regarding their imprisoned leader: Mandela[922].

Mandela's stint on Robben Island became an important vector for what he was to be: an authoritative figure. Indeed, as Robben Island was a prison for political prisoners, it became a place where people resisting apartheid gathered: ANC members, but also members of organizations advocating for more radical solutions such as Biko's South African Students' Organization (hereafter, "SASO") or Sobukwe's Pan Africanist Congress (hereafter, "PAC"). While in jail, Mandela often served as a mediator and arbitrator of sorts between the white gaolers, the older ANC members and the younger more energetic PAC and SASO members: "I regarded my role in prison as not just the leader of the ANC, but as a promoter of unity, an honest broker, a peacemaker, and I was reluctant to take a side in this dispute, even if it was the side of my own organization. If I testified on behalf of the ANC, I would jeopardize my chances of bringing about reconciliation among the different groups. If I preached unity, I must act like a unifier, even at the risk of perhaps alienating some of my own colleagues."[923]

921 Woods pp. 31 ss.

922 Mandela p. 576; d'Almeida p. 63; Brown chapter 15 pp. 3, 14-15. In 1980, multiple attacks were carried out against places of power in South Africa by Umkhonto we Sizwe, some with the objective to free Mandela, which showed how big a place Mandela was now occupying in the collective conscience of black South Africa. He was indeed one of the two last internationally known black leaders fighting against apartheid who was still alive, along with Desmond Tutu. The others (Sobukwe, Biko and Luthuli) all died in ways that involved the government directly or indirectly, which further augmented Mandela's stature (d'Almeida p. 63; Woods p. 43).

923 Mandela p. 580; Brown chapter 15 pp. 15-16. This was confirmed by a Robben Island gaoler, Jack Swart (cf. *infra*).

It was through his years in jail that Nelson Mandela put into practice the wisdom that eventually made him one of our contemporary world's highest moral authorities. His credentials as far as authority was concerned had multiple prongs: an attorney, a resistant against a racist government, a peaceful but not weak mediator and ultimately, someone who tried to put the interests of society in front his own individual needs, not unlike ancient Greeks and Romans[924].

This penchant for unity is, in our mind, best seen in what could be considered anecdotal episodes of Nelson Mandela's captivity. While guards on Robben Island were mostly concerned with making his life miserable, the Afrikaner guards Mandela met while imprisoned in Pollsmoor and Victor Verster prisons (after his transfer from Robben Island) seemed to accept him not only as an equal, but as a superior.

An interesting case is that of warrant officer Swart, one of his guards on Robben Island who then cooked and cleaned for Mandela in Victor Verster prison. By that time, Mandela had become a global icon and could force Swart's respect without too much effort, the difference in stature being clear. However, stature was not the reason for which he generated respect from the former Robben Island guard. Rather, Mandela treated him as an equal despite having a higher social standing and receiving visits from then Minister of Justice Kobie Coetsee himself. In addition, he showed an interest in Swart's culture, the Afrikaner culture, by asking Swart to correct his Afrikaans in exchange for him correcting the warden's English. The difference in Swart's perception before and after meeting Mandela was striking, as he went from considering him a terrorist to calling him a brother, "a man whose quiet dignity won him over."[925]

This yearning for harmony in unity persisted after his liberation in 1990, when Mandela did not advocate the systematic punishment and imprisonment of all those guilty of supporting apartheid. Rather, after the ANC won the 1994 elections by a wide margin, he decided to mount a government of national unity that even included Frederik de Klerk, the last head of state hailing from the pro-apartheid National Party. The ultimate proof of this desire appeared after these elections, which saw the ANC fall just short of a 2/3 majority which would have enabled them to enact a new constitution without consulting the other political parties. If certain ANC leaders felt understandably frustrated, Mandela was relieved: "Some

924 Cf. *supra* part 1, I, 2 and part 2, II, 4 and 5.

925 ‹https://www.theguardian.com/world/2013/dec/11/mandela-jail-warden-terrorist-brother-jack-swart›, last consulted on 11 June 2020; Mandela pp. 650 ss.

in the ANC were disappointed […], but I was not one of them. In fact, I was relieved; had we won the two-thirds of the vote and been able to write a constitution unfettered by input from others, people would argue that we had created an ANC constitution, not a South African constitution. I wanted a true government of national unity."[926]

In addition to the political side of Mandela, his attitude was also constitutive of his authority. Coming out of prison as a national hero, he was still very conscious of the poverty in which the vast majority of South Africans lived. So, instead of heading to the luxurious house his wife had built during his incarceration, he decided to return to his old and small house in Soweto, because he wished "to live not only among [his] people, but like them", which is something elites seldom do, usually preferring instead to isolate themselves from the rest of the world[927].

3. South African conclusion

The case of Nelson Mandela lays out very clearly why we disagree with Arendt when she states that authority is in abeyance the moment arguments are used, for it is through the strength of arguments that human beings overwhelmingly gather the consent of their brethren, thus becoming acceptable and eventually symbols of authority, something Mandela exemplified brilliantly.

It is not difficult to understand just how different the authority of both Malan and Mandela is, despite the fact that both were heads of South Africa for a similar duration, supported by a vast parliamentary majority and with a power they could use to enforce their decisions and legislative agenda. Furthermore, both men had a similar type of power in the palm of their hand: the South African state apparatus.

However, Malan was a white supremacist who could not be bothered with the plight of South Africa's black majority, and Mandela managed to be both a symbol of resistance against political oppression, for peace and reconciliation throughout the world. Nowadays, the authority of the former is nigh-inexistent, while that of the latter is used and abused by all those who wish to elevate their own agenda or to make a point in a doctoral dissertation.

926 Mandela p. 743.
927 Mandela pp. 679-683.

The choice we made to look at Nelson Mandela's authority, as swiftly mentioned at the beginning of this South African excursion, is not entirely innocent. In addition to the fact that apartheid is, like most tragic political events, something from which many lessons can and should be drawn, the figure of Mandela is one that has towered over international politics as far as authority goes, which is due to a broad range of factors factors.

Indeed, the very story of peaceful protests followed by a more robust resistance punctuated by a rare happy ending of sorts, makes for a story, a myth, that not only appeals to a great number of people, but also gave birth to an authentic figure of authority. The case of Mandela is easy to understand because he spent the bigger portion of his life fighting against power rather than being in power. More importantly still, the power against which he fought was one easily labelled as unjust, unacceptable, contrary to the common good and contradictory to the very notion of justice for many in the 21st century.

That being said, the gesture that propelled an already popular Mandela to the rank of living myth, was when he decided not to retaliate against his former enemies. The gesture of forgiveness is quite rare in confrontational politics, yet Mandela extended a hand to a regime guilty of torture and systemic racism, responsible for his 27 years in prison and many more of political resistance, not as a gesture of surrender or forgetfulness, but to cease the vicious spiral of retaliation, to be accepted by all South Africans including what had suddenly become much less relevant political minority.

Coming from a person who was already known throughout the world[928], this gesture further cemented his reputation as a moral compass, an authority. In addition to this, he also served as a beacon for imprisoned activists thereafter, no matter where they hailed from, because every politically involved person knew who Nelson Mandela was[929].

Until he became president of South Africa, Mandela had no power, no capacity to enforce anything. While he was the head of the armed division of the ANC for a relatively short period of time, he had but a limited capacity to enforce his will. He

928 Cf. the concert that was given in his honour for his 70th birthday at Wembley, while he was still imprisoned, which attracted over 600 million viewers.

929 Cf. ‹https://www.nytimes.com/2010/02/07/opinion/07intro.html›, last consulted on 15 June 2020. This article retraces the steps of seven people imprisoned for opposing their governments' actions, and who have drawn both strength and inspiration from Mandela's own story.

earned his reputation as a freedom fighter through concrete acts of resistance (mostly of a pacific nature), fair and equitable political ideas and the fact that he was willing to take responsibility for what were considered crimes under apartheid, but mere genuine legitimate acts of resistance by him, his peers and a majority of people in general. He sacrificed 27 years of his life for his cause when he was sent to jail, thus demonstrating that he whole-heartedly embraced his cause, regardless of the impact on his own personal freedom and well-being. In other words, he sacrificed his individual welfare for the greater common good of all those who were discriminated against under the apartheid regime. Given his status as an attorney and as a member of the royal family of the Thembu tribe, Mandela could have easily enjoyed a comfortable life, even under the apartheid regime. He sacrificed it all for the sake of a just society, the common good, the foundation of a new South African society.

All of those aspects made him acceptable not only to black but also white South Africans, who ended up recognizing that his struggle had been the right one all along. His authority was that of a person who had battled, suffered, won and forgiven. It was that of someone who had a simple wish of fairness and justice and fought for it against all odds in what can be considered as a very honourable way to do so. The name of Mandela is often invoked when talking about forgiveness, but the weight of the name, his authority, does not stem from this single action, but from his entire life[930].

[930] Eraly p. 218.

V. Authority in legal philosophy

1. Before the concept of authority: a quick introduction to the concept of common good

Authority as we have carefully built it over the course of its genealogy implies a few elements, the most nebulous of which is the common good. Exceedingly hard to define in any western society constructed on individualism and the idea of absolute freedom, the common good is transversal to the extreme and more than the simple nominalist sum of all individual goods in a society[931].

Given its centrality in our upcoming tentative definition of authority, it would be useful to attempt an explanation of the common good, although a fully-fledged definition would exceed the scope of this dissertation by far, requiring the input of scholars from all fields and walks of life[932]. We should thus be satisfied with a broad definition, whose content we will continue to detail when good opportunities to do so arise within the frame of this dissertation.

We shall proceed through comparative negative characterizations of the common good i.e., by emphasising what the common good is not through the use of "neighbouring" concepts. This should yield a precise-enough illustration to move forward and define authority from a legal-philosophical perspective. This will also allow us to dispel a source of confusion for many people, their legal-philosophical affiliation notwithstanding: the difference between the general interest, common interests and the common good.

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931 Cf. Billaudot pp. 32 ss, who summarizes this problem very well.

932 Indeed, such an exercise would be us far beyond the realm of legal philosophy, involving notions and century-long debates of theology, sociology, politics, pure philosophy, comparative history, anthropology, etc. An interesting exercise to be sure, but too removed from our main problematic to be justified in these pages.

Common interests are the most easily and readily describable, for they are simply matching interests. Those can be long-term or short-term and concern anything from a passing interest to a fundamental long-lasting one. More importantly, common interests are highly individualistic in nature, and their "common" aspect alludes to the fact that they are a match between two or more individuals. In other words, common interests lack any overarching societal dimension, contrary to the common good and the general interest.

Additionally, we could also make a distinction between the common good and common goods, which are sometimes referred to in their singular form as well, confusingly so. Here, common goods refer to commodities and public utilities such as roads, parks, public transportation, etc. This is obviously not the definition we have exhumed of the common good, which stands for much more than items whose usage is shared by people[933]. More particularly, this definition frequently uses economic criteria to define what is common, a far cry from the fundamental moral aspect of the common good we will see *infra*.

The general interest is much more easily mistakable for the common good. Jurists, when they do not outright conflate them, often characterize the former as a legal notion for judges to use in concrete cases to define state action[934]. Some even go as far as tying its very existence to legal texts. The idea is that the general interest legally delimits the state's area of action: that which is not in the general interest must not be pursued by the state[935].

Although we do not abide by it, such a vision has the merit of highlighting the main difference between general interest and common good: the moral dimension. Interests, whether they are general or personal, do not require the inclusion of concepts such as morality in their application. Morality, which derives from the Latin *mos*, the mores, shares a common root with tradition in the sense that both imply inheriting behavioural standards from past generations, and given that tradition is an integral part of the common good, this would mean that the notion of common good is indeed a moral construction. There is, to be sure, some overlap between the general interest and the common good, as the latter serves as a

933 Montialoux pp. 25-26; Didier pp. 279-280. Cf. also Grange pp. 26-27, who, even while attempting to escape the clutches of economic analysis, uses economic criteria to define what are common goods.

934 Alves p. 267; Truchet pp. 5-6; Derieux pp. 105 ss.

935 Pontier pp. 34, 39, 42, 49.

compass for an entire society's actions. However, the general interest is not so much concerned with morality as it is with utility[936]: building highways is in a society's general interest, but it is not representative of the common good. On the other hand, the preservation of the ecosystem in which a society exists and upon which its survival hinges is part of the common good, fully integrated in the way our traditions have developed for centuries.

We began describing the general interest by using a legal definition, but the question whether Law belongs to the general interest or the common good remains unanswered. The answer is quite elusive, especially for those hailing from the Aristotelian tradition according to which the substance of the Law is found in its concretization i.e., *in casu* justice. For example, monetary compensation for the damage sustained through another's fault serves our personal interests, and yet, at the same time, is reflective of the overarching general legal principle of personal responsibility, which is part of the general interest[937]. In turn, the personal responsibility of the one who caused the damage is also a reflection of Law's most fundamental principle, the key to justice and thus an unquestionable part of the common good: the *suum cuique tribuere*[938]. Going full circle, the monetary compensation we receive cannot be directly subsumed under the notion of common good, but it does participate in its concretization, albeit on a very modest scale.

Summarily, and according to what we have seen so far, the common good appears to resemble the fundamental values and rights of a society. This would, however, be somewhat reductive of the common good, which cannot be delineated this "strictly". Indeed, we view fundamental freedoms as legal vessels of the common

936 Which would insert the general interest in the utilitarian logic, unlike the common good. As a quick reminder, utilitarianism essentially uses the question "what use is it?" as Ockham's razor to determine what is a good or a bad choice.

937 This is typically where this debate becomes heavily influenced by one's own axiological inclination, where interdisciplinary scrutiny becomes mandatory for the debate to progress and where concepts become profoundly entangled (what is an institution, the public, a good, an interest, political regimes, sociological specificities, cultural impact, historical sources and ramifications, etc.). The matter of individual responsibility is also quite loaded, as it reflects what is commonly viewed as the main separator of political ideologies: the individual vs. the collective, liberalism vs. socialism. Although we personally consider this distinction lacking, it is the most widespread and influential one in the *doxa*, both informed and uninformed. The question whether individual responsibility is part of the general interest or the common good probably varies depending on each's perception of society.

938 Cf. *supra* part 2, II and *infra* part 2, V, 5, C, *c* regarding the definition and the developments of this concept.

good, not the common good itself. The latter is more rooted in a society's mindset, the way citizens behave on a day-to-day basis, permeating our daily actions[939].

An interesting example would be to compare the freedom of speech to the concept of *suum cuique tribuere*, the latter being closer than the former to the core of the common good. Both are clearly very important in occidental societies, but their scope and purpose vary. One cannot invoke the *suum cuique tribuere* in justice, contrary to freedom of speech. However, the *suum cuique tribuere* is much more widespread than any freedom imaginable. It could even be argued that fundamental freedoms are the result of the contemporary occidental vision of the *suum cuique tribuere*[940]. Said otherwise, the *suum cuique tribuere* permeates the mindset with which we conceive justice, a functioning akin to the common good with society, simply on a smaller scale.

The purpose of Law, its final cause, is justice. In turn, the notion of justice has been labelled as the pre-condition to the Good according to both Plato and Aristotle, among others[941]. This would mean that jurists have an important role to play in the articulation of the common good, one they unfortunately seem to shirk too often[942].

939 Cf. *supra* part 2, II with the Roman *auctoritas*.

940 Without unearthing every detail, if the *suum cuique tribuere* is the legal incarnation of the idea that each person should receive what they are due, what they are owed, occidental history indicates that our freedoms are the consequence of a legion of intolerance, culminating with World War II. In the wake of this tragic episode, the idea that human rights were inherent to our human condition gained traction to the point of becoming a mainstay in occidental cultures and Laws. Fundamental freedoms were thus considered as a due borne from our simple existence, reflecting an extension of the scope of the *suum cuique tribuere*.

941 Plato, Laws 696b, 727e-728a; Plato, Protagoras 322c-322d; Plato, Gorgias 470; Aristotle, Nicomachean Ethics 1129b; Dworkin, Virtue p. 62; Rawls p. 433. We will not go into the details of the Good's components, which is yet another doctoral dissertation all to itself. Moreover, it is also too far removed from our topic to warrant serious developments. For the sake of the present dissertation, we shall define the Good as the most cardinal of virtues and whose main component is the common good mentioned throughout this work, although the Good is not limited to it. Authors such as Thomas of Aquinas (Modde p. 223), Plato (Plato, Republic 504e-505b; Plato, Republic 517b-520e) and Aristotle (Nicomachean Ethics 1096a11-1098b20) have described the Good as the final cause – or supreme Idea – of all human beings. Anglophone commentators of Aristotle often, wrongly, call this final cause "happiness". The word used by ancient Greeks, εὐδαιμονία (eudaimonia), refers to a much broader concept than happiness, encompassing concepts and virtues of justice, courage, wisdom, a harmonious soul, generosity, a virtuous city, etc. Given this broadness, it is more accurate to refer to the final cause of human beings as the "Good" or even "goodness" than happiness.

942 Cf. *infra* part 2, V, 5, A and B regarding arbitration and part 3, III from an hermeneutical standpoint.

Justice as a condition to the Good is a connection with which we fully associate ourselves. Again, the best way to explain why is to do so through a negative approach: could the Good be reached without justice? Could a society dominated by injustice and unfairness be deemed as good? Using a stereotypical legal example, let us imagine the case of a burglary, very loosely defined as an act of theft combined with an act of breaking and entering into a home. Most people would – rightfully – feel violated in what is usually viewed as their most intimate space. Furthermore, they would also be relieved of valuable possessions, maybe family heirlooms, maybe items acquired after much honest hard work. In such cases, injustice would have the burglar go scot-free and the burglarized left with no recourse to compensate all damages suffered, reflecting cases of pure *potestas* void of *auctoritas*, which is often where a justice-less society leads.

A sheer *potestas* society is one where strength void of justice rules i.e., violence, a far cry from a power borne from and based on authority, serving as a simple means to reach other more noble objectives[943]. In any case, could we, in such instances, truly consider human beings as walking towards the Good or even a common good? Even more so, would we even be able to consider the possibility of creating or striving towards said common good in such an atmosphere of generalized insecurity, instability and looming violence? The answer is obvious enough that we do not have to go into further detail on the matter.

Having established the importance of justice with regard to the common good, the role of jurists in this context could be described as easing their society's path to the common good through justice, as justice is indeed their prime concern and as they are justice's most active actors. This obligation towards justice is truly befitting of jurists, who learn time and again what the fundamental freedoms, rights and values of their society are, all the while (presumably) comprehending that these are inherited from their predecessors, from the past, and that current

[943] Again, we will not into the details of whether a society solely based on power is even conceivable, with justifications along the lines of strength being a societal indicator like any other, that many animals use strength to organise themselves societally and that the hierarchy between countries is determined according to the size of their armies. Even if we were to accept all of these arguments, which we are not, there remains the question whether a pure strength-based society could indeed be considered just, or even sustainable. Although the current dissertation might, very implicitly and indirectly, provide some answers, we will leave such debates to political scientists and sociologists for the time being, despite the fact that legal philosophy could probably help further such debates.

jurists are hopefully augmenting them by ensuring that they continue doing justice[944].

Hence, and although this is somewhat of a tautology considering what we have seen so far, a sizeable part of the definition of the common good could be described as the mindset we inherit and use in order to perpetuate and ameliorate our society and its values, making use of the very basic idea underlying the concept of authority. These values are distinguishable from all others by checking their resistance to time, as opposed to those whose flexibility and importance are insufficient and discarded along the way[945].

The question then becomes whether the concept of common good can exist independently of authority. More precisely, can the common good exist without the underlying mentality of authority consisting in the augmentation of inherited foundations? We know that authority would lose its purpose without the common good, because there would remain nothing to augment. Although authority generally consists in an augmentation, let us not forget that in its most profound acceptation, authority is an act of creation, that of the common good that future generations will inherit and augment. Despite the fact that it is not the purpose of our analysis to deliver a clear-cut answer on this matter, we would be inclined to answer that the common good is intricately linked to authority, to the point where it is doubtful that one could exist without the other[946].

[944] This is where the history of Law and Roman Law are particularly important from a hermeneutical standpoint: they help us understand the context in which we insert ourselves, that there can be no understanding of present Law without knowing the why and the how from the past. Common lawyers usually know this much better than civil lawyers, for they practice it much more openly, with the necessity to understand the historical context of the leading cases they either attack or use to defend themselves.

[945] This is yet another criterion distinguishing the common good from the general interest. The former has, to a certain extent at least, a capacity to resist the passage of time. The latter, on the other hand, varies depending on the historical context. For example, the preservation of the environment was not as often taken into consideration when analysing the general interest in 1930 as in 2022. This is probably what we could call, to a certain extent, the sacredness of a society (cf. *infra* conclusion).

[946] This is the point where going any further on the matter would make us stray quite drastically from our initial objective i.e., giving a definition usable in our general presentation on authority and arbitration. Had we decided to dig any deeper, we would have started with the work of Thomas of Aquinas, who dedicated large swathes of his *summa theologica* to it. This would have brought us face to face with concepts such as his metaphysics, the importance of one's personality, the final cause of all human beings and the *summa divisio* between soul and body (Modde p. 223).

Regarding the common good in the current arbitral paradigm, giving a clear-cut definition is very far from obvious, perhaps even more so than in any other legal field. The first reason is inherent to international arbitration: its contingency and factual complexity make it very hard to define common substantive elements, let alone finding a common good. Secondly, and contrary to Gaillard's vision of an independent international arbitral order, arbitrators cannot be removed from their own *lex fori* culture and education for hermeneutical reasons[947], meaning that regrouping international arbitrators as a single relatively homogenous community is not possible, despite them often belonging in the same formal institutions. Thirdly, and this would also show why Gaillard's independent arbitral order is misguided, the awards of arbitrators insert themselves in very eclectic societal and legal contexts throughout the world. Once an award has been decided, it does not simply hover in an international arbitral ether, it is applied by local authorities with very real ramifications within the concerned society, making each arbitral award part of a different society, each of which has a different conception of justice and the common good.

The best answer we have been able to craft is one which still requires apprehending all the elements we discuss *infra* in the remainder of this dissertation (the three-dimension theory we shall see shortly, hermeneutics, contractual positivism, etc.). As such, we will refrain from encroaching too much on these upcoming developments and give a tentative, working definition of the arbitral common good.

Generally speaking, what separates arbitration from state courts is flexibility *lato sensu*, whether we are talking about a much more flexible procedure, a much more substantive Law or a much more flexible room to operate for the one deciding the case, arbitration's purpose is essentially to go where state justice cannot for reasons of "clunkiness", for lacking in adaptability in doing justice, especially considering that equity i.e., what allows for the most flexible and adaptative legal interpretations, is the basis of arbitration[948].

As such, what characterizes arbitration is the interpretative freedom arbitrators enjoy in comparison to judges, not only on the factual level, but also on the legal-philosophical level. *A priori*, this further complexifies our task in the exhumation of an arbitral common good, and yet, it is precisely this complexity that forces us to take a step back from this situation and reconsider the place of international

947 Cf. *infra* part 3, II, 2, B, *b*.

948 Cf. *supra* part 1, I, 2, B; part 1, II, 2, A, *c*; part 1, II, 2, B, *b* and *infra* part 3, III, B.

arbitrators in today's world, not as parts of an exceedingly complex legal paradigm, but as the rare jurists capable of bringing justice in such a contingent paradigm, on the *sine qua non* condition that they act authoritatively, which is currently not a given (cf. *infra*). Should our working hypothesis be one wherein arbitrators are unauthoritative figures of the Law, we would not be able to define a common good less superficial than the procedural level, which is where we are presently standing. More problematically, the very notion of common good should never be purely formal, the reason being that it is the substance (literally "under the stance") of a society: what is permanent under the stance, the form, the shape. As such, we need to consider that arbitrators are figures of authority if we want to develop a tentative definition of the arbitral common good indeed.

In light of the flexibility of arbitration, in particular the fact that its legal-philosophical foundation is equity, we are of the opinion that the arbitral common good may be as complex as the field itself, varying from case to case. The common good arbitrators therefore seek to augment is the one of all societies and parties involved in each case they need to decide. Consequently, it might be more appropriate to talk about common goods i.e., each common good the arbitrator will need to take into consideration in their final award. Determining the common goods which need to be taken into consideration would require a tremendous hermeneutical effort, one whereby the arbitrator seeks the societies that shall be impacted by their decision and thus needs to understand how to augment them through an authoritative and just award. Seeking out these various common goods could, for example, be done in accordance with the notion of *Binnenbeziehung* that we sometimes come across in private international Law. For the time being, unfortunately, we are lacking too many elements to go any deeper. We will revert to this matter *infra*, at the very end of this dissertation, once we have all the elements necessary to understand this peculiar type of common good.

2. The legitimacy, validity and effectivity of authority in light of the three-dimension theory of Law

A. General aspects of Miguel Reale's three-dimension theory; the central concepts

Quite like the common good, authority is a difficult concept to define, although we have done so throughout the course of the current part 2 of this dissertation. Summarized to the extreme, authority consists in the augmentation of our society's inherited foundations, the augmentation of the common good.

Authority is clearly not a legal concept *stricto sensu*, but is transversal to every single field of academia and potentially permeates all aspects of our daily lives. Concepts and notions such as *pacta sunt servanda*, the *lex rei sitae* or the hierarchy of norms are all much more commonly thought of as Law or legal concepts for instance. In order to consolidate the implementation of the concept of authority in legal philosophy, we shall make use of Reale's three-dimension theory[949]. *Grosso modo*, this theory postulates that concepts can be determined as legal *(juridiques)* via the interactions between three poles: validity, legitimacy and effectivity[950].

The validity pole reflects the formal aspect of the Law i.e., was the Law crafted in respect of the applicable formal prescriptions? The validity pole is strictly limited to said formal aspects and does not concern itself with informal sources and influences (e.g., the usual parliamentary legislative procedure for more important laws, the proper formal administrative channels for less important texts of law)[951]. The importance of this pole varies greatly depending on the school of thought of each jurist, from the essential to the afterthought. For most occidental jurists however, this pole is clearly the most important one, as anything beneath a certain threshold of validity will not be viewed as Law, satellites of Law at best[952]. In our case, we will see *infra* that this pole is perhaps the least important concerning the way authority translates into Law.

The legitimacy pole reflects the societal values featured in the Law which, admittedly, can be very broad. This notion of legitimacy can indeed go from the acceptability of the Law to the legal translation of fundamental values via the political system the Law is borne from and applied to. In order to circumscribe this pole, it is important to note that it is used *ex post*, after the concrete application of the Law[953]. Legitimacy is thus a prism for determining whether an application of

949 Reale pp. 369 ss.

950 Ost/van de Kerchove pp. 364-365.

951 Some authors have incidentally included the capacity to take legal action inside the effectivity pole (Papaux, Jus auctoritas p. 239). They also suggest that the validity pole should be replaced by a justiciability pole, because of how much more important the materialization of rights in front of a court is when compared to the *ex ante* formalization of said rights. Although we agree with both reasonings, we would personally favour the first of these options as for us, this materialization of rights in front of a court of law, should we admit its insertion inside the three-dimension theory, directly participates to a law's effectivity and usage rate (cf. *infra*), which includes potential ramifications if we take it to the extreme (Ost/van de Kerchove pp. 330 ss).

952 Papaux, Jus auctoritas pp. 216-217, 230; Ost/van de Kerchove pp. 307-308, 337.

953 Papaux, Jus auctoritas p. 218.

Law, a legal interpretation, is justified or not according to a variety of criteria, all of which are part of a historical-political context[954]. Legitimacy and its process of inception are thus never "pure" or simple reflections of causal links[955].

The effectivity pole is perhaps the most difficult to measure among all three poles, if only because the term "effectivity" has variable and various contents, definitions and synonyms (efficacity[956] or efficiency[957]). More importantly however, "[C]*roire que les effets du droit se ramènent à ses résultats sociaux mesurables, exiger une coïncidence entre droit et état de l'opinion, attendre du droit qu'il ait réponse à toute question*, [c]*'est, en définitive, postuler l'existence d'une règle mythique en apesanteur sociologique, qui traduirait les réponses claires et complètes du législateur à des problèmes sociaux parfaitement identifiables. Dans ce modèle, l'ineffectivité du texte, même partielle, apparaît nécessairement comme un dysfonctionnement dommageable; quant à son efficacité, elle n'est mesurée qu'à l'aune de critères instrumentaux*."[958]

Ultimately, are we talking about the capacity of a law to curb behaviours? Or are we speaking about the strictly legal impact of a law on the overall legal order? Are laws that are seldom applied directly but with a huge influence on our mindset as a society truly effective? What of the use of measurable and quantifiable criteria? Are we thinking about a law's direct legal effects only or do we also factor in social, economic, and other ramifications? These are but a few questions we can

954 Reale p. 384. This is eerily reminiscent of what we will see *infra* in part 3, II, 2, B, *b* and *c* regarding philosophical hermeneutics and our prejudices. Similarly to hermeneutics, criteria of legitimacy are never absolute. Rather, they are the result of a social-historical-political process, demonstrating how Law is made of elements which are not texts of law, or extra-legal so to speak. The legitimacy pole illustrates once more why, when studying Law in-depth, we cannot limit ourselves to a purely technical legal analysis of Law.

955 Reale pp. 372-373.

956 The efficacity of the Law measures the adequacy between the means chosen by the legislator and the objective it sets (Ost/van de Kerchove p. 331). For instance, a law whose purpose is to rehabilitate drug addicts but only allows judges to throw them in jail, or a law whose purpose is to grant medical financial aid to all while excluding thousands of viable medical treatments from reimbursement. We also frequently come across laws whose goal is to protect the environment, yet utterly fail not only concerning the means of reaching this goal, but even in the basic estimation of said goal (Frigerio pp. 472 ss).

957 The efficiency of the Law represents the cost, monetarily speaking, to reach the goal as laid out by the law (Ost/van de Kerchove p. 331). History and the passage of time will, for instance, tell us whether the laws passed by various occidental legislators with regard to Covid-19 were efficient or not.

958 Ost/van de Kerchove p. 334.

legitimately ask in regard to effectivity, showing how broadly construable the notion is. For the sake of this dissertation, we will hold effectivity to be composed of two aspects[959].

The first aspect is the usage frequency by those to whom a law is destined[960]. Said otherwise, we will use both the usage rate and the idea of obsolescence to call a legal concept "effective". When a law or a legal concept suffers from a very low or non-existent usage rate, it becomes obsolete. In the context of the effectivity pole, this translates to concepts remaining at the theoretical stage without an ounce of practical effect.

The second aspect of the effectivity pole described by Ost and van de Kerchove is what they call the symbolic conception of effectivity, which goes beyond the behaviourist first aspect of the effectivity pole[961]. The symbolic aspect of effectivity takes into account the aptitude of a text or concept to influence the mental representations of its recipients. This goes way beyond the simple application of the Law, for it embodies how a concept or a law can influence a person's or society's values. Freedom of speech for instance, holds a symbolic magnitude far beyond that of the rules on the calculation of a post-divorce allowance, despite the latter being used in tribunals much more often than the former, in Switzerland and neighbouring countries at least.

The symbolic aspect of the effectivity pole is intricately linked to the legitimacy pole, if only because symbolic representations of the Law are axiologically oriented by the degree (high/low) and type (positive/negative) of legitimacy reached by the concept. If the legitimacy pole is strong and positive, the symbolic effectivity potentially deriving from it will result in an important attractor, a symbol towards which an entire society veers. The idea of a repellent pole is also worthy of consideration: a Law so illegitimate that it becomes a repellent pole i.e., a symbol of what not to do. For instance, nearly a century later, Nazi laws have become a shining symbol of legal repellent poles which must be avoided at all costs. Debatable at length, especially whether such laws were illegitimate and ineffective at the time they entered into force, even according to our contemporary standards,

959 Ost/van de Kerchove pp. 330-331.

960 Ost/van de Kerchove p. 331. For instance, a procedural rule destined to help prosecutors close their cases faster that they often use or, on the other side of the spectrum, a law enacting an 80 km/h speed limit on a highway where nobody drives anything less powerful than a Maserati.

961 Ost/van de Kerchove p. 334.

this example shows quite well that the symbolic aspect of effectivity can be negative, the same way freedom of speech has a positive symbolic effectivity.

Once we have properly gauged the three poles and their separate resonance with the concept that interests us, we need to analyse the interactions between said three poles. Law and legal concepts can be defined and determined by listening to the "conversation" between the three poles, one concerning the concept of authority in our case. The result of this "conversation" will indicate to us whether a concept (authority in our case) can be considered as part of Law or not.

We understand that authority is far from being a typical legal concept. Contrary to the principle of clean break in divorce laws, a working permit in both immigration and labour laws, etc., authority's place of concretization is not limited to Law, but extends to society as a whole. In other words, it reaches the meta-legal.

B. The validity pole

Let us start with the easiest pole to apprehend with regard to authority: its validity. Plainly put, the existence of authority does not depend on any formal validation. Authoritative jurists for instance do not require their authority to be validated by any formal procedure to exist. A professor of Law, competent to the point where they augment both their field of specialization and the capacities of their students, does not need any formal validity to be so. Even after their retirement, they remain influential.

Going a step further, an authoritative Law or source of Law also does not need a strong validity pole in order to be authoritative. Elite legal doctrine is a very good example of this[962]. Although it is sometimes mentioned in certain laws with regard to the interpretation of a legal text[963], the authoritative doctrine is and will remain consulted by all, its lack of formal validity notwithstanding. Beyond the epistemic authority these scholars incarnate, those capable of augmenting their field and transmitting their knowledge for future generations to build on will never require any formal validation of their authority for said authority not only to exist, but be highly effective and legitimate (cf. *infra*). Likewise, a legal rule does not need to be valid in a specific national legal order to bare a certain authority, especially when judges draw inspiration from comparative Law in order to draw their own

962 Papaux/Wyler, Doctrine pp. 532 ss.

963 E.g., art. 38 of the Statute of the International Court of Justice, which mentions "the teachings of the most highly regarded publicists."

conclusions. These judges do not apply foreign rules, which are invalid in their national legal order, but they can draw inspiration from them because of their authoritative status[964].

Even more so, authority would lose much of its countenance, interest even, if its existence was perpetually conditioned to any degree of formal validation. Indeed, although there are numerous historical examples of formally valid authorities, this validation intervened *ex post*, after the authority had already been established. The case of Augustus is telling: it is because he had achieved such a high degree of *auctoritas* that he was able to acquire the newly-crafted formal title of emperor. This case even flips the need for authority's validity upside-down: his authority did not come into existence because of a legally valid title of emperor. Rather, this title came into existence because his authority made it possible. Obviously, Augustus' authority was one of the strongest ever recorded in history, which is why it was validated. The crushing majority of instances of authority, however, never come close to this degree of notoriety, meaning that the quasi-totality of authorities throughout the ages did not require any validation.

One of the strongest recent incarnations of authority, Nelson Mandela, never saw his authority validated, unless his election as South Africa's president counts as such. His authority served as the basis for his power, which he acquired through a valid legitimization process, hereby meaning that his authority existed before, long before, any semblance of validity was attached to it.

In Law, the most historically common example, much more than comparative Law, are customs. We will see *infra* how authority is involved in the creation process of customs, but for the time being, we will simply say that the two elements allowing customs to exist are the *longa consuetudo* and the *opinio iuris*[965]. The second element, consisting in being persuaded that a certain behaviour is Law, corresponds to a certain degree to the authority of this behaviour, to the point where people become convinced that acting in accordance with it is the legal thing to do. This *opinio iuris* element goes beyond the simple legitimization of a behaviour by continuing traditions forming the common good of the society applying this custom. Customs are inherited from previous generations and perceived as

964 Cf. for instance the Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth, Inc., no. 83-1569, decided on the 2nd of July 1985, 473 U.S. 614; ATF 124 I 49; Ahmad v. ILEA, 1 QB 36 (CA) of 1978, etc.

965 Papaux/Cerutti pp. 124-126.

augmenting the common good by making one's society more just, which is why they require both the *opinio iuris* and the *longa consuetudo*[966].

Another example, perhaps more attuned to contemporary Law, would be that of a *lex ferenda*. A *lex ferenda* is a law which has yet to enter into force, to be valid, but whose application is still possible via the mechanism of *effet anticipé*[967]. The typical case is when a text of law has been accepted by vote and adopted by a parliament but whose entry into force is not simultaneous to this adoption[968]. In such instances, laws do not have a particularly strong validity pole: they have not entered into force, thus are not positive Law. However, they are considered sufficiently authoritative in spite of a very weak validity pole to be applied by anticipation. The idea behind said applications is usually that the new text of law is more adapted to the current problems facing the society wherein this text applies, that it does more for the common good than its "predecessor".

To be fair, we cannot think of a situation where having a strong validity pole would hurt an authority either. Overall, a valid authority can perhaps move more fluently inside a legal system given the "clearance status" it has obtained. Should authority be a consequence of the validity pole, it would become void of much of its organicity, which is the very reason it can exist between any two persons at any given time, probably why it has existed since before ancient Greece and Rome. Furthermore, a validation process can perfectly be illegitimate or unauthoritative. In such cases where an authority becomes validated by an unauthoritative validation process, co-opting it to a certain extent, can this authority still be deserving of the name? If so, how long would it take before the last shred of authority is torn from it[969]?

[966] Cf. *supra* part 2, I, 2, E and II, 2-4. This example poses another problem: if the validation pole is concerned with the formal validity of Law, wouldn't the criteria used to validate feature in a valid document? In a way, the validation pole could be seen as a superficial allegory for Law's autotranscendance.

[967] I.e., the application of a text of law to a legal case before it has formally entered the positivist body of Law, before it has become formally valid (Papaux/Cerutti p. 209).

[968] There can be many reasons to this, notably, in Swiss Law, the requirement for a referendum's delay to expire. More commonly, when an important new law is adopted by parliament, one that will have an impact on many other laws such as a brand-new code of procedure, it should not enter into force right away. A prudent legislator would, at least, adapt the rest of the body of laws for this integration to be as smooth as possible. During this period of adaptation, this new code of procedure is a *lex ferenda*: it has not entered into force, but it eventually will. Cf. Papaux/Cerutti pp. 207 ss.

[969] This is arguably when a political regime is or becomes authoritarian; cf. *supra* part 2, I, 2, F regarding the nuance we establish between authoritative and authoritarian.

This would mean that authority, while not entirely estranged from the pole of validity, is neither the cause nor the consequence of validity and vice-versa. In other words, considering that legal/contractual positivism[970] grants the highest degree of importance to the validity pole, the only relevant one some would say, this would mean that authority has little to no link with this legal-philosophical doctrine[971].

C. The effectivity pole

Our genealogy demonstrated how strong an effectivity pole authority really had, and not in a negative way as modern scholars and their descendants have had us believe for so long. Before exploring this side of authority's effectivity pole, we must first analyse the frequency at which the concept of authority is used in Law.

Going by the modern conception of authority, it is of the utmost effectivity given how often it is used to control, to perform, to enforce, to decide, to judge, etc. However, when we shift definitions and use the one underlined in this work, the augmentation of the inherited common good, the effectivity pole appears *a priori* weaker. Under closer scrutiny however, we will see that the situation is not as clear-cut as one may have anticipated. Let us take for example the case of the two big schools of interpretation in the U.S., originalism and living Constitution.

Very summarily, the first advocates in favour of maintaining the original intent of the author of the constitution, while the second arguments that the interpretation of a text should evolve with time alongside society in order to best reflect the values of said society and their evolution. Although they might seem antithetical, they both revolve around authority. In the case of originalism, the belief is that the original act of authority indicates how justice is to be dispensed in the name of maintaining the common good, which so happens to be the inherited foundation of the U.S. found in the federal Constitution.

The doctrine of living Constitution has also adopted an approach centred around authority, but instead of sticking to the original act of authority, the creation of the U.S. as a nation independent from the British crown, there is a constant movement of – attempted – augmentation on the part of the legal interpreters. The idea of this doctrine is to ascertain the continued authority of the Constitution by rendering it as

970 Cf. *infra* part 3, III, 2.

971 Papaux, Jus auctoritas p. 230. Cf. *infra*.

adequate as possible to the society for which it serves as a compass[972]. As we will see *infra* in part 3, this method of interpretation is much sounder hermeneutically speaking, but in both instances, the gravitating concept is the same.

More broadly, authority is very often used in legal interpretation[973], with its most salient manifestations being through doctrinal interventions, those who augment what they inherited from their predecessors, those who interpret Law the best[974], transmit it to younger generations all the while taking care to push for more adequate interpretations of the Law, better befitting of the common good and the constant augmentation of the traditions in which it is incarnate.

The first aspect of the effectivity of authority is even more visible in the field which interests us, international arbitration, although it tends to dwindle the more arbitrators rely on precedents and formal rules and laws to the detriment of equity to decide their cases[975]. The idea is quite straightforward. We know that one of arbitration's most important historical functions is to serve as a complement to litigation, state justice. This was not done by replicating the exact same model upon which state justice operated, but by filling in its inherent blanks. This "filling" has been characterized by an extreme legal and judicial flexibility, in addition to a high level of privacy that allowed arbitrators to circumvent formal rules and laws when they were too inadequate. Arbitration served its part in augmenting a society's common good by pushing said society towards more complete and fair incarnations of justice. The first aspect of the effectivity pole of arbitral authority was thus quite strongly established given how the basic model was geared towards authority, meaning that the default posture of arbitrators, their most frequently used and effective one, was one of authority.

Nowadays, whether it is in arbitration or in general, authority has become much less visible for the reasons mentioned *supra*. This does not mean that it has vanished, as Arendt and others would say, simply that it is more dormant, less visible and often

[972] A typical positivist response would be to say that the Constitution should never adapt itself to society, rather the opposite whereby the Constitution dictates to society where to go. This is a simplistic view of the application of Law, which consists in a constant dialogue between facts and Law, and not in a top-down command.

[973] Cf. *infra* part 3, III, 6.

[974] The notion of best possible interpretation will forever be debated amongst jurists, but it is worth noting that, in our view, such an interpretation is not synonymous with "fitting into a system", but a matter of justice *in concreto* in its distributive form (cf. *infra* part 2, V, 5, C, *c* and *d)*.

[975] Cf. *infra* part 2, V, 5, C.

more superficial as is the case with epistemic authority. It is not our purpose to re-found authority, to re-create it *ex nihilo*, for the good reason that it is still "here", as the case of Nelson Mandela and many daily human relations show. In international arbitration, the idea of an authoritative arbitrator is quite easy to conceptualize[976].

And then there are the obvious cases of "shallow" authority, epistemic authorities[977], which are found throughout academia and universities, the parental authority, the purely circumstantial authority (e.g., witnesses[978]), etc. All of these examples may or may not reach the stage of "full" authority depending on how they are exerted. An epistemic authority can easily become self-involved and egotistical, without care for future generations and more interested in monetizing their knowledge rather than sharing it. Likewise, an epistemic authority who is caring and patient with PhD candidates and students alike, responsible for increasing the intellect and wisdom of graduates, is not confined to their status as epistemic authority, stepping instead inside the realm of general authority.

The case of epistemic authority is an interesting one, because it never ceased to be visible and was never replaced with another concept or word. However, much like with the environment, the notion of augmented tradition became lost to us because of our focus on "self". With the recession of otherness and tradition, authority was stripped of its most essential components, and epistemic authorities, which should have combined both knowledge and the care to augment the common good, the inherited traditions, were left with nothing but knowledge, bereft of the wisdom needed to be better than simple epistemic authorities. Consequently, epistemic authorities are in an awkward position. On one hand, they fell prey to the shift to the modern paradigm, but on the other hand, they maintained part of their original authority, putting them in a good position to find the lost portion of their general authority. This situation is further accentuated by the fact that epistemic authorities often work at universities, a fertile ground for authority given that one of its purposes is to nurture future generations, an act already quite authoritative in itself.

[976] One that renders fair awards, is capable of crafting solid legal reasonings when rules and laws have failed, manages to leave everyone satisfied that justice has been served, augments the arbitral institution, etc.

[977] In ancient Rome, a knowledgeable jurist could be considered an epistemic authority, all the while not having much *auctoritas*, which required this epistemic superiority to be put to good use, to augment the common good (cf. *supra* part 2, II, 4).

[978] Cf. *supra* part 2, II, 4.

More generally, we do not think that authority can truly and entirely disappear from human societies. We are not talking about whether authority as a concept is left in abeyance, which has undoubtedly been the case, but whether human societies can function without a speck of authority. Parental authority is perhaps the most obvious proof in support of this statement, although it is an extremely specific type of authority, one that mixes elements of biology and child psychology alongside elements of philosophy. According to what is stated *supra*, epistemic authorities often evolve in a professional setting advantageous to the safeguard of authority, meaning that the probability of this happening is not negligible and is something we had the privilege of experiencing and witnessing during the years spent writing this dissertation.

More relevant than our own personal experience, philosophical hermeneutics teaches us a very valuable lesson concerning the presence of tradition in our everyday lives, which heavily impacts our *Vorverständnisse* and thus the way we interpret everything around us[979]. The presence of tradition, an essential component of authority, is very visible in Law, be it in common Law systems through binding precedents[980] or in civil Law systems through the history of norms and the oral traditions that directly preceded the European codification movements of the 19th century.

The most problematic part of the first aspect of authority's effectivity pole i.e., the usage frequency of authority, is the consideration given to the common good, especially in light of the heavy prevalence of individualism[981]. The question with regard to its effectivity pole, is whether our propensity to augment the common good is still prevalent enough that we can say that authority is still alive despite many authors' dire warnings?

To leave one's society better than when one first entered it, this is the basis of authority. Typical of general formulae of wisdom, this is much more difficult to apply than to conceive intellectually. Thankfully, there are still people who, knowingly or not, continue to follow this precept. Notable examples of our era include Nelson Mandela, Martin Luther King, Malcolm X, Julian Assange, Edward Snowden, Bram Fischer, Gandhi, etc. Less famous examples include whistle-blowers who put their careers at risk for the sake of outing the corrupt and

979 Cf. *infra* part 3, II, 2, B, *b*.

980 Which also feature in civil Law countries, albeit to a much lesser extent.

981 Cf. *supra* part 2, III, 2.

powerful, an older sister taking care of her siblings after the death of their parents, etc. The latter examples are certainly less striking than the former, but authority was never limited to those acknowledged widely so much as it is accessible to anyone capable of fulfilling its conditions, even on a very small scale. This is precisely what made it so strong in ancient Rome: the fact that anyone could augment Rome through acts of authority, which were not limited to the most illustrious or the richest of Romans. This is also what has allowed authority to endure the treatment inflicted upon it by modernity and despite the relatively recent heightened importance of the validity pole. It did not thrive due to the lower consideration it received, as well as the continued confusion surrounding it to our days, but it did survive through the actions of those capable, willingly or not, of augmenting their society's inherited traditions and common good. Such actions were very visible during the first occidental Covid-19 quarantine of 2020, with nurses, doctors and supply workers accepting what was, at the time, the grim outcome that would be theirs should they catch the virus, all for the sake of their society, effectively augmenting the oft-forgotten tradition of putting others above ourselves. As such, it is not that authority became obsolete, simply that we do not know what it is anymore, that we have serious problems recognizing it[982].

Ost and van de Kerchove's second aspect of the effectivity pole, the symbolic effectivity, is much easier to demonstrate than the first one. Throughout this dissertation, we have indeed used enduring symbols of authority to exemplify the underlying concept, the case of Nelson Mandela being the most striking one in recent memory[983].

Just like the symbolic aspect of effectivity, authority's main place of action is the meta-legal, although both operate on the infra-metalegal plane as well. This aspect of authority is very visible in political spheres, where politicians lacking in authority often force-invoke figures and past events of authority to rally voters behind them.

This can be seen in Law on both a meta-legal and infra-metalegal plane. On a meta-legal plane, the authority of the Brown v. Board of education of Topeka[984] still holds to this day in the U.S., not only from an infra-metalegal perspective (unconstitutionality of racial segregation in public schools), but also from a

982 Cf. *supra* part 2, III, 4, C.

983 Cf. *supra* part 2, IV, 2.

984 Brown v. Board of education of Topeka (347 U.S. 483 decided on the 17th of May 1954).

meta-legal perspective (a symbol of the fight for black Americans' civil rights). On the infra-metalegal plane, this decision has served as the authority on racial discrimination laws for decades, a "landmark case" (or "leading case"), aught in law schools all over the U.S., unquestionably augmenting the common good by allowing all children and teenagers to have access to a complete curriculum of basic education, irrespective of their birth and race[985].

This reasoning can also be applied the other way around with legal decisions so removed from authority that they become symbols of bad justice, "what not to do"[986]. These unjust decisions are perhaps the most salient concerning authority, as their incapacity to do justice belies a lack of authority, serving as rallying points for future legal decisions, as symbols of anti-authority against which jurists can fight back in order to re-affirm their values, eventually consolidating the authority of their Law.

As we can see, the effectivity pole of authority is both easy and convoluted to comprehend. Authority is present in many aspects of both legal practice and theory and yet, because it has become foreign to Occidentals, it remains hard to discern. However, we now know how effective a legal concept authority is, showing that there is indeed no need to re-establish it, that a dissociation from power already goes a long way to grasping how consistent the effectivity pole of authority really is.

D. The legitimacy pole

Finally, let us explore the third and last pole of authority, the legitimacy pole. As stated *supra*, this pole is directly linked to the second aspect of the effectivity pole i.e., the symbolic and meta-legal effectivity. Before analysing the legitimacy of

985 The example used here is one of the most broadcasted one since World War II, but such authoritative leading cases can be found in any judicial order. In Switzerland, there is the recent Uber Federal Tribunal decision (ATF 2C_34/2021 of the 30th of May 2022), which has been an important step taken in favour of the protection of workers' rights.

986 In Japan, the decision concerning the 砂川事件 *(Sunagawa jiken)* is still a very strong symbol for Japanese jurists, despite having been decided decades ago. In the 1950s, thousands of Tokyoites peacefully protested against American armed imperialism, ended up beaten down by the police (over 1000 people were injured without fighting back). In the midst of those protests, some people were charged and condemned for unlawfully trespassing on the grounds of the U.S. army base despite not attempting anything violent (最高裁大法廷判決昭和 34.12.16). In England, the extradition decision concerning Julian Assange is sure to become an effective symbol, not just in the U.K., but throughout the world, of an unauthoritative attack on freedom of the press ([2021] EWHC 3313, case no. CO/150/2021 of the 10th of December 2021).

authority, we will therefore make a quick distinction between the second aspect of effectivity and legitimacy, in order for the presentation to be as clear as possible.

Very quickly, we described the legitimacy pole as the *ex post* prism through which we decide whether an application of the Law was legitimate or not. As such, the legitimacy pole is necessarily related to a historical-political context and is never exhumed from the void by a pure manifestation of objectivity[987]. This is where it links with the second aspect of effectivity, as both are firmly inserted in a societal culture, with symbols rarely being illegitimate and anti-symbols rarely being legitimate, with a society's history being the key to determine which is what[988].

The difference, although seemingly obvious, lies within their purpose. The symbolic effectivity cares not for the legitimacy behind the symbol, which is why the idea of "anti-symbol" as a negative pole is perfectly imaginable. In our South African example *supra*, this would be the apartheid laws, effective laws embodying white supremacism, but whose legitimacy was highly dubious given that only white people could vote in the parliamentary elections at the time. On the other hand, what is legitimate is not necessarily effective as a symbol, and legal examples are legion. For instance, art. 105 of the Swiss code of obligations[989] concerning the debtor in default of payments of interests, annuities and gifts is legitimate according to the majority parliamentarian system, as it was voted in by the federal Assembly without a hitch. And yet, we doubt that a single person would consider art. 105 to be the symbol of anything meta-legal, provided one even knows of its existence.

Obviously, the legitimacy of legal concepts is much more intricate than the simple majority rule, and there are other criteria we can – must – use to determine this legitimacy. For instance, we could use the criterion of acceptability, how well an interpretation of the Law is received by the society in which it applies. Quite useful in contracts law, such a criterion can become somewhat counterproductive in tax law, where the acceptability of a higher tax on secondary houses will often be

987 Reale pp. 372-373.

988 Cf. *infra* part 3 regarding the importance of context for anything interpretative and how our understanding of our surroundings is necessarily influenced by the historicity of the interpreter.

989 RS 220. Art. 105 para. 1 of the Swiss code of obligations ("Swiss CO"): *"Le débiteur en demeure pour le paiement d'intérêts, d'arrérages ou d'une somme dont il a fait donation, ne doit l'intérêt moratoire qu'à partir du jour de la poursuite ou de la demande en justice."* Para. 2: *"Toute stipulation contraire s'apprécie conformément aux dispositions qui régissent la clause pénale."* Para. 3: *"Des intérêts ne peuvent pas être portés en compte pour cause de retard dans les intérêts moratoires."*

criticized by those owning multiple houses i.e., those most directly concerned by such a tax hike. Among the more intelligent criteria to determine whether a legal interpretation is legitimate or not, private international law developed the concept of *réserve d'ordre public* to determine whether the interpretation and application of a foreign Law is sufficiently acceptable and legitimate[990].

Another criterion, this time used to legitimize doctrinal research, is the professional career of the author. Not necessarily the most reliable of criteria, readers will often be more drawn to an article written by a tenured professor than by one of their assistants. Pushing this example a bit further, to a point where the criterion makes more sense, an article on the rights of company shareholders does not reach the same degree of legitimacy if written by a medical doctor rather than a corporate lawyer with a PhD in financial law.

Prolonging this list of criteria is not our purpose here, and we would be very quickly forced into imagining multiple concrete instances where such criteria apply. Indeed, typical of Law, relevant criteria vary depending on each case. "It depends". What is really interesting to us right now, is the determination of the legitimacy of the concept of authority. After having determined that authority had a nearly non-pertinent validity pole, combined with a very strong effectivity pole, we need to determine the extent to which the concept of authority is indeed part of Law.

To some, the concept of authority is the foundation of legitimacy: it is because a rule is authoritative that it becomes acceptable, legitimate[991]. The reason is that the foundation of authority is sacred to a society: its common good. Accordingly, there is nothing more legitimate in society than its sacred common good, that which is cared for and augmented from one generation to the next. Authority then gives birth to *jus auctoritas*, by opposition to the very top-down *jus potestas* consisting in the generalization of the criminal law model, ruled by sanctions and commands. Basically, *jus auctoritas* considers that the validity pole merely validates what is already Law. The idea is that the two other poles, effectivity and legitimacy, are the roots of any legal concept and that the validation pole merely translates them into – mostly – a textual form, without adding anything else in terms of legal solidity. *Jus auctoritas* is therefore a bottom-up conception of Law, which entails an application of said Law through uncoercive means, "soft power", *"la loi pédagogue"*[992].

990 Papaux, Jus auctoritas p. 206.
991 Papaux, Jus auctoritas p. 217.
992 Papaux, Jus auctoritas pp. 217-219.

Although our definition of *jus auctoritas* slightly differs[993], we fully agree with the idea that legitimacy is a necessary consequence of authority and thus inherent to it. Indeed, what could be more legitimate, "conforming to recognized principles or accepted […] standards" according to the Merriam-Webster dictionary, than the very concept tasked with the creation and constant amelioration of a society? Principles are tested and tried under the lens of authority, while standards are inspired by authority itself. This conception of both standards and principles makes sense when we remember that authority is, in its strongest declination, an act of creation, of foundation. As such, the foundation of a society implies setting standards and principles according to what the founder(s) wished for their newly founded entity.

Let us try spinning the reasoning around by questioning whether authority is legitimate, rather than asking if legitimacy is indeed authoritative. This would mean asking ourselves whether authority is in conformity with a society's "recognized principles and standards". A foundation is by definition an act whose purpose is to start something new ("first steps in building" according to the Merriam-Webster dictionary). Although we are the first to admit that a foundation can never spring *ex nihilo*, by definition inserted in a hermeneutical context, we need to concede, for the sake of not rewinding every causal chain to the big bang, that all human societies have started with one foundational act or the other. Consequently, should we accept that authority can be illegitimate, this would mean that the act of setting the foundational principles and standards of a society could contradict "recognized principles and standards". Is it not the purpose of founding something new to break away from an unaccepted past? Even if we were to take authority in its "less pure", more common form, an augmentation instead of a foundation, the result would not change because what is augmented is what a society determines to be its original foundation[994]. Foundational principles can obviously evolve with time, but whether

[993] The reason being that our conception of authority goes further than the epistemic authority upon which Papaux, Jus auctoritas *passim* bases himself to define *jus auctoritas*. Our conception of authority includes indeed epistemic authority as an occurrence of authority, but never as the defining matrix of the concept, the only exception being when there is such a lack of common good that epistemic authorities become the foundation of an authoritative Law, a *jus auctoritas*. The resulting difference is that a *jus auctoritas*, for me, is much wider than an epistemically superior Law or legal concept, for it implies a society's inherited common good and the mindset of always improving upon it as it is viewed by this society's citizens as what they hold most sacred.

[994] We understand that the idea of a perfectly clean new foundation is impossible given how anything and everything is necessarily preceded by something else (a scientific event, a human event, etc.), never springing *ex nihilo*. However, there comes a point where we must decide where and when is the "breaking" point from the past. Obviously, new foundations

this evolution results is an augmentation of the common good or not is a separate matter, one usually best verified by determining whether this evolution measures up to the test of time, retrospectively[995].

As we can see, hypothesizing authority as a consequence of legitimacy is logically unsound, in contradiction with both the concept of authority and the definition of legitimacy. On the contrary, legitimacy as the consequence of authority makes much more sense: authority sets the standards, and legitimacy verifies *ex post* whether an interpretation of the Law is indeed respectful of said standards.

We mentioned *supra* that authority as a legal concept had a particular place in the three-dimension theory because its validity pole was weak to non-pertinent. However, authority represents much more than this in this theory, for it is the basis of the legitimacy pole. This means that any legal concept[996] deprived of authority cannot be considered legitimate according to the three-dimension theory.

Before moving on to the interactions between the three poles, we would like to comment briefly on the state of the doctrine debating about the authority-legitimacy duo. Firstly, authority as the foundation of legitimacy is widely unknown[997]. Secondly, the near totality of modern and contemporary scholars do not understand the difference between power and authority[998]. Consequently, "legal-political philosophers" often debate about the legitimacy of authority[999], which is, as shown

are heavily influenced by previous circumstances and saying what is a foundational moment is very hard without the passage of time. Whether a moment or an act is foundational heavily rests on the perception and subsequent actions of those concerned by said act or moment. This difficulty to perceive an authoritative foundation would explain why so many contemporary politicians speak about "watershed moments" whenever they do something they consider authoritative. The test of time, however, rarely proves them right.

995 A devolution of principles, one that contradicts the established standards, is by definition unauthoritative and can therefore be qualified as illegitimate without any logical contradiction.

996 Similarly to customs, the criteria of *opinio iuris* and *longa consuetudo* determine whether a concept is authoritative or not, although we should probably talk about an *opinio auctoritatis* rather than an *opinio iuris*. We could say that a concept becomes authoritative when it becomes part of a society's common good, its tradition, and thus part of what citizens of said society – hopefully – augment on a regular basis.

997 Aside from Papaux, Jus auctoritas, we have yet to see any author addressing this issue directly.

998 Cf. *infra* part 3, III, 2 and *supra* part 2, III, 3.

999 Cf. for instance Wahnich; Peter; Hurd; Zürn; Tankebe/Liebling; Hofmann et al.; Nayak; Dagger; Ferrara; Rawls pp. 310-315; Uphoff; Ladenson; Dickson et al.; Smith; Koppell; Kang; Lefkowitz; Weber I pp. 285 ss.

supra, methodologically unsound. The problem is that the inversion between authority and legitimacy is then used to fuel debates regarding the legitimacy of authority when they should, at the very least, be talking about the legitimacy of power (as Weber does), or even better, the authority of legitimacy, which we have not seen anywhere. This is also what spurs some ironic pleonasms such as "collective authority"[1000].

E. The interactions between the three poles: what place for the concept of authority in the three-dimension theory of Law?

Of all three poles, legitimacy best represents the one through which justice acts[1001]. The effectivity pole is just as important because it is the one transforming ideas and theories into concrete Law and *in concreto* solutions to cases. However, the latter is not as strongly linked to a society's axiological choices as the former, as it already intervenes, most of the time, after the legitimacy pole, effectuating what has been deemed legitimate. Said otherwise, authority is the basis of the legitimacy pole and the raison d'être of the effectivity pole[1002], which helps with the concretization of authority. This is further confirmed when remembering that in ancient Rome, *auctoritas* served as the base of action of *potestas*[1003]. In return, *potestas* allowed *auctoritas* to be respected in cases requiring a modicum of strength. This is essentially where the validity pole plays its most important role, as a support to the effectivity pole to ensure that what is authoritative is well integrated in the legal-political system, strengthening the link between *potestas* and *auctoritas*.

We know that the legitimacy pole derives from authority and that the effectivity pole takes up the core role of *potestas*[1004]. To be clear, the effectivity pole, even in the simplified version we are currently using, is much larger, complex and subtle than *potestas* alone. The major reason is that most of what is effective in Law does not require *potestas*[1005]. Moreover, the symbolic dimension of the effectivity pole can doubtlessly involve elements of *potestas* such as the police having a psychological impact on people despite being nowhere in the vicinity. This symbolic aspect,

[1000] Cf. Caron for instance.

[1001] Papaux, Jus auctoritas p. 218.

[1002] An effectivity pole void of authority would need to rely on a very strong validity pole in order for said effectivity to come to pass indeed.

[1003] Cf. *supra* part 2, II, 3-5.

[1004] Ost/van de Kerchove pp. 360-361.

[1005] Cf. *supra* with our example of daily contracts performed without any form of coercion required.

however, is not limited to simple avatars of *potestas* as we have seen *supra*. This means that in addition to serving as the base for the legitimacy pole, authority also partially serves as a base for the effectivity pole. Admittedly, it is so less directly than with the legitimacy pole because, to use precise semantics, authority legitimizes the *potestas* facet of the effectivity pole. Through the legitimacy pole that it "controls", authority thus impacts effectivity, with its influence depending on said effectivity's degree of legitimacy. The higher the legitimacy, the higher the effectivity of *potestas* in the effectivity pole, the higher the overall effectivity of the effectivity pole.

To put it otherwise in a more reader-friendly way, the poles of legitimacy and effectivity do not dialog about the concept of authority in the same manner as they would about more typical legal concepts (e.g., good faith, binding precedent, specific performance, individual responsibility, etc.). Usually, we would take a concept and look at its resonance with the three poles in order to verify its legality, whether said concept is of Law or not, using concrete examples and testing the theoretical limits of each concept. However, in the case of authority, two of the three poles' "magnetisation" depend on the very concept whose legality we are trying to verify. Adding to the complexity, the third pole (the validity pole) is close to unresponsive, to the point where its importance and usefulness can reasonably be doubted[1006]. This means that authority, much more than a concept being analysed, is a foundational element of two-thirds of the analytical structure of the three-dimension theory. Consequently, it is not the three-dimension theory which dictates whether authority is Law or not, but authority which guides the three-dimension theory into determining whether any other concept is legal or not.

The only question left concerns the validity pole, which we have alluded to *supra*, but whose role in the "polar" conversation deserves to be mentioned more clearly. We already know that there is no existential correlation between authority and validity. Hypothetically, let us imagine that authority depends on the validity pole to come into existence. A strong validity pole would heavily decrease the inherent capacity of authority to potentially come into existence between any two human beings, organically and informally, because we would be required to go through a formal validation process to establish the existence of authority, which would be impractical to the point where it would only be a seldom occurrence throughout history. We also know, on the other hand, that a validated authority can sometimes

[1006] Papaux, Jus auctoritas p. 217.

make it more durable and memorable (e.g., Augustus, Mandela, Nicholas of Flüe after his sanctification, Lincoln), as well as facilitating its effectiveness by integrating it in the legal system.

The organicity and informality of authority might seem trite a characteristic, when it is, in fact, the very reason why authority has been able to survive despite its definition being widely lost. Indeed, with the substitution of society by the individual, the paradigm in which it was intrinsically designed to function optimally, authority was left with the much smaller field of individual relations to operate. By definition, it is much harder and incredibly wasteful to validate anything individually rather than collectively. If a legal concept required validation in each of its occurrences, only concepts of ancient Roman Law would be able to consider themselves authoritative legal concepts. The fact that authority does not require any validation to exist and to be effective is the very reason why it survived the passage from the societal to the individual.

A good example of this is the influence of soft Law in public international Law: never validated formally and not mandatory, it nonetheless commonly serves as an authoritative source of Law from which inspiration is drawn by tribunals and treaties alike[1007]. Another example would be the circulars published by certain offices such as Switzerland's *Finanzmarktaufsicht* (FINMA), whose task it is to regulate the country's financial actors. Without being mandatory or integrated in the country's positive Law, these remain widely used because the FINMA often acts as an epistemic authority for banks, traders, etc.

Authority's ability to grow organically, regardless of any formal validation, is the reason for its survival in the modern age, and very probably the reason why it existed with a real consistency long before ancient Romans. More generally, and as mentioned *supra* regarding the validity of classic legal concepts, their validation

[1007] Cf. Cazala pp. 46 ss for instance, as well as Abi-Saab, Droit international (p. 209): *"Et comment peut-on comprendre complètement l'édifice juridique fini sans prendre en considération les différentes pierres de construction et les différentes phases de sa formation qui constituent son parcours et ses origines 'génétiques', quel que soit le nom qu'on leur donne*: soft law, hard law, lex lata, lex ferenda? *La pertinence juridique du droit en formation n'est cependant pas exclusivement épistémologique ou cognitive, ni seulement rétrospective, en ce sens qu'elle ne se présente qu'une fois que les règles ont atteint leur maturité, pour comprendre comment elles sont devenues ce qu'elles sont. Car les phases intermédiaires et les briques ou pierres de construction produisent des effets juridiques immédiats bien que de manière indirecte ou par ricochet* […]."

does not condition their existence: it simply imbues them with a formal status after the case is all but solved from a legal standpoint[1008].

We have seen *supra* and will continue to see *infra* the linked past, present and future of authority, power, individualism, collectiveness and legal positivism. In the three-dimension theory of Law, this shared space is most interestingly illustrated by the validity pole. Validity is generally considered as the most important pole for positivists, legal and contractual. Historically speaking, it brought about a new ponderation of the three poles, with a strong accentuation on the legislative process of written texts[1009]. In its most unbalanced conception, the validity pole can render legal what is both ineffective and illegitimate[1010]. The effectivity pole is largely cast aside by positivists. In their view, the effectivity of a text is in no small part determined by its validity: "if there is a valid law, we must apply it, therefore making it effective." Even from their standpoint however, valid laws are not necessarily effective (e.g., an obsolete thus unapplied text of law), although an invalid text cannot be effective. As for the legitimacy pole, positivists tend to assume that the validation process is legitimate, meaning that any text that has passed the formal requirements is authoritative[1011].

Using examples at our disposal, societies applying this vision of Law often end up authoritarian rather than authoritative[1012]. Given how it is intricately linked to the

[1008] Papaux, Jus auctoritas p. 231.

[1009] Papaux, Jus auctoritas p. 239.

[1010] Silverstein pp. 75-76.

[1011] Cf. *supra* part 2, III, 3 with Hart or Kelsen for instance. At best, they might criticize the legitimacy of the validation process. However, this is not done in order to emphasize the importance of the legitimacy pole, but to reaffirm the primacy of the validity pole by inadvertently drawing from the authority of the legitimacy pole.

[1012] The stereotypical example is that of Nazi Germany whose judges, when confronted with the horrors they validated judicially for years, tried to avoid any responsibility by claiming that they simply applied the Law, that they had no influence on the legal process as a whole. Likewise, Louis XIV did not suffer well those who opposed his will, which is why under his rule, arbitration as an alternative to state courts became extremely scarce. Lesser-known cases include Singapore which, in the wake of the Ong Ah Chuan decision by the Singaporean Court of Appeal, amended its Constitution to prevent judges from reviewing national security discretionary powers. As a consequence, Singaporean judges understood their position: to apply and comply strictly with the rules crafted by the People's Action Party that has ruled the country since its independence in 1959 (Silverstein pp. 83-86). A similar approach can be found in Pinochet's Chile, where judges were supposedly independent, yet applied blindly the rules passed by the authoritarian regime (Hilbink pp. 102 ss).

legitimacy and effectivity poles, an authoritative Law inextricably places the validity pole last in terms the importance in the conversation between the poles.

Overall, authority is characterized by the tension between the validity pole on one hand, and the effectivity and legitimacy poles on the other hand. This probably explains why authority is so flexible in its application: it avoids most of the stagnation inherent to formal validation processes. Squarely residing inside the two poles viewed by positivism as "simple adjuvants"[1013], authority can arguably be viewed as the legal concept farthest from the most dominant legal doctrine of the past centuries[1014].

At this stage, the two most obvious objections for positivists appear as follows. How could a concept that can barely be enshrined in a text of law be Law? How can a concept be deemed legal if it cannot be directly invoked in front of a judge? To this, we will argue that the enshrinement of a concept inside a text of law only concerns a minority of legal concepts, that most of them have been and continue to be defined and anticipated by doctrinal sources, which sometimes become jurisprudential sources themselves[1015].

These concepts do not need any sort of validation to be Law. Even more so, when judges and legislators draw inspiration from the doctrine (and they often do), they are not the ones to continue the inherent movement of augmentation of a concept to maintain it at an authoritative level. Instead, legislators and judges (albeit to a lesser extent) often cede this position to the very doctrine from which they drew inspiration in the first place. The most typical scenario is that of doctrinal authors writing articles and commenting on the latest legal and social trends, criticizing the Law for being inadequate or obsolete. Legislators and judges read these authoritative articles from which they draw heavy inspiration for much of their activity[1016]. Examples of this sort are legion in environmental law or divorce law; this is also typically how international arbitration became increasingly validated in national laws in the post-World War II era. What guides the validation process are

[1013] Papaux, Jus auctoritas p. 217.

[1014] This partially supports the thesis according to which positivist Law is *jus potestas*, the opposite of a *jus auctoritas*. The reason why we use the term "partially", is because we now know that *potestas* is not so much the opposite of *auctoritas* so much as it is an *auctoritas*-based type of coercion. The use of power unsanctioned by authority is much more opposed to *auctoritas*, what we would call violence or even gratuitous violence.

[1015] Papaux/Wyler, Doctrine pp. 524 ss.

[1016] Papaux/Wyler, Doctrine pp. 524 ss.

thus emanations of authority, epistemic or general[1017]. None of these emanations, however, require any sort of formal validity to exist as a source of Law. As such, the concept of authority might not be of the legal technical sort, but it guides entire phases of the legal process, as we will see again *infra* in part 3 with interpretation.

Moving on to the enforceability of authority in front of a court of Law, let us remember that there are some fundamentally important principles which are not directly enforceable in court. In Swiss Law for instance, art. 2 of the Swiss Civil Code concerning good faith cannot be applied directly and needs to be tied to another legal provision. This indirect application does not make the principle of good faith any less relevant in Switzerland legally speaking. Going a step further, there are also frequent-enough instances of unenforceable legal concepts and arguments. For example, in the cosmopolitan city of Geneva, there are many wills whereby the deceased has expressed the wish to create a trust, despite the fact that this legal construction is absent from Swiss Law. Swiss lawyers have often argued for the creation of trusts, despite not having any formal legal basis to do so, without success until now. Bearing this illegal construction in mind, judges still do what they can to accommodate the will of the deceased, not discarding every single element of the trust directly, giving them instead partial legal life.

[1017] The importance acquired by the validity pole is very often the reflection of a lack of legitimacy: the less a Law is legitimate, the more emphasis will be put on its validity as compensation. The validity pole can thus be used to give a semblance of countenance to a Law whose authority is flimsy at best. Although occidental political regimes are often touted as "beacons of democracy", the influence of private lobbies and interests certainly suggests otherwise. The U.S. is the starkest reminder of this: over the last 10 years, private lobby spending has routinely broken the annual 3 billion USD mark. As a consequence, the private interests of lobbies are better represented in formally valid laws than the common good, or anything else for that matter (Chomsky *passim*). These lobby-oriented laws are perfectly valid according to the U.S. federal formal procedural rules, they are also very mindful of the entire formal democratic process. However, their legitimacy is clearly lacking, and the reason is that they have little to no authority. A recent example of this is the CARES Act (Pub. L. 116-136, passed on the 27th of March 2020), which oversaw the biggest upward transfer of wealth in history, despite hospitals' pleas for additional funding to deal with the Covid-19 sanitary crisis. These types of examples are typically the reason why positivists are convinced that fascistic laws are the equivalent of democratic laws from a formal legal standpoint, that what dissociates them is overwhelmingly extra-legal. Both are just as enforceable and just as respectful of the formal prescriptions in the creative process of the Law.

Shifting lines and trying to make legal categories evolve is part of Law's evolution and is, in fact, the prime role of jurists. Given the importance of context to Law[1018], the evolution of society implies the evolution of Law. This is a reflection of the mindset purported by authority, which implies a constant movement to avoid stagnation and to push towards a better society, a movement judges are an integral part of. Dismissing the legality of authority for simple reasons of formalism is a combination of both an overestimation of the strength of the validity pole and an underestimation of the effectivity and legitimacy poles. Whether authority can be directly invoked in front of a tribunal or not does not change its importance in the overall process, including during a judge's interpretation and deciding of a case, as we shall also see *infra* in part 3.

So fundamentally legal a concept is authority that it is a premiss to the theory used to determine whether a concept is legal, as it defines legitimacy and important facets of effectivity. Additionally, in non-positivist paradigms, the validity pole, whose primary role is mainly to facilitate the integration of a concept inside a legal order to render its application more seamless, is the least important pole[1019]. It is worth noting that arbitration is as historically remote from the positivist paradigm and the validity pole, meaning that arbitral authority has little to nothing to do with this legal doctrine. At this point, the legality of authority is beyond doubt.

Conversely, the diametrical opposition between authority and positivism confirms the parallel made by certain scholars regarding the more profound nature of positivism, a *jus potestas*. If positivism is indeed the polar opposite of authority from a legal standpoint, this would, in all logic, translate into the two also being opposites philosophically. *Potestas* is found in all Laws, but a *jus potestas* is a Law placing power at its most fundamental level, contrary to a *jus auctoritas*, which would ground manifestations of power on authority[1020].

[1018] Cf. *infra* part 3, III.

[1019] We are indeed talking about the applicability of a concept and not its effectivity. As demonstrated by Reale (Reale p. 373), the validity pole does not affect the effectivity pole. Instead, validity affects what has been called *"réalisabilité"*, which can loosely be translated into "feasibility". Had the validity pole truly impacted the effectivity pole, the crushing majority of European medieval Law would have remained *lettre morte*.

[1020] It is questionable whether a *jus potestas* places any importance on authority given that power is already viewed as the solution to end all problems. More likely, it will see authority as a convenient way to expedite small cases without expending resources through the use of power.

This opposition between authority and positivism/the validity pole and what it does for the arbitral paradigm is quite clear. Given arbitration's intrinsic distance with power due to its incapacity to coerce and enforce, as well as its consensual nature, it is perhaps the legal field most removed from being a *jus potestas*, although it seems to have recently taken a few steps away from this authoritative nature (cf. *infra*). Considering that one of the purposes of this dissertation is to rehabilitate international arbitration through authority and vice-versa, the conclusions drawn from the application of the three-dimension theory are highly relevant. Indeed, the path taken by arbitration towards a more judicial and litigation-like paradigm is the reflection of an overemphasis on the validity pole. To curb this tendency, international arbitration would require a shift towards the *jus auctoritas* poles of legitimacy and effectivity. This would, as detailed *infra*, involve greater consideration for the common good (legitimacy and effectivity poles), a less contractualist and commutative conception of interpretation (effectivity pole), as well as avoiding the pitfalls of individualism and re-affirming arbitration as a societal glue from both an internal and an international standpoint (legitimacy pole) rather than a tool of legal imperialism (anti-symbol of the effectivity pole).

3. A brief analytical take on authority

A. General disclaimer and a word of caution

Authority is a staple in Law, even though it is often used to describe emanations of power and is much more technical than its political counterpart (e.g., the authority of the legal guardian, the supreme judicial authority, the authority to legislate, etc.). In this regard, international arbitration offers an extremely interesting vantage point because power plays a lesser role, as we will see *infra*, compared to other legal disciplines.

As far as we can tell, high-quality sources regarding the relation between Law and authority are quite scarce. To be sure, there are many articles and books on the matter in general, but these are either written by jurists focusing on the legal-technical version of authority (much closer to power), or written by non-jurists who do not understand what Law is, often having an excessively romanticized or apocalyptic vision of it.

While this may be a little abrupt, we are of the belief that the analysis of legal phenomena can only be partial when done by people who have not studied Law. This does not mean that contributions from non-jurists are worthless. Quite the

opposite, they often remind jurists overly immersed in their craft to take a step back and consider the entire picture instead of focusing on legal-technical details.

Generally speaking, non-jurists are often unable to understand how Law is conceived, practiced and how said practice frequently differs from theory. Moreover, and unbeknownst to them, they often misdiagnose the problems of a legal system and consequently, prescribe remedies that are ineffective at best, illegal at worst. A classic mistake that is still abundantly found nowadays, is when people say that judges should simply apply the Law, without reversing previous decisions or without even interpreting it.

The recent overturn of Roe v. Wade provides an interesting example in this regard[1021]. It was indeed commonly heard that the Supreme Court's decision violated the rule of the *stare decisis* and that its judges needed to abide by past decisions. Additionally, it was also commonly said that judges should never interfere in political matters, that doing so was a breach of the separation of powers[1022]. Unjust interpretations have a high probability of hurting a judge's authority, but should not be cause to call for inexistent apolitical judges, or worse, to call for judges to be replaced by algorithms. Interpreting is the very foundation of a jurist's capacity to act, allowing it to bridge the gap between general and abstract texts of law and particular and concrete cases. Separating a jurist from their political opinions and prejudices is impossible[1023].

Another example of a classic misconception involving a legal concept is one that is featured more prominently *infra* in part 3: the concept of contract. Answering to very specific criteria and conditions from a legal standpoint, the concept of contract has been very freely used since the time of Rousseau and his social contract. As we will see *infra*, however, there is nothing contractual about the social contract. We, for one and very selfishly, have never agreed nor consented to anything remotely resembling a contract with our government, be it federal, cantonal or municipal.

On the other side of the spectrum, many jurists are also guilty of partially analysing legal phenomena, but for different reasons. Specialists are indeed highly prone to overanalysing small segments of a big picture, all the while failing to capture the

[1021] Dobbs v. Jackson women's health organization (no. 19-1392, 597 U.S. decided on the 24th of June 2022).

[1022] Cf. for instance Morgan Marietta, a professor of political science: ‹https://theconversation.com/a-revolutionary-ruling-and-not-just-for-abortion-a-supreme-court-scholar-explains-the-impact-of-dobbs-185823› (last consulted on the 5th of September 2022).

[1023] Cf. *infra* part 3, II, 2, B, *b.*

global essence of said picture. This is particularly visible when discussing with so-called legal technicians, specialized in the nuts and bolts of a very specific legal field with a propensity to bring everything back to their preferred domain. Their most common flaw is to forget that Law will never be a discipline isolated from others, and as a consequence, restricting one's self to Law without trying to understand politics, economics, hard sciences, medicine or psychology, prevents them from ever seeing the aforementioned big picture.

All in all, understanding both the big picture and the small details is never easy. The former requires interdisciplinary knowledge, while the latter needs specialized training. At this point, we are simply hoping to clarify some of the questions surrounding authority, although we certainly do not have the pretention to have a panacea to answer all matters related to authority.

B. Building and discarding analytical thoughts on authority

At this point of the dissertation, all the necessary elements of authority have been laid out, as well as most of its genealogical aspects (cf. *infra* for what remains of it). The reason for which we are writing the following section is to demonstrate just that: the necessary fundamental aspects of authority have been repeatedly laid out *supra*.

Authority is indeed very multi-faceted, conceivable differently by scholars of different fields. As such, any specialist can have something different to add or counterargue regarding its composition. Given the context, we will obviously use our own definition of authority in the following deconstruction, one very heavily influenced by the Roman *auctoritas*. The only elements that remain a staple are those we have discussed at length: augmentation/creation and the common good. These elements are, in the end, those fundamental to the essence of authority. All other characteristics discussed *infra* are contingent and simply reflect the various contexts in which authority manifests itself.

Generally speaking, we consider that authority needs to remain flexible in order to understand where and how it applies to various domains and situations. It is indeed the type of concept whose description varies immensely depending on the person who describes it. Sociologists[1024], anthropologists[1025], jurists[1026], philosophers[1027],

[1024] Cf. Eraly; Bouvier.
[1025] Cf. Severi.
[1026] Cf. Raz.
[1027] Cf. Kojève.

educators[1028] or scientists[1029] cannot give a common definition of authority, unless it is kept flexible enough. The reason is simple: the common good varies in each field of knowledge[1030]. For instance, justice is undeniably the centre of an authoritative Law, but such is not the case in physics, for justice is not the final cause of physics.

A micro-deconstruction of authority may be useful to establish a casuistic, but whatever elements and conclusions are exhumed in this context will inevitably be subordinated to the prior, necessary analysis of the augmentation of the common good. To be sure, certain elements appear with a certain regularity, but they remain clues, not essential aspects of authority.

Useful to exhume lesser details, analytic philosophy, summarily, aims to deconstruct notions in the smallest parts possible in order to decipher hidden intricacies, before "reconstructing" these intricacies to have a final picture, as exhaustive as possible. The mindset of analytic philosophy is quite close to that of legal positivism, as they share a love of technocratization and the conviction that a "whole" amounts to the sum of its parts[1031]. More importantly, they view themselves as untarnished by ideology, objective in their approach, neutral in their assessment[1032].

[1028] Cf. Renaut.

[1029] Cf. Bricmont.

[1030] So does the idea of an augmentation, but to a lesser degree.

[1031] This means that they tend to consider specialists as infinitely more useful than interdisciplinary generalists. If indeed it suffices to line up small parts analysed by specialists to obtain the best general picture, generalists become useless to them. Unfortunately for this school of thought, many scientific and academic breakthroughs emanate from the opposite side of the spectrum (cf. Lahire pp. 549-556, who demonstrates beautifully how a collection of specialists cannot effectuate serious research, especially in fields where scholars have an obligation to publish a certain number of articles each semester).

[1032] Beaney p. 19. We will see *infra* (part 3, II, 2, B, *b)* that this mindset is a delusion of epic proportions, especially through Gadamerian hermeneutics. Regarding this topic, Revault d'Allonnes (pp. 155-156) adds a very interesting thought, one she names *"présentisme"*. We already know that modern and liberal thinkers are very fond of the atomisation of topics, which is something analytic philosophy pushed even further in terms of deconstructing a topic (Revault d'Allonnes calls this *"l'hyper-modernité"*). One of the numerous pitfalls of this approach is the atomisation of history, and the tendency to evacuate what precedes analytic philosophy as outdated. In other words, what is not close enough to the present is either obsolete, either incomplete because it never passed the "deconstruction test" of analytic philosophy. Such an approach would never had led us to the conclusions drawn on the crisis of authority in international arbitration (cf. *infra* part 2, V, 5, C), which is yet another reason why we view this branch of philosophy as confusing.

Before discarding this approach, it will be used to establish, albeit briefly, what some of the numerous elements of authority are. What characteristics, other than the two *sine qua non* ones, can be highlighted? The first one is the intellectual matrix.

a. The intellectual matrix

There are two intellectual matrixes: top-down and bottom-up. The top-down motion implies a motion from top to bottom, or in platonic terms, from the perfect realm of Ideas to the lower realm we inhabit. For Plato, the world in which we live is but a reflection of a perfect intelligible world, and it is only through reminiscence that our soul may contemplate the Ideas of the intelligible world in their perfect form, where it once dwelled, before being trapped inside our terrestrial body. Those able to contemplate Ideas try to emulate them in the sensitive world where we live, in a top-down motion from the place of perfection (above, top) to the place of imperfection (under, down)[1033].

However, authority belongs to the other main intellectual matrix of occidental philosophy: the bottom-up one, whose main representative happens to be a disciple of Plato, Aristotle. According to him, ideas are not the starting point of an intellectual process, but the end. The starting point are *pragmata*[1034], concrete objects and situations, which are as legion as one can imagine.

From these *pragmata*, we can induce rules, principles and concepts by finding commonalities. In legal philosophy, this means that general principles and rules are the representation of a multitude of concrete cases and problems, but more importantly, that they will continue to evolve according to the evolution of this

[1033] Plato, Cratylus 389a-389e; Plato, Phaedo 103e-106b; Plato, Republic 514a-519e.

[1034] *Pragma, pragmata*, a thing done, a fact, something concrete in ancient Greek. For Aristotle, *pragmata* are the starting points to observe what constitutes our world, Ideas included. By comparing similar *pragmata* through analogical reasonings, we become able to determine what is their function i.e., what is permanent. For instance, if we compare what is known as "cars", we will find that there is an abundance of models depending on colour, size, brand, energy source, etc. What is common to all cars, however, is their capacity to take us from point A to point B through minimal physical effort on the part of the driver; this would thus be the essence of the car (we understand that many will want to debate this example, which we have simplified for the purpose of making it easy to access). Essences are, in proper Aristotelian jargon, called substances, because they are right in front our eyes, concretely (*sub*, under, *stans*, what is firm, what stands in Latin). They are what remains after everything contingent has been uncovered (Aristotle, Metaphysics 1041b9-1041b32; Papaux, Introduction pp. 42 ss).

world's *pragmata* and *doxa*. Authority is not borne from a general principle so much as it is borne from people's opinion, acceptance and deference[1035].

This importance of the *doxa* is further demonstrated by the first European academics to acquire a certain political weight in the Middle Ages, 13th century theologians in particular. While they were part of a dominant doctrinal current (Christianity), their authority as intellectuals did not rely on the power of the Church. Quite the opposite, the Church often interfered with the most influent scholars and universities of the time in order to curb their influence.

The source of their authority was partially linked to their lectures, but more importantly, to their *a quolibet* and *de quolibet*[1036] interactions with their students. During these interactions, lecturers such as Thomas of Aquinas or Henry of Ghent, would freely lay out their thoughts and answer the students' questions through typical scholastic dialectic (*pro, contra* and *syn*): these quodlibetic sources, the opinions of doctors, were the base of their authority.

The content of those sources was then used every year to "update" the reputation and competence of each scholar to arbitrate some of the most difficult and

[1035] Eraly pp. 34-35, 224. The *doxa* is the opinion, judgement or even reputation *(lato sensu)* in ancient Greek (cf. *infra* part 2, V, 5, C, *c*, (ii) regarding Cauquelin's definition of *doxa*). It is from those opinions that a person's authority comes into existence, and not because authority exists prior to people's opinion, which in turn would be the cause of their respect and deference. In this regard, Mandela's case is once again a very useful example. Before he became a symbol for peace and reconciliation, Mandela was but a normal member of the ANC. Though he steadily rose through the ranks, he never outshone Albert Luthuli while he was alive. On a more international scale, the ANC and its members were considered a terrorist group by the U.S. until the 5th of May 2008 (House report 110-620), which goes to show that the U.S. government was unmoved by Mandela's authority for quite some time before conceding to what had been obvious for many years. Nelson Mandela did not fundamentally change in terms of what he stood for, but decades of hardship and a genuine thirst for peace and unity rallied people to him over the years, gently but surely transforming him into the symbol he became. Said otherwise, authority is a somewhat democratic concept: it is impossible to amount to anything on the "authority ladder" without people trusting and backing you. Those people are the "bottom" and their actions (trusting in someone, viewing them as an authority) produce the "up", the concept of authority, which may change depending on the "bottom", the *doxa*. Authority's intellectual process thus starts with *pragmata* (people, feelings, opinions, *doxa*) and ends with a concept (authority). To be sure, we are not suggesting that we should apply the traditional Roman *auctoritas* to modern and contemporary situations in contradiction of the constant evolution of both *doxa* and *pragmata*. We are merely using it as a distant standard because ancient Rome was the last occidental society where people were citizens, not individuals, and that made thorough use of authority.

[1036] Literally, "from anyone" and "about anything".

controversial theological questions of their time. This doctrinal authority also emanated from the "bottom", the base of academia, the interactions between a teacher and his students. This authority was the bedrock of these scholars' institutional influence, one they used to arbitrate some of the highest doctrinal conflicts opposing some of the most powerful actors of their time (kings, cardinals and even the pope himself, though he did not take too kindly to it)[1037].

b. Other elements

Other elements of authority can include, depending on the source: a lack of coercion, volatility, acceptability, legitimacy, sacredness, hierarchy, temporality or a form of morality/ethics. The following deconstruction is fairly tentative as scholars have used varying versions of authority, usually the modern one, which mostly differ from the one used here[1038].

The lack of coercion has already been underlined by both Arendt[1039] and Kojève[1040]. Although we do not think that both concepts are always as mutually exclusive as they say[1041], we can understand that an authoritative Law should not require any form of coercion to be applied. Generally speaking, we would say that coercion and authority are, most of the time, incompatible. According to Kojève (p. 57), "[…] *l'acte autoritaire se distingue de tous les autres par le fait qu'il ne rencontre pas d'opposition de la part de celui ou de ceux sur qui il est dirigé*."

Given the historical opposition between power and authority, the lack of coercion is probably one of the most widespread elements in the definition of authority, especially from a socio-political standpoint. This does not mean, however, that the use of power automatically disqualifies an action as unauthoritative[1042]. In the end, the concrete circumstances of each case are too influent to establish sweeping theories on this matter; despite this, however, we do know from our study of the Roman *auctoritas* and Reale's three-dimension theory that power without authority is much closer to violence than coercion.

[1037] Marmursztejn pp. 11-14.
[1038] Cf. *supra* part 2, III, 2 and 3.
[1039] Arendt, Authority pp. 92-93.
[1040] Kojève p. 57.
[1041] Cf. for instance the respect some can have for a mortal enemy or the way warriors build their own authority.
[1042] E.g., the use of force to stop a serial killer. We have also seen *supra* part 2, V, 2, E how authority was the basis of power, how authority legitimizes power while unauthoritative power is much closer to violence.

Volatility is much less popular when defining authority, and for good reason: it becomes difficult to qualify it as such if one uses the Roman model as a starting point, a model that lasted for over 1000 years. However, let us not forget that authority manifests itself individually most of the time, even in Rome[1043]. The authority of individuals tends to be somewhat less stable, especially when they turn out to be the antithesis of what they pretended to be or fight for. This is typically the case with corrupt politicians boasting about being honest and fighting corruption.

The volatility of authority has been witnessed by anthropologists in certain tribes, where a single abuse from the chieftain could destroy the authority he was supposed to represent[1044]. The reasoning is that a chieftain is supposed to act for the sake of the common good, to a degree where any selfish action is sanctioned from an authority standpoint. In more occidentalized latitudes, it is also easy to imagine such a case: a man rewarded for his fight against corruption with a position of justice minister, who ends up being more corrupt than those he prosecuted[1045].

While losing authority, similarly to losing trust, may happen very fast, constructing one's authority is a lot slower, often requiring years of perseverance and actions in favour of the common good[1046]. In other words, authority is generally slow to build up, yet can sometimes be quick to vanish, although always *ex nunc*.

Up to this point, we have been mentioning authority and its volatility through the prism of a person's individual authority. Authority itself and what constitutes it[1047], however, is much less volatile than the *doxa* it is based on. Indeed, as mentioned *supra*, authority does not vary according to the rhythm and changes of the *doxa*. Despite the importance of the *doxa* on authority, authority's roots grow deeper than the *doxa*, all the way to the traditions of a society, which represent the permanence and sedimentation of the *doxa*. In order to illustrate this, we would like to use the "most legal" of traditions: customs.

Legal customs are made of two elements: *longa consuetudo* and *opinio iuris*. The latter, a reflection of the *doxa*, is the psychological conviction that a certain

[1043] Cf. *supra* part 2, II, 2 and the example of Augustus.

[1044] Eraly pp. 80 ss.

[1045] Cf. the tale of Sergio Moro in Brazil, who imprisoned Lula for corruption before the verdict was overturned because Moro had corrupted judges and prosecutors.

[1046] For instance, Thomas of Aquinas' authority did not mature overnight, but took years, decades even of theological, philosophical and scholarly work. The same happened with Augustus and Nelson Mandela.

[1047] I.e., the answer to the question: "what is authoritative?"

behaviour is akin to Law or, in our case, akin to authority. On the other hand, the *longa consuetudo* represents the aforementioned permanence of the *doxa* required for said behaviour to become a custom, or authority in our case[1048].

As such, changes in the *doxa* can unquestionably influence tradition and Law over time[1049]. The *longa consuetudo* could explain why authority is slow to build, which would in turn explain why only citizens above a certain age could become arbitrators in ancient Greece[1050]: they needed to build up their authority, including their wisdom, for the *doxa* to become sufficiently favourable for them to be chosen to decide cases through sheer equity *ex aequo et bono*.

Regarding the volatility of authority, this means that authority does not change as fast as the *doxa*. The reason is that, although the *doxa* composes much of the fabric of authority, an authority solely made of *doxa* would be much closer to the notion of "popular opinion" than to a concept tasked with the augmentation of the societal common good. As such, authority needs something more than the *doxa*, which is where tradition and the common good intervene and giving more "weight" to authority, sharply reducing its volatility.

However interesting this aspect of authority may be, it is of lesser importance with regard to international arbitration, which has already suffered from a loss of authority. It might be helpful when discussing how quickly international arbitration started suffering from a deficit of authority, but this debate is not particularly relevant anymore given how we find ourselves in the midst of a crisis of authority (cf. *infra*). Any discussion regarding the volatility of international arbitration's authority would thus be quite short: it has largely disappeared and will quite probably take time before re-emerging[1051].

[1048] Papaux/Cerutti pp. 124-126. The period of time a custom takes to become part of the Law depends on the context and the intensity of the custom. The same can be said about authority and the *doxa*: depending on the opinion, it will take more or less time for it to become authoritative. For instance, in the 1960s in North America, positions in favour of environmental rights took a few more decades to become authoritative than those in favour of civil rights.

[1049] E.g., homosexual marriages which were illegal a few decades ago in most of the Occident; paternity leaves which are becoming increasingly common in Europe; the increased standards to construct buildings in terms of energy conservation due to the developing awareness on environmental problems over the past 50 years, etc.

[1050] Cf. *supra* part 1, I, 2, B.

[1051] Such a discussion would also depend on each person's conception of time and speed: is arbitral authority volatile because it has vanished in a few decades, or is it not volatile because it took so long and such an astounding level of effort to bring it down? While we

Acceptability has already been thoroughly discussed by many legal theorists and is closely linked to validity, legitimacy and even effectivity[1052]. We have witnessed the importance of authority with regard to those three poles, with authority defining both effectivity and legitimacy[1053]. Considering that acceptability is assimilated to legitimacy by jurists[1054], we will refer to our developments *supra* on the matter, meaning that similarly to legitimacy, what is authoritative is necessarily acceptable, whether it becomes so immediately or not is another matter.

Depending on the context, an authoritative decision can indeed take years to become authoritative, gathering acceptability along the way. Likewise, what is accepted can be unauthoritative and will quite often lose in acceptability over time. For decisions which were widely accepted at the time but ultimately proven unauthoritative, we have good examples in the decisions made by Nazi Germany tribunals regarding the spoliation of Jewish goods (widely accepted in Germany at the time) or the many arbitral decisions taken during the 1970s and 1980s concerning the natural resources of newly decolonized countries (cf. *infra*). On the other end of the spectrum, there were decisions which were contested at the time, but eventually became authoritative such as the U.S. Supreme Court's decision to end racial discrimination in public schools[1055] or Lincoln's initiative to abolish slavery.

With regard to authority, its acceptability can also vary significantly depending on the nature of the "targets". If the target is someone who lives in the same society as a person/institution who works to augment the same common good, we have little doubt that this target would whole-heartedly accept this authority. However, it might not be the case for someone whose conception of the common good is

understand that certain people will deem this aspect of authority very important in order to know how long it could take for arbitration to reconquer its lost authority, we have no interest in this type of speculation. It may be fast, it may be slow, but so long as international arbitration is brought back on a "healing" path, it matters little "when?", especially given that we will see *infra* in part 3 "how" it could happen. Moreover, the "when?" is impossible to predict and is unquestionably subordinated to the "how?".

[1052] Ost/van de Kerchove pp. 324 ss.

[1053] Cf. *supra* part 2, V, 2.

[1054] Ost/van de Kerchove p. 325. Those using legal philosophy to support their claims in political philosophy have another vision, one whereby acceptability is a pre-requisite to legitimacy, which has itself replaced authority and where the notion of authority has in turn been assimilated with power. We have seen examples *supra* (part 2, III, 3) with Rawls for instance, and have also already seen why, through the three-dimension theory of Law, their logic was flawed.

[1055] Brown v. Board of education of Topeka (347 U.S. 483 decided on the 17th of May 1954).

completely different, or who lives in a society whose common good suffers because of this authoritative person's action[1056].

Acceptability is hard to define in the abstract, but what if we circumscribed its definition to the realm of international arbitration? The answer varies depending on one's conception of justice: commutative or distributive. If we view justice as commutative and arbitration as nothing more than a contract concerning two parties, it becomes very easy to craft an acceptable arbitration model, because it would only need to satisfy the signatory parties (cf. *infra* regarding both types of justice).

If, however, we view justice as distributive, meaning that international arbitration concerns more than the signatory parties, it becomes much more difficult to build an acceptable arbitration model, let alone an authoritative one, because the arbitrator has to take into account many more people and parameters than under the commutative model. That being said, arbitrators are supposed to be brilliant minds, and doing so is expected of them (or should be, at least).

Overall, acceptability is very variable and depends heavily on one's conception of justice. Although the concept of acceptability can be important, in particular when trying to define a society's common good, defining it remains too secondary to the two conceptions of justice we discuss *infra*[1057]. Furthermore, defining what is

[1056] This is why heterogenous societies have more problems issuing acceptable laws: there are simply more parameters that the legislator has to take into account, on the condition that said legislator is mindful of the Aristotelian prudence of course (Papaux, Introduction pp. 52-53), which is when an authoritative doctrine becomes even more important to adapt and establish proportions (cf. Papaux/Wyler, Doctrine pp. 523-524). Cf. also Kenny's sharp overview of the matter.

[1057] One of the distinctive characteristics of arbitrators (and judges) is the obligation to decide "for good". As such, they do not have the same luxury as politicians to alternate positions, experiment or tell the parties that they might change their mind in two or more months' time. They cannot therefore manoeuvre around the acceptation of the parties as much as politicians can manoeuvre around popular opinion, meaning that the best they can do, and this is where international arbitration requires wisdom more than anything else, is to make educated guesses as to what is acceptable and what will become acceptable over time. Furthermore, let us not forget the purpose of arbitration: justice, and if done properly, justice through the augmentation of the common good. If doing so requires going against what is deemed acceptable by certain people, parties included, we genuinely do not have a problem with this: as long as the common good is augmented by arbitral justice, the acceptation of such decisions is only a matter of time. History has already shown this with certain decisions proving to be controversial at the time. Cf. for instance Brown v. Board of

acceptable and what should be acceptable differs greatly, yet defining one is essential when defining the other.

Moving along, the sacred aspect of authority is, according to me, the one most deserving of scrutiny. We have seen how sacredness was intertwined with the birth and durability of Roman authority[1058], which gives us a detailed-enough picture already. The genealogy of authority, its links with the sacred included, could definitely benefit from a proper historical study, in particular regarding the end of the Roman era, the Middle Ages and the transition towards Modernity. Doing so would also require an interdisciplinary take and a strong knowledge of theology[1059].

Very quickly, the first step to take before talking about sacredness would be to distinguish it from religion. As mentioned *supra*, religion is but a means to connect humans to the Gods and with it, their sacredness[1060]. According to certain authors[1061], authority needs tradition, which needs religion, which is why Modernity, by skewering religion, emptied authority of its content. While we agree that brutally setting aside religion has hurt tradition and its transmission, we do not think that it emptied authority of its content but simply blocked the most useful way to access it[1062]. The reason is quite simple: sacredness, not religion, in the shape of the common good, is the heart of authority and tradition.

Considering that traditions are made of the most important societal customs and knowledge, passed from one generation to the next, the link between tradition and authority is very clear: only by augmenting our inheritance can we prolong and ameliorate our traditions, only by doing so can we become figures of authority[1063].

education of Topeka (347 U.S. 483 decided on the 17th of May 1954) which outlawed racial segregation in public schools.

[1058] Cf. *supra* part 2, II, 3.

[1059] Cf. for instance Dupuy, whose essay is already very eclectic, yet could have been more developed legally and historically.

[1060] Cf. part 2, I, 2, B and II, 3.

[1061] Arendt, Authority p. 100; Renaut p. 65.

[1062] This observation is shared, although in a different, more artistic context, by Lahire pp. 529 ss.

[1063] Once again, a full development on the matter would require a separate, full doctoral dissertation, which is why we will not go into further detail regarding the content of tradition (for more details, cf. Arendt, History and Gadamer pp. 449 ss for two brilliant starting points on the matter). Cf. also *supra* part 2, II regarding the links between *auctoritas, potestas*, tradition and the sacred in Rome, which offers a clear picture as to how these notions are interrelated, how separating them from one another is not possible without altering their meaning. Closer to the heart of this dissertation, this would mean augmenting the institution of arbitration that we have inherited from our predecessors and augment it by restoring distributive justice to its rightful place, making sure arbitration remains a

It is important to note that sacredness is not synonymous with godhood, and can thus be found in many other places[1064]. This is why the aforementioned traditions, when embodying a society's most basic values, can be deemed as sacred, even in very secular societies[1065].

In Law, those most concerned with the augmentation of tradition are those deciding and concretizing the Law i.e., judges or arbitrators. The choice of having the most experienced or the wisest members of a community as judges/arbitrators is not innocent at all[1066]: they are the best-placed to ensure that traditions, through justice, are augmented in order to preserve their authority.

The notion of augmentation is here very important, for it dissociates the augmentation of traditions from their conservation. Conservation implies maintaining something in the same state, which, by definition, excludes augmentations. Moreover, conservation is not preservation because it makes tradition inadequate to liquid societies as both need to evolve hand in hand. Rendering a tradition stale is the best way to make it unauthoritative, which in turn, means it is holding back the very society it is supposed to support. Certain changes must, of course, be fought back; in Law, an arbitrator/judge's task is to operate the just selection between good and bad changes (which is why choosing the wisest members of a community is a good idea).

Traditions are therefore not manifestations of something old and obsolete, but of what is so important to a society that it becomes sacred to its denizens[1067], with the

complement to state justice rather than a replacement, ceasing to imagine that international arbitration can form a new unseen legal order removed from the "vicissitudes" of national legal systems and restoring equity and wisdom as the heart of arbitration, as has been the case for centuries (cf. *supra* part 1, II, 2, A, *c*; *infra* part 2, V, 5, C, *d*; *infra* part 3, II, 2, B, *b* and *c)*.

[1064] Obviously, Gods are the first we think of when imagining sacredness, but it is not a reason for us to limit the scope of sacredness to them. Other items include the very obvious love for friends and family, entire parts of nature, certain works of art, etc. For positivists, that would be the text of law. For analytical philosophers, that would be objective logic.

[1065] At the risk of sounding like a broken record, secularity is opposed to religion, not sacredness. This should be quite obvious given that secular societies undeniably hold many things sacred (love, friendship, family, cultural knowledge, etc.). There is thereupon nothing religious about authority, although it has been linked to it due to religion being the main historical vector between a society and sacredness.

[1066] Cf. *supra* part 1, III, 3, B for instance.

[1067] The environment in which we live, the fundamental cultural and legal values of a society, the capacity for a society to satisfy its citizens' needs for justice, etc. In other words, what is sacred is that around which a society unites. On a sidenote, what is sacred does not require

constant need of being actualized and adapted to the evolution of society. They inject regularity in an otherwise extremely contingent world, more fast-paced than ever. In Rome, the *pomerium* defined what was sacred: the city itself. The purpose of every Roman thus became its augmentation because they saw the common good, Rome, as sacred.

Understanding the links between sacredness and authority is more important than those between authority and the other elements presented in this section, which is why we have now mentioned it twice in this dissertation. On the whole, what we have laid out on the matter has been dictated by necessity: what is necessary to understand authority and the necessity to avoid endless debates on a topic littered with controversies for thousands of years on all continents. Additionally, if we consider sacredness to be tied to tradition and the common good, this would make sacredness a part of the essence of authority. Even if we were to use seemingly small and incongruous examples (e.g., a judge and a witness), their authority would still, ultimately, be tied to a society's sacredness, in this case, to justice[1068].

The hierarchy stemming from authority is another characteristic that, frankly, serves little to no purpose for our dissertation. The reason is that not only can hierarchies easily exist without a trace of authority (pure brutal power being a very good illustration), but also because hierarchy is not inherent to authority.

The case of the judge and the witness illustrates this once more: the witness has the position of authority regarding his testimony specifically, but the judge clearly holds the superior hierarchical position, as they are the ones to decide what authority to grant to each witness.

Furthermore, hierarchies exist all the time, in various shapes and for different durations. Using it as a criterion, even as a clue, thus makes little to no sense[1069]. Even some of the allegedly most egalitarian contractual relations can be viewed as

the presence of Gods; what is sacred is not necessarily divine, although the divine admittedly makes it easier to craft the sacred.

[1068] To be clear, this matter of sacredness is more subtle in its relation to authority than all its other elements. Given more time and knowledge, we would have greatly appreciated studying it in further detail. However, such is not the purpose of this dissertation. Furthermore, the study of sacredness automatically implies that of the common good when implicating authority in said study. Cf. the conclusion of this dissertation for more details on the common good.

[1069] The hierarchy between a master and his disciple has little in common with that of the general and his foot soldiers.

hierarchical (e.g., labour law, lease law, banking law)[1070]. In general, the notion of hierarchy is too widespread and malleable to be used as a criterion when talking about any sort of authority[1071], which is why constraining the definition of authority by using hierarchies is not a methodologically sound choice.

The next element of authority is less known and consists of the temporality of authority. Revault d'Allonnes wrote that "*Le temps est la matrice de l'autorité comme l'espace est la matrice du pouvoir.* […] [E]*lle assure la continuité des générations, la transmission, la filiation, tout en rendant compte des crises, des discontinuités* […]."[1072] Without agreeing or disagreeing with Revault d'Allonnes' vision[1073], time is of no particular relevance to this dissertation[1074]. The reason is

[1070] Even in Hobbes' leviathan-esque contract, knowing who is superior will depend on each one's affinities: is the state superior to each individual because it has the power, or is the individual more powerful because he is the one "lending" his power, thus granting it legitimacy? For more on hierarchy and the problems faced since modernity, cf. Dupuy pp. 206 ss.

[1071] Is the arbitrator superior because their decision must be applied, or is their client superior because they pay the arbitrator? This very simple question illustrates how jurists, economists and sociologists could diverge on the matter. According to Eraly (p. 224), a sociologist, "*Nulle part, l'autorité ne se réduit à la forme réifiée d'un statut formel dans une hiérarchie*. […] *Il n'y a pas* une *autorité, encore moins une chaîne hiérarchique cohérente, mais des autorités multiples et circonstancielles*." Even in Law, there are relations such as the witness and the judge, where the notion of hierarchical superiority is very hard to construe, despite the fact that, for a very short while, the witness bears more authority than the judge.

[1072] Revault d'Allonnes p. 13.

[1073] If we were, however, to pronounce ourselves on the matter, we would most definitely not use "time" as the matrix of authority. For one, temporality can be used as an analysis matrix for everything, including the end of times and of all lifeforms, which, admittedly, does not help us further any discussion of any sort. More than temporality, historicity seems like a much more intelligent way to place authority in a temporal context. Given that authority is chiefly concerned with the augmentation of inherited foundations, history becomes a major factor in the understanding of the foundations, our inheritance. Solid knowledge of a society's history allows one to have a better vision as to where said society should be steered in the future. We do not intend to lay out an entire theory on the historicity of authority right now, as this dissertation has already largely shown how important history is for authority (cf. *supra* part 1).

[1074] Other than the fact that it is not a "proper" intellectual matrix but a characteristic of authority, we are not entirely convinced by the fact that time is the paradigm in which authority exists. The idea that we leave our society in a better state than when we entered it is undeniably part of authority, but alterity is more important than time, which comes after alterity, after the common good. Furthermore, the notion of time and transmission can also apply in much more individualistic circumstances such as the inheritance of family wealth. The word "individualistic" is here used by opposition to the common good, not in its strictest

simple: the temporality of authority lies in the transmission of the common good, that upon which future generations can continue to build on. Temporality is thus secondary to the common good and its augmentation, as are all other characteristics of authority.

In a domain like international arbitration where there is a deficit of authority and a lack of concern for the common good[1075], temporality becomes, frankly, a non-factor. More importantly perhaps, it does not provide us with a solution to this crisis, at least not one that could not already be solved by the augmentation of the common good.

Finally, ethics in their broadest sense could be considered as the last element of authority[1076]. Once again however, even if we were to view ethics as a corollary of authority, it would necessarily be dependent on the presence of authority's two main characteristics. If the common good is indeed set aside, how can any behaviour be truly considered ethical[1077]? Unless someone has a truly formalist view of ethics, one where the respect of certain formal prescriptions suffices to be branded ethical, it is very hard to define an unauthoritative behaviour as ethical.

Without needing a full analytical scope, it is quite apparent that the many characteristics of authority are largely, if not entirely, dependent on the common good and its augmentation. These two fundamental aspects of authority are its real essence, and all other subsequent characterizations and elements become secondary.

Generally speaking, it is important to understand that the more criteria are used, the harder it becomes to use a concept. This is even more flagrant in the case of authority, as its definition varies immensely from one scholar to the next and hence has numerous elements. Self-inflicted rigidity renders interdisciplinary links nigh impossible to establish, for each domain has its own definition of the same concept. This severs the transversality of authority, and incidentally, the reach of the common

acceptation. Inheritance money has been one of the cornerstones of economic inequalities in occidental societies for decades now. For more details, cf. Piketty pp. 599 ss, who lays out how extreme concentrations of wealth have ravaged the middle class, how the diminution of inheritance taxes is directly related to that and how inheritance money fosters extreme wealth gaps.

[1075] Cf. *infra* part 2, V, 5, A and B.

[1076] We will see *infra* why ethics is very different from authority, particularly in the legal context, which is why we will not expand on it for too long.

[1077] There is a good reason why ethics have been closely linked to the acceptability of Law: it cannot really be separated from its application, and I, for one, would be very interested in seeing an authoritative unethical Law (Ost/van de Kerchove p. 337).

good it incarnates. It is precisely for this reason that the analytical approach must be discarded if one is to talk seriously about authority: the whole is much more than the sum of its parts, especially when dealing with such transversal knowledge and concepts[1078].

Moreover, the heart of this dissertation is the state of authority in international arbitration, which so happens to be Law's most flexible branch in many respects (applicable law, procedure, location, etc.), the one where applicable concepts require a certain flexibility and fluidity in order to be manipulable. Lacking this, we would find ourselves at a loss to exhume authority's problems in international arbitration.

4. In general

Having established a tentative definition of authority, we will now lay out the most important developments of this second part: authority in a legal and judicial context. More precisely, in an international arbitral context.

"*Le système juridique de l'Occident se présente comme une structure double, formée de deux éléments hétérogènes et cependant coordonnés: un élément normatif et juridique au sens strict – que nous pouvons inscrire ici pour plus de commodité sous la rubrique* potestas *– et un élément anomique et métajuridique – que nous pouvons designer du nom d'*auctoritas."[1079] This broad definition of the opposition between *auctoritas* and *potestas* in the overall legal context essentially separates the two concepts according to their spheres of influence in Law. Even though this definition is lacklustre, it is a useful entry point to legal authority[1080].

On one hand, power directly influences Law in its most basic day-to-day application: the power of a tribunal to enforce judgements, the power of the state apparatus to ensure the application of the texts of law, etc. Power thus ensures the concretization of the Law, be it through the strength it wields or as the threat it poses. On the other hand, authority exerts its influence less visibly, by imbuing Law with something bigger than power: respectability, legitimacy, acceptability and

[1078] Analytic philosophy barely makes any use of historical contexts, despite the fact that they are essential in the case of authority given how much the notion has been hijacked, which is further confirmation of the inaptitude of this approach to properly define this concept.

[1079] Agamben p. 144.

[1080] We will see why in the following sections, even though we will not waste too much time doing so.

the idea that the Law of the land embodies the moral values its members live by, the common good. An authoritative Law augments the society to which it applies by ensuring that justice is properly done.

To be clear, Agamben's take on Law's normative element is partially false. While he meekly acknowledges it *("pour plus de commodité")*, the conflation he makes regarding *potestas* is a dangerous one, because authority is more important than power regarding the final cause of Law i.e., justice. The legal element he mentions thus not only consists of *potestas*, but mainly of *auctoritas*[1081]. This has been verified throughout European legal history, where customs flourished for centuries upon a double base: *longa consuetudo* and *opinio juris*, the long practice and, more importantly, the belief that a custom is Law. This belief belies the obligation to abide by the custom, without the need for *potestas* to intervene[1082].

Very often, power and authority fill the vacuum left by the other. Accordingly, authority has less space the more coercion is involved[1083]. On the other hand, power is hardly required when a Law is truly authoritative. In such cases, people apply it freely, means of coercion hence become unnecessary (even detrimental) and power is reduced to fringe cases.

Law forms its own paradigm, one where power and authority dynamics have been at play since the very beginning in a way unique to Law[1084]. Legal power is used either pre-emptively to prevent someone from (not) doing something or after the facts, to force someone to (not) do something. If a person does something willingly, there is no need for any form of coercion, which is the case in the overwhelming majority of

[1081] This bias is unfortunately one that is found in an astounding majority of writings concerning Law, but not written by jurists. These authors are very often better than jurists for the meta-legal, but still lacking in legal knowledge to articulate proper legal theories. Even then however, there remain unmistakable elements of power, whose importance grows as international arbitration's authority wanes.

[1082] Papaux/Cerutti pp. 124-126.

[1083] Cf. *supra* part 2, III, 4, B, *a*.

[1084] It can be very "soft" as in mediation and arbitration, or very "hard" as in criminal law. In the first instances, having a *ius potestas* would ruin the very purpose of the legal institution, whereas in the second case, criminal law concerns above all fringe cases. *Potestas* becomes very important because quick efficiency is important when dealing with people who are a danger to society. Even then, this level of *potestas* is only possible because criminal law has a common good aim: protecting society from its – supposedly – most dangerous elements. This combination explains why, very often, non-jurists miss the mark when they attempt even the most basic definition of Law, and why Modernity's most well-known figures failed to provide a proper definition of Law (Diderot, Kant, Rousseau, Locke or Hobbes never studied Law, but at some point, all tried their luck defining it).

legal situations occurring tens of times in each individual's daily life. The same can be said of society in general: if citizens do something willingly, there is no need for power to force them to do something they are already doing[1085].

However, authority does not only operate on the same level as power, but also on a higher level, meta-legal. Its domain thus cannot be reduced to written laws and jurisprudence. Indeed, the meta-legal involves all that composes Law without being legal *stricto sensu*, which includes for example politics, history, geography, hard sciences, psychology, sociology, theology and the overall evolution of entire societies (including the links between them). The notion of meta-legal varies depending on authors, which is why we will be using the following widespread definition of what constitutes the meta-legal: everything that influences Law, excluding laws and jurisprudence i.e., the material sources of the Law[1086].

The link between meta-legal and authority becomes all the more apparent when bearing in mind the Roman *auctoritas* and its link to sacredness, which is undoubtedly meta-legal. Was Rome not founded upon an augur? Was the *pomerium* not the sacred boundary wherein the use of *imperium*, the most violent form of *potestas*, was forbidden? Sacredness cannot be considered a direct source of the Law (it is not used in legal cases, at least not in front of the usual secular state courts), but a meta-legal one, often used to justify Law's auto-foundation[1087].

The problem with Agamben's definition is that he reduces authority to the meta-legal. However, the common good is more far-ranging than the meta-legal, because

[1085] This does not mean that coercion is not inherently bad, nor does it always involve physical violence. Let us take the case of an employee wrongfully terminated who files a complaint in order to obtain compensation money and is vindicated by a tribunal. Should the employer refuse to pay the amount decided by the tribunal, the employee will have the possibility to ask the competent authority to enforce the judgement in order to obtain their due. In this case, there is no doubt that the employer did not want to pay, and by forcing them to do so against their will, the competent authority uses its power of coercion upon them. In the end however, because the employee will receive an amount due both legally and morally, this violence can be thought of as positive, for without this act of violence, this manifestation of power, justice would have been failed. In this case, the use of power is guided by Reason and bends the will of the recalcitrant party in order for justice to be better served.

[1086] Papaux/Cerutti pp. 115 ss.

[1087] Summarily, Law's auto-foundation is the answer to the following question: at its very origins, how can a Law be Law if there is no previous Law to institute it as such? Because of this, any Law will require a certain degree of auto-foundation to exist and be effective. The most famous example is the institution of judicial review and the U.S. Supreme Court's auto-foundation to interpret the Federal Constitution and strike down laws contrary to it (Marbury v. Madison, 5 U.S. 137 decided on the 24th of February 1803).

the latter is included in the common good, which is itself the core of authority. This is why Agamben's definition of *auctoritas* in Law is underwhelming: what constitutes authority is already bigger than the meta-legal. This means that the meta-legal is a part of authority, not the other way around. Agamben's definition of legal authority remains nonetheless useful to illustrate that authority freely floats in and out of Law, and that even authors aware of authority's Roman conception can misconstrue it.

Certain legal domains will be more prone to power and others more so to authority: if power manifests itself in top-down vertical fashion[1088], then authority does so from the bottom up[1089]. The archetype of the former is criminal law, where culprits are forced to pay a fine, go to jail, etc. Even then, there will be elements of authority and even horizontality in criminal law (e.g., the relative importance of the victim forgiving their aggressor in the criminal judicial process). For example, a victim forgiving a culprit is never an act of power, but one of authority, from the one who forgives. The culprit will probably not see the victim as a grandiose incarnation of authority, but the act of forgiving in a situation where forgiveness is hardest is one that commands respect from most people, from the *doxa*[1090].

[1088] Usually, the one with power legally stands above the one without. Quite often, the simple appearance of having a legal superiority is enough (one only needs to think of the American criminal system and the power prosecutors hold ever potential suspects to understand). But even if there is clearly no legal superiority, the power to coerce against one's will is enough to be a power wielder (the strength of arm comes to mind, or basic physical strength such as the one used in rape or bullying).

[1089] The one with authority morally stands above the one without, but is nearly always on the same grounds legally speaking. To be transparent, authority does not manifest itself in an as clearly cut way as power does, because its creative process is much more complex and discrete while its impact is not as visible. Moreover, wielders of authority, although morally superior, can also be in an inferior societal and legal position as was Mandela when he was not yet president of South Africa while he was holding talks with Prime Minister de Klerk and still a prisoner. De Klerk needed Mandela's authority from a political standpoint, while Mandela was nudging de Klerk towards legally ending apartheid. In addition to this verticality, there is also a horizontal, or non-vertical to be precise, aspect of authority stemming from its lack of coercion: an authority wielder will most certainly have a form of moral ascendance, but this ascendance is not one that comes from the top down, but one that has been accepted from the bottom up. It is only once this acceptation has taken place, that there will be a hierarchy between the wielder and the recipient. In a sense, it is impossible to speak of an illegitimate authority, for denying said legitimacy automatically involves denying its existence (Kojève p. 62).

[1090] Cf. the example of Nelson Mandela *supra* part 2, IV.

A good example of a bottom up legal field on the other hand, is international arbitration. Although much has changed in the enforcement of arbitral awards over the past 20 years, arbitrators still cannot enforce their own awards directly. Much therefore depends on the cooperation of the parties, which is, according to the unanimous doctrine and statistics, not a problem in more than 90% of the cases[1091]. To be fair, the horizontal aspects of international arbitration are not the sole components of the field. During the entire proceedings, arbitrators are indeed in a superior position to that of the parties, allowing them to give them certain orders for the good conduct of the trial.

Contracts law, with which arbitration law has certain similitudes, is also an interesting example of a bottom-up legal field, although authority does not have much to do with it and although it is much more horizontal than arbitration. Those entering into a contractual relationship generally do not need to be coerced to perform: buying food, paying rent, returning a borrowed book to the library, giving away your French fries to your older cousin, etc. People properly perform those everyday actions not because they are forced by an avatar of power, but because they freely want to[1092].

The reason why we are establishing a link between the bottom-up matrix, international arbitration, horizontality and verticality to a limited extent and authority is to show that despite being a fertile ground for authority, international arbitration manages not to be so. Indeed as developed in the upcoming section, the meta-legal is far from holding an important place in international arbitration, where the legal-technical has taken an immense place in the field. This is yet another reason why the common good, which goes beyond Law, and could thus benefit from meta-legal interventions, is ignored in international arbitration.

[1091] Cf. Morchid's overview on the matter.

[1092] Authority is obviously not a staple of contracts law given that there is seldom any place for the common good. In contracts law, people will act on a very individualistic basis, the common good being a factor in only very rare instances. There can obviously be elements of power in legal relationships as horizontal as contractual relationships. One simply needs to think about the occasional business bad faith actor who, without any threat of sanction looming over their head, would only respect the contracts they signed when they felt like it, whatever the incentive may be.

5. The case of arbitration

A. A historically comparative overview of the contemporary situation of arbitration

The first part of this dissertation was dedicated to the history of arbitration, and while a general background is always appreciated, the purpose of it all is to illustrate why and how the crisis of authority so dear to Arendt has extended to the world of arbitration.

Historically, there were always many reasons to use arbitration rather than state courts. In ancient Greece, arbitration was mainly used to pacify and solve conflicts between city-states. Unlike judges, arbitrators added their own individual authority to the proceedings to augment them. This made arbitral awards more respected and thus more efficient. While the authority of the arbitrator belonged to him individually, the crux of it was that he worked for the common good, for peace between neighbours[1093]. The sacred aspect of the Greek common good was reflected in the fact that arbitral awards were displayed in temples, the intercommunal ones in particular.

In ancient Rome, international arbitration took a backseat given how monstrously powerful Rome was compared to her neighbours: the difference in power was so big that its use required minimal efforts for maximal results for ancient Romans, who could obtain what they wanted without conceding anything[1094]. Internally however, arbitration thrived, especially after the introduction of *bona fides*, the basis of equity *ex aequo et bono*, itself considered the main difference between the job of a judge and that of an arbitrator[1095].

There were other factors than the high use of equity *ex aequo et bono* that contributed to a Roman arbitrator's authority, some of which are completely ignored nowadays such as the pecuniary aspect: ancient Roman arbitrators were deemed corrupt if they dared to receive any compensation from the parties. As a consequence, their authority (and thus their reputation) would vanish, for such people put their own interest in front of the common interest, which was to do justice, to be equitable and fair. Like in ancient Greece, parties could choose their

[1093] Cf. *supra* part 1, I, 2, A and the many examples of authoritative arbitrators like the Delphic oracle, Alexander the Great, athletes, poets, etc.

[1094] Cf. *supra* part 1, II, 1.

[1095] Cf. *supra* part 1, II, A, *c* and B, *b*.

arbitrator, a choice where the arbitrator's reputation and authority were obviously very impactful given how both notions were important in ancient Rome[1096].

Having said that, the main reason why ancient Romans, as parties, used arbitration was to protect their own reputation, which was directly tied to their individual authority[1097]. Given the importance of maintaining both, arbitration (the *arbitrium ex compromisso* in particular) was very popular because awards were never made public and thus allowed the losing party to save face, to maintain their own level of authority.

In both Greece and Rome, authority played an extremely important role in arbitration. More precisely, arbitrators heavily relied on it to stake their claim as worthy of deciding cases in that manner, with more freedom than normal state judges. In Rome, this was even more accentuated: in addition to the ability to decide *ex aequo et bono* being conditioned by the arbitrator's authority, equitable awards also fuelled it. The idea was that equitable awards augmented the common good by keeping the peace, allowing people to preserve their reputation and bringing a modicum of flexibility to an otherwise very rigid legal system[1098]. Equity was therefore both a source of augmentation of arbitral authority and its result[1099].

Somewhat disappearing from Europe during the early Middle Ages then reappearing after the rediscovery of Roman Law, arbitration remained closely tied to both authority and equity *ex aequo et bono*. At the highest political level, individuals with the highest continental authority were often called upon to grant awards and solve conflicts (popes and kings mainly), and the less important a conflict was, the lower the authority threshold of the arbitrators became (bishops, scholars, lower nobility, etc.)[1100]. An arbitrator's authority however, never dipped under a minimal level inside his community, which is why even arbitrators at the "lowest" level were still authoritative (under said certain level, they were not chosen as arbitrators anymore). It was essential for the arbitrator to have authority

[1096] Cf. *supra* part 1, I, 2, B and part 2, II, 4.
[1097] Cf. *supra* part 1, II, 2, B, *a* and part 2, II, 2-4.
[1098] Cf. *supra* part 1, II, 2.
[1099] How equity materializes is another question, one answered *infra* in part 3, II, 2, B, *c* on hermeneutics, which then helps arbitrators develop their authority by augmenting the common good.
[1100] Cf. *supra* part 1, III, 3 and 4.

in the eyes not only of the parties, but also of the society where the arbitration took place[1101].

Over the course of the Middle Ages, arbitration became more widespread as time passed, eventually becoming more acceptable than state justice, which had become corrupt due to the greed of local lords. Like in ancient Rome, arbitration was an accessible way of obtaining justice while avoiding an otherwise less accommodating state justice[1102].

At this point, arbitral authority was still linked to the common good of society, which is illustrated by the choice of the first Swiss confederates to send the wisest members of their communities to be arbitrators should the need arise[1103]. Authority could also manifest itself more spectacularly, as in the case of Benedetto Caetani, chosen to arbitrate a disagreement between the kings of France and England. While ultimately failing to properly perform his duties, Caetani was not chosen because he was the pope, but because of his personal authority, void of all considerations of power-play his role as pope entailed[1104].

There were also numerous counterexamples, chief of which that of Simon de Montfort, Henry III and Louis IX. Acting as arbitrator, Louis IX displayed a lack of

[1101] Cf. *supra* part 1, III, 3, B-D.

[1102] Cf. *supra* part 1, III, 4, C.

[1103] While some may consider this as not a proof that the common good took precedence over anything else in the pursuit of justice, we beg to differ. Indeed, understanding their status as small fish on the European continent, the first Swiss confederates also understood the requirements of self-preservation through association and the construction of a common good, or they would not have felt the need to enter into an alliance. The foundational authority of Switzerland is one of solidarity and common peace. Preserving this peace (necessarily through justice) between them was paramount and who better than wise people to do so? Without requiring intricate knowledge of how a community functions, wisdom is capable of grasping the big picture looming behind an arbitral award and how this award will be received by the community, in addition to selecting which are the best uses of the knowledge at hand. This big picture is exactly what wisdom is about and a person concerned with the well-being of their community. Interestingly, the writers of the 1291 proclamation did not allude to the most knowledgeable, the best experts or the highest born to dispense justice. The expression “the seven sages” is still used nowadays when mention is made of the Federal Council, whose main way of functioning is through collegiality: they are a unit and not a compilation of seven individuals. The importance of wisdom and how it has evolved up to this day cannot, in our view, be understated: it is an integral part of the foundational authority of Switzerland and is responsible for keeping the peace and preserving the common good.

[1104] Cf. *supra* part 1, III, 4, A.

consideration for the common good, wilfully protecting his peer rather than appeasing the conflict. As a result, the Second Barons' War broke out[1105]. More importantly still, was the increased usage of arbitration to solve conflicts in order to avoid the powerful-yet-void-of-authority lords who administered a sinister justice system, based on their individual profits. The lack of authority of the state justice system was quite clear by the end of the 15th century in western Europe, which explains why arbitration was so popular at the time[1106].

The early modern period saw arbitrations diminish as they were curbed by state tribunals, which were becoming more powerful under the regime of absolute monarchies and the consolidation of the central state. Powerful rulers had indeed little to no appetence for a justice system parallel to theirs that was generally seen as a way to circumvent the corruption and lack of speed of state justice, in Louis XIV's France in particular[1107]. Before him, Louis XII and Francis II[1108] had already severely reduced the right for arbitrators to decide cases in equity *ex aequo et bono*, hereby effectively cancelling their strongest legal vector of authority[1109].

As a result, arbitration suffered its first significant qualitative downgrade since the Greek era: technicians began to replace the wise as arbitrators. These technicians could be experts of a country's Law (now that arbitration was integrated in the state justice system) or experts in the field where the problem arose (agriculture, trade, metallurgy, etc.). As a counter-reaction, the French Revolution heavily promoted the use of arbitration, which they saw as a solution to a lacklustre justice system, by rendering it much more accessible[1110].

Such was not the case in England, where arbitration continued to thrive under Elizabeth I and James I, with the monarchs intervening regularly as arbitrators[1111]. More importantly, both understood the importance of arbitration in the peaceful resolution of conflicts, an incontestable part of the common good. Arbitration was seen as a complement to state justice rather than a refuge to run away from it,

[1105] Cf. *supra* part 1, III, 4, C.
[1106] Cf. *supra* part 1, III.
[1107] Cf. *supra* part 1, IV, 2.
[1108] Respectively through the enactment of the *ordonnance relative à l'exécution des conciles de Bâle et de Constance* of June 1510, followed by the edict of Fontainebleau of August 1560. Cf. also Hilaire pp. 192-194.
[1109] Cf. *supra* part 1, IV, 2.
[1110] Cf. *supra* part 1, IV, 2.
[1111] Cf. *supra* part 1, IV, 3, A and B.

which is undoubtedly the healthiest cohabitation between those systems, as was the case in Rome[1112].

By the end of the 19th century, the codification movement had reached its cruising speed and arbitration was obviously not spared. One of the ways arbitration was codified was through the international treaties that created arbitral institutions, which served as the catalyst for the professionalization of arbitration.

At this point, arbitration was still considered non-professional in the sense that it was impossible to make a living out of it, with merchants even giving their arbitral fees to charity. This certainly gave them a good reputation, but also showed that arbitrators were not for sale, that their judgement did not depend on who paid them. It is also important to remember that at this point, arbitrators were not the wisest anymore, but the best technicians in trade laws, which was certainly the reflection of how legal positivism was thriving in occidental societies[1113].

In the 1920s, in order to strengthen their hold on arbitration in the U.S., these technicians lobbied to expand the vision purported by the arbitration institutions to state and federal laws, an opportunity they used to complexify arbitration through legal technicities. They also rendered it more sweeping by generalizing the possibility to agree on an arbitral settlement before any conflict had occurred, in addition to increasing its scope[1114]. This vision of arbitration was then slowly exported to the international stage.

This complexification of the arbitral process had very anticipable consequences. The first one was the "elitification" of arbitration, which went from an accessible way of solving problems to one impossible to navigate without the help of specialists of arbitral procedures, something incredibly apparent in the increase of lawyer representation in such proceedings (from 36% in 1927 to 91% in 1947)[1115]. The arbitral formalities were yet again reinforced in the ICC rules, which further reduced the importance of equity, particularly equity *ex aequo et bono*. That being said, ICC arbitrators were still not paid, for they considered it an honour to be an ICC arbitrator.

The post-World War II West heavily promoted international arbitration through legal texts, in particular by the beginning of the 1980s onwards, placing party autonomy

[1112] Cf. *supra* part 1, IV, 3, A and B.
[1113] Cf. *supra* part 1, V, 2.
[1114] Cf. *supra* part 1, V, 1.
[1115] Cf. *supra* part 1, V, 3.

at the centre of their vision of arbitration, to the point where private companies are now allowed to sue public governments if their pursuit of a common good impedes on their individual economic freedom[1116]. Legal and contractual positivism had unquestionably become the leading train of thought in international arbitration at that point[1117].

Nearly reaching the end of arbitration's historical journey, we now have to ask ourselves what is the current "authority situation" in international arbitration. We already know that the essence of authority diminished the more individualism took centre stage. Applying this to arbitration, this implies verifying the state of the common good, that through which arbitration is augmented: has arbitration managed to salvage something following the modern atomization of society, or has it gone too far down the road of individualism to the point where authority is no more?

Before answering this question however, it is critical to understand the current state of international arbitration (the post-World War II order, but in particular from the 1970-1980s onwards), something we have not done in part 1 because it is intimately linked to the current state of authority in international arbitration. Only by understanding both the most recent developments of arbitration and the concept of authority can we know where to search for clues of a possible crisis of authority.

B. The most recent developments in the genealogy of international arbitration: towards technocratization and away from authority

a. The general context after World War II

Historically, arbitration has served as a complement to state justice with varying degrees of importance. While the most outstanding cases were international in nature, the bulk of the caseload was internal, between members of a single community[1118]. Commercial, political and technological developments have relatively recently reversed this feature of arbitration, internal arbitrations having indeed become a rarity, in occidental countries at least[1119].

Among these factors, two of them affected international arbitration the most directly: decolonization and the rise in the usage of oil. Both of these factors

[1116] Cf. *infra* part 2, V, 5, B, *a* and *b*.
[1117] Cf. *infra* part 3, III, 2.
[1118] Cf. *supra* part 1, I, II, III and IV.
[1119] Derains pp. 44-45.

pitched countries liberating themselves from European colonizers against – mostly – European oil companies. More precisely, the new international investment arbitral caseload concerned the nationalization of natural resources.

At this point, we would like to mention the distinction between international investment arbitration and international commercial arbitration. The main distinction is that the first one involves public international Law, whereas the second is construed more under the light of private Law. Other differences include the nature of the *clause compromissoire* (general in investment arbitration, limited to the case in commercial arbitration), procedures or the transparency degree[1120]. The frontier between both however, has blurred over the course of the 21st century, as "investment provisions are now being included in free trade agreements."[1121] This distinction, while relevant a few decades ago, becomes less so as both types of arbitration are increasingly similar[1122], with nearly identical personnel[1123], and similarly lacking in authority (cf. *infra*).

In this context, the original noteworthy case was not arbitral, but issued by the International Court of Justice[1124], wherein the Court declared itself incompetent to decide a matter between the U.K. and Iran regarding the nationalization of oil by the newly appointed Iranian prime minister Mosaddeq. This left the British government with little legal recourse but did not stop it from setting in motion a grave chain of events with the sole purpose of protecting its access to Iranian oil[1125].

Subsequent cases of a similar nature (foreign company vs. recently independent country nationalizing natural resources) were brought in front of arbitral tribunals after the ICJ declared that matters of nationalization of natural resources by newly decolonized countries were not part of its jurisdiction. International arbitration thus began to evolve into an instrument to legally defend the financial interests of foreign companies, a colonial legal arm of western countries[1126].

[1120] Bernardini, Commercial-investment.

[1121] Roberts p. 300.

[1122] Böckstiegel, Lecture p. 578.

[1123] Grisel, Elites pp. 269 ss.

[1124] Anglo-Iranian Oil Co. Case (United Kingdom vs. Iran) Judgement of the 22nd of July 1952, ICJ reports 1952 pp. 93 ss.

[1125] Cf. Katouzian; Louis; Byrne pp. 215-216; Gasiorowski; Gasiorowski, Conclusion for more details on the matter. It is now extremely clear that Mosaddeq was forcefully removed from power by the U.K. and the U.S. after deciding to nationalize Iranian oil resources.

[1126] Schultz/Dupont p. 1152 who comment that during that time, arbitration was "neo-colonial in that its purpose [was] to allow developed countries to exercise control over and exploit

It then became Libya's turn to be targeted by the same company (now known as British Petroleum) in the early 1970s[1127], in similar circumstances and with many other cases following[1128]. The general context was laden with heavy political ramifications, where an understanding of a common good spreading through giant swaths of the planet was vital for the authority of arbitrators, even arbitration in general given that it occupied an important role in the most explosive political theatre at the time, and given especially that the use of oil went from 19 million barrels a day in 1960 to over 44 million a day in 1972 in the so-called free world[1129]. It is worth noting that more than 99% of all claims filed in investment arbitration during this era was done by investors against developing countries and former colonies[1130].

While the cases make for interesting reading, what interests us are the ramifications of this movement on the arbitral paradigm, and how they progressively pushed international arbitration as a whole towards technocratization, furthering the loss of sight of the common good, their own authority and even their very essence as a legal institution[1131].

b. The post-World War II actors

In the post-World War II arbitral order, there were two categories of actors who would define the rules of the game. The first was a small contingent of elite European arbitrators, often with an academic background. The second were the arbitration institutions, which would recover spectacularly from their "hibernation" caused by World War II[1132]. For some time, the first category was believed to have been the most influential, and while we do not deny their intellectual influence

developing countries. The economic interests of investors from richer countries [were] promoted to the detriment of the regulatory freedom of governments in poorer countries […]." Cf. also van Harten pp. 17.

[1127] Dezalay/Garth p. 81; BP Exploration Company (Libya) vs. Government of the Libyan Arab Republic award of the 10th of October 1973.

[1128] Cf. for instance Sapphire International Petroleum Ltd. vs. National Iranian Oil Company (15th of March 1963); Texaco Overseas Petroleum Company vs. the Government of the Libyan Arab Republic (19th of January 1979); ICC Case no. 3099-3100 Algerian State Enterprise vs. African State Enterprise (30th of May 1979); Elf Aquitaine Iran (France) vs. National Iranian Oil Company (14th of January 1982); AGIP SpA vs. Government of the People's Republic of Congo (ICSID case no. Arb/77/1, 30th of November 1979).

[1129] Yergin pp. 227-475.

[1130] Schultz/Dupont p. 1153.

[1131] Schinazi p. 16.

[1132] Cf. *supra* part 1, V, 3 regarding the evolution of these institutions until World War II.

(e.g., the creation of the *lex mercatoria*), those who truly shaped international arbitration as we now know it, were the arbitration institutions and the business heavyweights using and supporting them[1133].

By the beginning of the 1970s, international arbitration cases[1134] were becoming so lucrative that they started drawing the attention of North American scholars and their small contingent of internal arbitrators (cf. *infra*). Before taking centre stage, they would have to contend with the professorial figures of international arbitration from western European civil Law countries.

These "grand old men" figures were the leading theoretical minds of international arbitration and often acted as arbitrators for the prestige rather than being full-time arbitrators able to live off arbitration. So small was their circle that they were considered a "mafia", for they always recommended one another to arbitrate or act as an attorney in an arbitral procedure[1135].

Possessing amazing legal minds, they crafted the contemporary version of some of the most important legal principles of international arbitration, including the *lex mercatoria*. Using the flexibility of the *lex mercatoria*, they promoted their geopolitical vision of the world through their arbitral awards, one opposed to the nationalization of natural resources, protecting the interests of occidental companies in southern countries in the name of business[1136].

Already, we can see how the behaviour of these arbitrators differed from their Roman counterparts. Their "aura" was limited to their expertise and charisma and used for purposes of self-aggrandizement. The augmentation of the arbitral common good and an authoritative arbitral justice were completely set aside and thereby started a crisis of authority in international arbitration.

Said otherwise, they incarnated perfectly the confusion surrounding authority, epistemic authority especially. The arbitral knowledge of the likes of Lalive or Goldman has never been up for debate, and having read dozens of articles and books written by them, we would personally vouch for their impressive acumen. Incidentally, both were tenured professors at their respective universities. In any

[1133] Schinazi pp. 273-274.

[1134] Investment arbitration first and foremost, but commercial arbitration was also expanding very quickly, cf. Derains p. 39.

[1135] Dezalay/Garth p. 10; Derains p. 47; Stone Sweet/Grisel pp. 71-72.

[1136] Dezalay/Garth pp. 51-61, 88 ss; Lejbowicz p. 84; Goldman pp. 223-225; Bredin p. 17; Batiffol p. 7.

case, their arbitral knowledge was as established as can be. In the modern sense, they were thus authorities in the field. Even more so, their writings and research durably changed arbitral theory; whether those augmented the field indeed is hard to truly establish, but we will assume so for the sake of the current argument[1137].

This augmentation, however, needs to be repositioned in its broadest context lest we attain a very partial picture. Indeed, while there was an augmentation of scholarly arbitration, it did not push arbitration as a whole to be better. Looking at the state of the discipline when the grand old men took over, and once they retired is fairly eloquent. Not once did they think that they were not serving justice through colonialist awards. Not once did they mention the right of colonized indigenous people to self-determination in their plethoric writings. "Hindsight 20-20" goes the saying, but during the grand old men's era of glory in the 1960s, 1970s and 1980s, the independence movements in soon to be ex-colonies had already reached full-speed and the human rights movement was already more than a decade old[1138]. This means that despite having much evidence on the matter, grand old arbitrators still inked arbitral awards regularly in favour of European resource-extracting companies.

More influential and methodical than these "grand old men", however, was the ICC, which institutionalized arbitration by standardizing it and heavily accentuating the technocratic (and bureaucratic one could even say) aspects of international arbitration. The development reboot following World War II was done through heavy lobbying and the promotion of a certain mindset, one insisting on "giving more weight to the parties' agreement than to national law". The underlying idea was to render arbitration and the performance of awards independent from national laws, if parties so wished[1139].

The avoidance of national laws in favour of arbitration was nothing new, as we saw in both ancient Greece and Rome[1140]. Romans in particular used the secrecy of arbitration to avoid the heavy and rigid consequences of the infamy and loss of reputation that could come along with the loss of a trial in front of state magistrates. The real problem was not in the "what", but in the "how" this avoidance was

[1137] Otherwise, we could make the conclusion straightaway that they were most definitely not authoritative.

[1138] Independence political movements arrived in power in 1952 in Iran, 1953 in Cambodia, 1956 in Egypt, 1960 in the Democratic Republic of the Congo, 1962 in Algeria, 1969 in Libya, etc.

[1139] Schinazi p. 128.

[1140] Cf. *supra* part 1, I, 2, B and II, 2, B, *a*.

achieved this time. For instance, there is no evidence that ancient Romans used arbitration in a way that outright contradicted Roman laws and *auctoritas*. Let us remember that for a period of time, the presence of praetors was mandatory in arbitral proceedings, which was the very reason why lodging an appeal against an award could only be done on procedural grounds[1141].

Rather than wise arbitrators capable of manipulating equity with ease and with a real sense of authority and distributive justice *(suum cuique tribuere)*, super-specialists and technocrats were selected to promote this "new" line of conduct. This shift would mark the legal-philosophical entry into the contemporary arbitration paradigm. Indeed, from this point on, arbitrators became increasingly estranged from the capacity to decide *ex aequo et bono*, progressively setting themselves on the path of interpretative univocity, trying to reach the correct answer as if solving a math problem rather than a fair decision.

The role played by arbitration institutions, the ICC in particular, in creating this new paradigm cannot be understated. The most important role they played was to unify arbitration laws, using comparative law to exhume common rules between legal orders and use them as "proof" that arbitration Law could and should be as unified as possible[1142]. By conflating similarity to identity, by ignoring cultural and societal differences and by lacking hermeneutically in their reception of compared laws, experts mandated by the ICC or the International Institute for the Unification of Private Law[1143] would push heavily towards uniformity.

Their motive in doing so was to expand arbitration, intentionally or unintentionally choosing quantity over quality, as shown in their *Rapport sur l'arbitrage conventionnel en droit privé*: *"Il serait hautement désirable que l'on pût mettre à profit toutes ces expériences et toutes ces études, en les coordonnant dans une règlementation internationale uniforme de l'arbitrage. Phénomène universel, partout inspiré des mêmes causes, l'arbitrage devrait d'autant plus être soumis partout à une loi identique qu'il apparaît aujourd'hui comme le mode de justice préféré du commerce international. La diversité des lois qui le régissent constitue au regard des besoins de ce commerce un obstacle des plus fâcheux: elle nuit à la sécurité des conventions arbitrales, et élève un doute constant sur la valeur des sentences d'arbitre."*[1144]

[1141] Cf. *supra* part 1, II, A, *b.*
[1142] Schinazi p. 133.
[1143] Hereafter "UNIDROIT".
[1144] David, Rapport p. 8.

This document, officially endorsed by UNIDROIT one year after its publication, illustrates many of the problems suffered by arbitration from a legal-philosophical standpoint. We can see how the modern scientific mentality was prevalent in the arbitral discourse of the era. By anchoring international arbitration in concepts such as univocity, legal security or universal law, arbitral institutions exerted the most important and decisive influence in moulding arbitration into its current shape[1145]. Reflecting the same mentality, the ICC decided to publish arbitral awards of interest in order to reassure the business community in terms of security of the law, laying the groundwork for the current quasi-jurisprudential functioning of arbitration (cf. *infra*)[1146].

c. North America joins the fray

During the 1970s, American jurists and law firms were hardly interested in the world of international arbitration. Even more so, their legal practice stood at odds with that of the grand old men, placing the emphasis on facts, whereas the continental jurists' analysis was centred around the law. It was at that time however, that the U.S. arbitration enthusiasts began heavily promoting international arbitration in North America.

Within 10 years, international arbitration would become better known within the U.S., even though it was still stuck on the fringes, with all the biggest firms focusing on litigation rather than alternative dispute resolution[1147].

In parallel to the very slow progress of international arbitration in the U.S., the caseload of state courts was augmenting dramatically. According to the report of the Federal Courts Study Committee (2nd of April 1990), "[t]he crisis of volume is beyond dispute", with appellate filings rising fifteen-fold between 1945 and 1990 and the caseload of an average federal judge increasing six-fold (p. 110 of the report).

In the early 1980s, federal judges were thus encouraging the use of alternative dispute resolution for small cases, if only to unclog court traffic. At this point, the U.S. was clearly far behind Europe in the field of international arbitration, with the hovering spectre of being excluded from elite international cases. It is in this general context that the U.S. Supreme Court decided in favour of the application of a foreign

[1145] Schinazi p. 135.
[1146] Schinazi p. 136.
[1147] Dezalay/Garth pp. 101-113.

law and a foreign court in the Mitsubishi vs. Chrysler-Plymouth landmark case of 1985[1148].

Very briefly, this case involved a Japanese corporation and an American-owned Swiss corporation in a car-selling joint-venture. A Puerto-Rican company subsequently joined them in order to manage car sales in Puerto Rico (Soler). Soler and Mitsubishi signed a sales agreement with an arbitration clause (Japanese seat and applicable Law). When issues regarding lacklustre sales arose, Mitsubishi petitioned the U.S. courts pursuant to the arbitration clause and the FAA. Not only did the U.S. Supreme Court allow the application of the arbitral clause, but it added that antitrust matters were also subjectable to international arbitration.

In the wake of this decision, the international arbitration market began to open in the U.S. and those selected to officiate as arbitrators were quite often former judges educated through the U.S. legal system and whose services were offered by the Judicial Arbitration and Mediation Services, Inc. (often called "JAMS"). These retired judges, attracted by the vast sums of money at play, helped tremendously in rendering international arbitration more acceptable in the U.S. as they were figures of authority in the U.S. legal system[1149].

At the turn of the decade, an intense competition was stirring in order to gain market shares inside the U.S., with litigators joining the field and bringing with them their own methods: "[A]t this point the trend has been away from legal authority and more toward the market and pure, business-oriented mediation [and arbitration]."[1150]

The more the international dimension of arbitration grew, the less was the importance of former judges who were out of their depth, which is when American litigators started occupying the field of international arbitration i.e., people who used litigation as "a tactic in economic warfare." Litigators were – and still are – people "who have only legal capital to offer." As such, they "will naturally play the only card they have, the law", which explains why international arbitration has reached heights that were unheard of in terms of legal technique and procedural complications[1151].

[1148] Dezalay/Garth pp. 107-113, 156 ss.; Benson p. 493; Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth, Inc., no. 83-1569, decided on the 2nd of July 1985, 473 U.S. 614.
[1149] Dezalay/Garth pp. 165-167.
[1150] Dezalay/Garth p. 173.
[1151] Dezalay/Garth pp. 101-106, 172-175, pp. 106 and 118 for the citations.

By the mid-1990s, these new, more aggressive jurists had overtaken the "old guard" and stripped international arbitration of whatever authority was still left. During the 1970s and the first half of the 1980s, arbitrators had lost sight of the common good, but they still understood the importance of equity, even if only applied to those party to the arbitration clause[1152]. This means that the institution of international arbitration was able to retain a modicum of its essence, whereby the wisest still held an advantage over the pure legal technician.

From the mid-1980s onwards however, not only was the common good more lost than ever in the wilderness, but a discipline known for its relative simplicity, accessibility and even lack of legal technique[1153] was becoming increasingly technical and procedural, to the point where now, jurists need to specialize in arbitration and arbitral procedures in order to navigate the waters.

The main witnesses were the first to be affected by the shift: the continental European "grand old men" who had dominated international arbitration for decades. To be sure, they still retained an immense influence, but there was a clear shift toward a more aggressive style of arbitration, less compromising, as their numerous articles on the matter attest to[1154]. We fully understand that these authors are not the most unbiased ones, but they do have unique insight. Moreover, there are regular critics that are often heard, meaning that the observations were shared (the legal aggressiveness, the technocratization and arbitration stepping away from justice and closer to a money-making machine). Given the geo-political importance of the U.S.[1155], it was only a matter of time before their shift towards international arbitration started having worldwide ramifications.

Before continuing, it is important to understand a few general ideas about the influence of U.S. Law. The first one is that there is no direct input from U.S. Law into the various continental Laws on the internal level. Traditions are too strong, roots too deep and mentalities too different for there to be a direct implementation

[1152] Cf. for instance Goldman p. 246, 253; Bredin 19-27.

[1153] Cf. *supra* part 1; Cicero, Pro Quintus Roscius 4, 10-13; de Loynes de Fumichon/Roebuck p. 198; Stone Sweet/Grisel pp. 1, 32-33, 171-217.

[1154] Lalive, Forme pp. 391-395; Lalive, Courage; Lalive, Réflexions; Maniruzzaman p. 439; Lazareff pp. 477-483; Hanotiau pp. 367, 370; Nariman pp. 554-556; Oppetit pp. 10-11, 26-28, 63, 79, 107, 109, 117-120, 124-127; Cremades pp. 142-143; Duclercq p. 214; Karsten pp. 354-356; Derains pp. 44-45.

[1155] Cf. Chomsky, Blum or Immerwahr on the matter, as they collectively retrace American influence over the world for the last 120 years.

of U.S. Law in French, Swedish or Austrian Law; the minimal acceptability degree is not met.

This can be seen quite clearly, as scholars repeatedly state that U.S. Law's impact on European positive Laws is of very little significance[1156]. Moreover, there is a stark difference between the U.S. legal system of common Law and that of continental European countries of civil Law, which makes any direct reception of U.S. Law procedurally complicated, in addition to being philosophically challenging.

Regarding internal Law, the process, when it exists, is thus not direct, but indirect: mentalities and *Weltanschauungen* are influenced, which then leads to changes that are seldom of legal technique, impacting perceptions and how we solve certain legal problems (typically through comparative Law).

Another aspect worth mentioning is that while international arbitration is connected to internal Law(s), international arbitration can change much faster than internal Law, if only because there is no legislating process, no rule of precedent and no uniform material or procedural rules. As such, international arbitration is impacted faster, more fluidly and more directly by those who practice it, meaning that the technocratization of international arbitration through U.S. actors, which began in the mid-1980s, has been more incisive than that of internal Laws: the legal culture of a jurist has more weight there than in internal, rigid, positive Law.

To give a simple example, there is an element of the utmost importance in Law, one where the Anglo-Saxon culture manifests itself very clearly: language. Very often, English is the arbitral language of reference, even if none of the arbitrators are anglophones[1157]. This shift is symptomatic of what has happened in international arbitration over the past 50 years, where it went from rotating around continental Europe to revolving around Anglo-Saxon legal culture.

A full account of the Americanisation phenomenon would take too much time and somewhat derail from the purpose of this dissertation[1158]. To be quite honest, we do not think that the recent historical changes in international arbitration can

[1156] Magendie; Farnsworth; Legrand p. 38; Reimann pp. 62, 64-68.

[1157] Lalive, Forme pp. 392-393.

[1158] Furthermore, such an account, if serious, could not bypass the economic and military aspects of Americanisation, by themselves subjects of an outstanding number of books, academic or not. Facing such wide topics, we are once again reminded of the Aristotelian finitude intrinsically tied to our human nature. While the acceptance of such a nature is strongly advised, it does not mean that one cannot feel chagrined by it.

solely be pinned on the U.S., despite the obvious role played by its law firms, in addition to being the last step in the exclusion of the common good from international arbitration.

This paradigmatical change had already started at the beginning of the 20th century, and was the consequence of the philosophical direction taken by western European thinkers since the 16th century through their promotion of individualism[1159]. Moreover, it is not so much the Americanisation as it is the technocratization of international arbitration that has aggravated the crisis of authority plaguing the field, although the U.S. has been leading the pack for the last 30 years, in addition to the heavy individualism and commutative justice it incarnates (cf. *infra*)[1160]. This technocratization is by no means the sole responsibility of North American mega-law firms, as already in the pre-World War II ICC, conciliatory procedures were being discarded in favour of the heavier arbitral procedures, despite the fact that conciliation had been working hand in hand with arbitration for centuries[1161].

d. The era of technocratization

One of the consequences of technocratization is that arbitration has become increasingly similar to the judiciary, with some authors seeing the trend very

[1159] Cf. *supra* part 2, III, 1 and 2.

[1160] Subsidiarily and drawing once more from the historical lessons learned *supra*, we can legitimately ask ourselves whether international arbitration can still function properly given the difference in *imperium* between the U.S. and the rest of the world. This difference is as clear as daylight when one knows that in 2020, the U.S. military budget was bigger than the sum of all other military budgets in the world's top 15 (cf. the Stockholm international peace research institute's report of April 2021, last consulted on the 22nd of June 2021: ‹https://sipri.org/sites/default/files/2021-04/fs_2104_milex_0.pdf›). Furthermore, the U.S. has boasted the world's uncontested strongest economy since World War II. By combining military and economic levers, it has imposed economic sanctions on certain countries for political reasons and in order to cripple them (cf. the Office of Foreign Assets Control of the U.S. Department of the Treasury, last consulted on the 22nd of June 2021: ‹https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information›). Given those facts, it is only natural that we ask ourselves whether international arbitrations featuring the U.S. or its proxies will be fair ones. We have indeed seen that when Rome became too powerful, international arbitration became somewhat of a lame duck, as she simply took what she wanted without really caring for the opinion of others. The case of the U.S. today is obviously more difficult to assert given the heightened complexity of the U.S. empire compared to its Roman counterpart: less territorial, much more widespread yet better hidden. We do not think that they have retaken Rome's role quite similarly for at least one good reason: international arbitration seldom happens between states anymore, and when it does, it is usually a WTO arbitration.

[1161] Cf. *supra* part 1, III and IV; Schinazi pp. 180-182.

clearly[1162], and others accelerating it wilfully or not, typically by recommending further legislating to solve problems encountered in the practice of international arbitration or by being unable to step outside the lines of arbitral procedural practice[1163].

Interestingly, the technocratization of Law is seldom defined by jurists, but by political scientists and sociologists, which often results in the following tautology: "[A] complex, multidimensional process by which organisational and reasoning elements characteristic of technocratic state intervention become inserted into a legal framework."[1164]

Unfortunately, such a definition is not suitable to Law, which is often the case when legal definitions are made by non-jurists. Moreover, this definition is also wrong in that the technocratization process is often used to depoliticize a legal matter, to separate it from any state or political activity[1165], which is still the reflection of a certain political ideology.

The one aspect sociologists instinctively grasp correctly is that technocratization disables the effective use of rights, although explanations are, again, legally unsatisfying[1166]. Indeed, non-jurists rarely make any mention of the two most important aspects of legal technocratization: legal inflation and the procedure superseding substantial rules. Both of these aspects are, actually, merely consequences of legal positivism, which requires Law to be written (hence the inflation) and precisely respectful of a certain procedure to be valid, hence the

[1162] Hanotiau pp. 367, 370; Lazareff pp. 477-479; Nariman pp. 554-556; Oppetit pp. 10-11; Duclercq; Lalive, Forme pp. 391-395; Derains; Grisel, Elites p. 275; Abi-Saab p. 383; Bellet p. 400; Tercier, Entre nous p. 1077; Mayer p. 373; Henry; Stone Sweet/Grisel pp. 171-217; Schultz, Consistency pp. 297-298.

[1163] Aurillac; Baum; Gabriel; Hunter; Karrer; Kaufmann-Kohler, Online; Nouel pp. 569-571; Reymond; Schneider; Kaufmann-Kohler/Rigozzi pp. 3-6, 13-29, 371; Jarrosson p. 110; Girsberger/Voser; Weigand/Baumann; Poudret/Besson pp. 895 ss; Redfern/Hunter/Blackaby/Partasides pp. 1 ss, 225 ss; Born I and III; Weeramantry pp. 115 ss who could not separate himself from legal technicities and codes in a chapter called "non-codified means of interpretation"; Park; Mills; Brekoulakis; Kriebaum; Mbengue/Raju; Shirlow/Caron; Morgandi; Cima; Vastardis; Mistelis; Dominicé; Giardina; Grossen; Mayer, Bonne foi (who seems to be evolving in the other direction however); von Mehren; Monaco; Perret; Sandrock; Schönle; Bermann; Kiffer; Ancel; Jarrosson/Racine; Tercier/Patocchi/Tossens; Wongkaew; Tamada; Tucker; Katselas; Marian; Schneider; Gazzini; Morris; Paulsson/Petrochilos.

[1164] Stryker p. 342.

[1165] Bachmann pp. 56 ss.

[1166] Cf. Ernst p. 12 and the quoted references.

superiority of formal rules reflected in the French adage *"bon parce que prescrit."* Another consequence is that arbitrators tend to be less creative as they feel obligated to respect written law, even if it is unjust[1167], which is diametrically opposed to the very notion of equity *ex aequo et bono*.

Such a trend is problematic because arbitration loses one of its main characteristics: the capacity to freely craft legal reasonings as closely adapted to the concrete case as possible, which fundamentally sets it apart from litigation in the Roman times already[1168]. This flexibility conceptually translates into an exceedingly important legal concept: equity *ex aequo et bono*, essential to reach any form of justice and thus any type of common good[1169].

While an exhaustive study of the evolution of arbitral decisions would be very hard to conduct given their secrecy and immense number, it is still interesting to take a look at some of the decisions rendered relatively recently, and see the degree to which arbitrators have interpretatively restrained themselves, denying themselves the possibility to use equity *ex aequo et bono* to higher degrees and therefore avoid being stuck in a paradigm where the number of options available to reach a just decision has become meagre[1170].

The technocratization of international arbitration is quite obvious when looking at problems concerning what should be minor procedural aspects. One would think that such matters should be quickly dispatched, but such is not the case as arbitrators use extremely often more than 15 legal references to justify themselves[1171] in a legal

[1167] Cf. *infra* part 2, V, 5, C, *d* and Henry, *passim*. This problem is not the sole property of international arbitration, but the reflection of a bigger trend (cf. Jestaz; Bredin, Remarques; Papaux, Introduction; Ost/van de Kerchove, Savoir-faire). It is however most visible in international arbitration, in particular once the history of the notion has been studied, showing how much more organic it is in comparison to the other legal fields.

[1168] Cicero, Pro Quintus Roscius 4, 10-13; de Loynes de Fumichon/Humbert pp. 324-325; Roebuck/de Loynes de Fumichon p. 198.

[1169] Cf. *infra* part 2, V, 5, C, *d*. There are still cases of arbitrators deciding cases *ex aequo et bono*, although they have become very rare. Cf. ICC final award in case no. 19627 for instance, concerning *damnum emergens* and *lucrum cessans*, wherein the sole arbitrator mainly drew inspiration from UNIDROIT principles and international customary Law.

[1170] Cf. Schinazi pp. 182-186.

[1171] Cf. Stone Sweet/Grisel pp. 151 ss who draw the same conclusions based on wider statistical evidence. Cf. for instance RSM Production Corporation vs. Saint Lucia (ICSID case no. ARB/12/10, 12th of December 2013) concerning fees; Lao Holdings L.V. vs. The Lao People's Democratic Republic (ICSID case no. ARB(AF)/12/6, 21st of February 2014) concerning jurisdiction; OI European Group B.V. vs. Bolivarian Republic of Venezuela (ICSID case no. ARB/11/25, 4th of April 2016) concerning provisional measures; Rafat Ali

field where the doctrine is unable to determine firmly whether there is a rule of precedent or not. The most pertinent description we have found on this matter is that "[e]ven though arbitral tribunals do not become tired of emphasizing that arbitral precedent is not binding, they nevertheless attach importance to it up to a

Rizvi vs. The Republic of Indonesia (ICSID case no. ARB/11/13, 16th of July 2013) concerning security costs; Highbury International AVV and Ramstein Trading Inc. vs. Bolivarian Republic of Venezuela (ICSID case no. ARB/11/1, 26th of September 2013) concerning jurisdiction; Renée Rose Levy de Levi vs. The Republic of Peru (ICSID case no. ARB/10/17, 26th of February 2014) concerning jurisdiction; Hassan Awdi, Entreprise Business Consultants, Inc. and Alfa El Corporation vs. Romania (ICSID case no. ARB/10/13, 2nd of March 2015) concerning provisional measures; Convial CallaoS.A. and CCI Compañia de Concesiones de InfraestructuraS.A. vs. The Republic of Peru (ICSID case no. ARB/10/2, 21st of May 2013) concerning jurisdiction; David Minotte and Robert Lewis vs. Republic of Poland (ICSID case no. ARB(AF)/10/1, 16th of May 2014) concerning provisional measures; AbengoaS.A. and CofidesS.A. vs. United Mexican States (ICSID case no. ARB(AF)/09/2, 18th of April 2013) concerning security costs; TeinverS.A., Transportes de CercaníasS.A. and Autobuses Urbanos de SurS.A. vs. Argentine Republic (ICSID case no. ARB/09/1, 29th of May 2019) concerning jurisdiction; CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. vs. Bolivarian Republic of Venezuela (ICSID case no. ARB/08/15, 3rd of March 2010) concerning provisional measures; Caratube International Oil Company LLP vs. Republic of Kazakhstan (ICSID case no. ARB/08/12, 5th of June 2012) concerning provisional measures; Perenco Ecuador Limited vs. The Republic of Ecuador (ICSID case no. ARB/08/6, 12th of September 2014) concerning provisional measures; ATA Construction, Industrial and Trading Company vs. The Hashemite Kingdom of Jordan (ICSID case no. ARB/08/02, 18th of May 2010) concerning jurisdiction; Alasdair Ross Anderson et al. vs. Republic of Costa Rica (ICSID case no. ARB(AF)/07/3, decision on provisional measures, 5th of November 2008) concerning provisional measures; Europe Cement Investment & TradeS.A. vs. Republic of Turkey (ICSID case no. ARB(AF)/07/2) concerning jurisdiction. In the sole domain of investment arbitration, more than 3'300 treaties are effective around the world, the vast majority of them having been signed after 1990 (Stone Sweet/Grisel p. 3). In commercial arbitration, sources are much more scant, meaning that commercial arbitrators cannot use arbitral "jurisprudence" in the same way investment arbitrators do, but still, the same mindset prevails, which is not surprising given how arbitrators in both fields are overwhelmingly the same people (cf. *supra*): ICC final award in case no. 17176 involving 17 patents; ICC final award in case no. 17326 which used the European Union's competition Law; ICC final award in case no. 17479 concerning the condition precedent to arbitration and the release of guarantee among other things; ICC final award in case no. 18203 concerning the interpretation of ambiguous arbitration clauses; ICC final award in case no. 17191 concerning interim measures; ICC final award in case no. 17768 concerning the applicable law to an arbitration clause; ICC final award in case no. 18671 concerning the fundamental breach of contract; ICC final award in case no. 19127 concerning a pathological arbitration clause; ICC final award in case no. 18981 concerning a breach of contract; ICC final award in case no. 19114 concerning the wrongful termination of a contract; ICC final award in case no. 18643 concerning the applicable law.

point where a *jurisprudence constante* becomes more authoritative as an argument than reference to a formal source of international law."[1172]

Regarding the notion of precedent *lato sensu*, there are practical differences depending on the field of international arbitration. Commercial arbitration, for instance, is less prone to *stare decisis* than investment or sport arbitration, particularly because very few of its awards are published[1173]. On the other hand, bilateral investment treaty arbitration uses a hybrid conception of precedent that is consistent enough to exhume a *jurisprudence constante*[1174], which is noteworthy given that some of the most salient attacks on international arbitration's authority have come from this field[1175].

There exists no obligation for arbitrators to make any reference to previous awards i.e., to operate a passage from an equity *ex aequo et bono* to a specific equity[1176]. The idea that an arbitral jurisprudence must be developed in the name of consistency and legal security is also generally refuted by arbitration specialists[1177], in addition to being epistemologically and hermeneutically false as we will see *infra* in part 3[1178].

The stifling of equity *ex aequo et bono* is of particular importance in this matter. The main difference between judges and arbitrators since the days of ancient Greece, this sole notion symbolizes the trust a society has in its arbitrators to do the best, most incarnate justice possible. Indeed, let us remind ourselves that equity *ex aequo et bono* consists in the creation of a decision of justice free of any legal constraint,

[1172] Schill, Sources p. 1104.

[1173] Kaufmann-Kohler, Precedent pp. 362 ss. It is worth noting that this article uses the stringent notion of *stare decisis* rather than the more permissive legal precedent.

[1174] Bentolila p. 1169.

[1175] Cf. *supra*, part 2, V, 5, B, *a* and *b*.

[1176] Bentolila p. 1167.

[1177] Bentolila p. 1190; Schultz, Consistency pp. 303 ss, 315-316; Weidemaier pp. 1952 ss.

[1178] For now, let us briefly quote Papaux, Sécurité pp. 38-39: *"L'expression 'l'application de ce texte à ce cas' omet la complexité de cette opération nodale de qualification en la recevant comme simple subsomption, réduction cognitive à laquelle était contraint le positivisme juridique en tant qu'il ne dispose pas des moyens logiques ni épistémologiques pour entreprendre le saut qualitatif (eu égard à l'hétérogénéité) qu'elle présuppose. Les notions, courantes en droit international, de 'sens ordinaire' des mots, et plus irréaliste encore de 'sens naturel', sont exemplaires de ce paralogisme de la subsomption* […]. *En d'autres termes, les cas dans leurs caractéristiques de singularité s'avèrent totalement absents des figures formelles mentionnées. Il s'agit dès lors d'une sécurité juridique 'en vase clos': rien ne sort des textes … parce que rien ne peut en sortir si ce ne sont papier, encre noire et caractères d'imprimerie divers."*

meaning that arbitrators deciding *ex aequo et bono* enjoy the most complete interpretative freedom imaginable to jurists, guided by only one idea: to do justice. Potentially very dangerous a capacity, the only basis and frame to acquire the trust, the legitimacy to decide *ex aequo et bono* is the decider's authority: it is because someone has shown throughout their life and professional career that they understood their society's common good and how to augment it that they can now be entrusted to craft authoritative awards when acting in equity *ex aequo et bono*.

The positivist technocratization of arbitration has hurt the ability of arbitrators to act *ex aequo et bono* without resorting to numerous texts of law, procedural rules and arbitral precedents to argue their point. This has damaged their authority in the process, indirectly feeding into the idea that arbitrators, just like any jurist, cannot be trusted to act *ex aequo et bono*.

Addedly, opting for this course of action sets arbitrators' on the path to "univocize" their field by using precedents to mould their own decisions. The use of precedents as an important source of analogical reasoning in Law is far from being a problem, quite the opposite. But when the legal-philosophical essence of a field is equity *ex aequo et bono*, and when actors of said field do not comprehend their own prejudices well enough to avoid mischaracterizing unbinding precedents as binding formal sources, the situation becomes problematic[1179]. This is especially so if the interpretative skills of arbitrators are increasingly lacking[1180], pushing them towards using more arbitral precedents, not for analogical purposes, but for a technocratic fear of failing positivist standards[1181]. In such a context, even if this kind of arbitrators are fully aware of the fact that precedents are non-binding, they will still use them as such, for precedents become their legal lifelines, from which they become unable to stray while retaining whatever epistemic authority they think they project. This *modus operandi* is in no way mandatory for arbitrators, showing that this tendency is mainly hinging on positivist mindset and *Vorverständnisse*, not positivist rules.

[1179] Cf. *infra* part 3, II, 2, B, *b*.

[1180] Cf. Ortino, *passim* and the example *infra*. Cf. also for instance Ampal-American Israel Corp., Egi Fund (08-10) investors LLC, Egi-series investment LLC, and BSS-EMG investors LLC v. the Arab Republic of Egypt (ICSID case no. ARB/12/11, decided on the 21st of February 2017); 9Ren Holding S.à.r.l. v. the Kingdom of Spain (ICSID case no. ARB/15/15, decided on the 31st of March 2019).

[1181] Henry p. 721.

The reduction of interpreters' latitude to decide *ex aequo et bono* is inherent to the technocratic legislative inflation initiated under the approving gaze of positivism, which, let us not forget, generally considers only formally valid texts of law as what constitutes Law. This is quite apparent when we think how massive the body of legal texts has become in the sole field of bilateral investment treaty arbitration (more than 3000[1182]), but also when factoring in the strengthening of arbitrators' tendency to rely on precedents[1183].

Going back to what we were quickly mentioning *supra*, the current state of the arbitral profession is such that even with these self-imposed restraints supposedly simplifying reasonings, enough arbitrators misuse precedents to be branded as "egregious failure[s]"[1184]. The reason is that hermeneutical deficits have caused many arbitrators to be lacking in terms of constructing analogical reasonings, the very bedrock of legal reasoning and the only tool one can really use when deciding *ex aequo et bono*, to the point where a negative publicity campaign was considered equivalent to an expropriation without factoring in proportionality in its analysis.

The rationale was that the investor "was radically deprived […] of the use and enjoyment of their investment"[1185] because of this negative publicity campaign. The tribunal drew this definition from a precedent[1186] which had indeed used the impact on the original investment as a criterion to define whether there was an expropriation or not, but more importantly, had placed the need for proportionality at the centre of its analysis, which the arbitrators in the more recent case failed to mention. This example might have undermined our argument according to which arbitral precedents are being used as if binding, but for the fact that what was kept by the arbitrator effectuating the analogy was the purely technical aspect of the definition of expropriation. The most important part, proportionality, was the one requiring the capacity to balance and weight clues and facts, the one where the interpreter's input is most crucial, but it was left behind.

This state of affairs, attributable to this behaviour vis-à-vis arbitral jurisprudence, causes a "univocization" of arbitral interpretation, which is mirrored in the current

[1182] Bentolila p. 1171.

[1183] Bentolila p. 1195; Weidemaier pp. 1934 ss; Ortino p. 5.

[1184] Ortino pp. 5 ss.

[1185] Compañiá de aguas del AconquijaS.A. and Vivendi UniversalS.A. v. Argentine Republic (ICSID case no. ARB/97/3, decided on the 20th of August 2007). Cf. also Ortino p. 6.

[1186] Técnicas medioambientales Tecmed,S.A. v. the United Mexican States (ICSID case no. ARB(AF)/00/2).

trend of harmonization of arbitration procedural rules, whereby procedures from various fields of international arbitration display an increasingly broad common denominator[1187], to the point where they have become one of the most researched topic among arbitral scholars, quite the jump for an institution based on equity *ex aequo et bono* and minimal proceduralism. This evolution, mostly heralded by arbitral institutions[1188], would explain how and why arbitrators attracting a disproportionately big number of cases can do so in any type of international arbitration, jumping from one specialty to the next[1189].

To summarize what we have said so far on the technocratization of international arbitration, the common good was in abeyance before the technocratization of the field began. By using general principles such as the *lex mercatoria*, continental arbitrators promoted the interests of merchants. We will see *infra* that at no point was the common good taken into consideration in their conception of arbitration, particularly that of people and societies not directly featured into the contractual base used to set the arbitral process in motion[1190]. Even more so, the contractualist conception of arbitration is intrinsically unable to accommodate a common good without reducing it beforehand to a nominalist collection of individual goods[1191].

Technocratization then anchored this tendency by lessening the number of interpretative options available to arbitrators and the creation of what is increasingly looking like an arbitral jurisprudence. What could have evolved with the passage of time and changes of mentality has now become much more difficult to move. With the sharp decrease in legal flexibility spurred by technocratization, the contractualist and individualistic conception of international arbitration is now more entrenched than before. If general principles could have evolved to take certain "new" common interests into consideration (e.g., the environment), a technocratic version of international arbitration would be much more difficult to shift, as both formal and material rules are now more ingrained and favouring the interests of the dominant actors of the field as we will see *infra* with the continuation of Middle Eastern type of problems in South America.

[1187] Kaufmann-Kohler, Globalization p. 1333.
[1188] Kaufmann-Kohler, Globalization pp. 1324 ss.
[1189] Bentolila pp. 1170-1171; Grisel, Elites p. 275.
[1190] Unless we consider international communities of businessmen to be reflective of the common good, at no point was the *lex mercatoria* reflective of the common good.
[1191] Cf. *infra* part 3, III, 2.

Proceduralization, which is an element of the more general trend of technocratization, is probably the biggest factor in this relatively recent immobilism in international arbitration. The field went from one with relatively quick procedures to one where participants use every single procedural tool to "win" rather than seek the most accommodating solution for all parties, as the distinction between litigation and arbitration becomes ever harder[1192]. Such an evolution strongly diminishes the utility of arbitration, given that some of its main advantages lie in its quickness, its acceptability (by the parties and those who are not), its accessibility, its adaptability and the preservation of the link uniting the parties, legal or otherwise[1193]. Other advantages such as the choice of Law or the secrecy of the procedure remain, but are quite removed from the most essential aspects of international arbitration.

It is hard to tell whether this technocratization is the cause or the consequence of the increased number of pure jurists in the arbitral process[1194]. Have rules become complicated to the point where navigating them now requires an arbitration procedure specialist: "One now needs to be an expert – the large law firms contend – to understand the tremendous variety of options available to business clients both onshore and offshore."[1195]? Or, have jurists taken so much space in the arbitral microcosm that, much like what happened in the U.S. around the 1920s, they complexified the procedural rules to lock non-jurist professionals out of the field[1196]?

In both cases however, the knowledge of legal options is now more valuable than the capacity to do justice, for this is what serves their clients' and their personal interests best, usually their financial ones as we have already seen: "[A]t this point the trend has been away from legal authority and more toward the market and pure, business-oriented mediation." The term "mediation" is here used loosely and designates alternative dispute resolution processes, which includes arbitration[1197].

Benson underlines the fact that in the first half of the 20th century, "lawyers virtually had no role in arbitration. Indeed, arbitration, as it was developing, not only avoided

[1192] Stone Sweet/Grisel pp. 121 ss.
[1193] René David pp. 223, 227, 230.
[1194] Cf. Schinazi p. 197, who seems to favour the second scenario, although to me, both scenarios appear to feed off each other.
[1195] Dezalay/Garth pp. 172-173.
[1196] Cf. *supra* part 1, V, 1 and 2.
[1197] Dezalay/Garth p. 173.

the use of lawyers but was hostile toward the legal profession […] because a lawyer 'is going to dominate the situation and bind the thing up with technicalities and precedent'."[1198] Now that lawyers have indeed taken over, what arbitration parties feared is exactly what ended up materializing.

This means that those now serving as figures of authority in international arbitration are not the fairest nor the ones most concerned with justice and the common good. They are not even the best jurists. Rather, they are the most specialized[1199], meaning that they will very often not have a transversal vision of a problem, necessarily impeding their capacity to even grasp what is the common good in the case at hand[1200], and instead overfocusing on details rather than looking at the entire picture[1201]. This is where the clarification of the notion of epistemic authority we made *supra*[1202] becomes important, as we will see in the upcoming section *infra*.

e. The latest addendum to the technocratic era?

What appears to be the latest trend in international arbitration will be briefly mentioned in this section, although it would seem to confirm our diagnosis, regarding both the crisis of authority of international arbitration, as well as the loss of the legal essence of arbitration i.e., equity (cf. *infra* for both).

This latest trend takes the shape of the dilution of technocracy in international arbitration, not because strictly technical skills have become less important, but because technocracy now shares its throne as the cardinal criterion of contemporary arbitrators with the capacity to manage arbitral proceedings[1203].

Given that we seem to be located at the beginning of the era of technocratic managers, we are currently lacking the necessary hindsight to fully assume that there has indeed been a complete shift integrating arbitral managers. The two scholars who have authored the paper of reference on the matter have wisely shown a certain carefulness: "The opinion that great managerial skills are part of the picture has […] been in the air for a while. The question is whether we should define a generation of arbitrators around it, as the results of our study would seem to

[1198] Benson pp. 491-492.
[1199] Schinazi p. 193.
[1200] Cf. *supra*.
[1201] Cf. Ost/van de Kerchove, Savoir-faire pp. 32-43, who share the same view and recall several similar situations in Franco-Belgian Laws. Cf. also Bredin, Remarques and Jestaz pp. 90 ss.
[1202] Part 2, III, 4.
[1203] Schultz/Kovacs p. 171; Mistelis pp. 373-374.

suggest. *That* would be new."[1204] This is why we will show similar restraint concerning the integration of this data to the present dissertation.

What we will do, however, is to explain how this most recent development would fit in this dissertation, and how it would not only confirm our analysis of the historic-genealogical path followed by international arbitration, but also our reasoning on the legal-philosophical path international arbitration seems intent on following.

From a historical perspective, the fact that arbitrators are now required to be managers of justice simply highlights how removed from equity international arbitration has become. Had this managerial aspect replaced the technocratic one, the story could have been different, but if management and technocracy indeed combine to form the core of arbitration, this means that we have fully and definitely entered the phase Lalive warned us about the mercantilism of arbitrators and the "mercantilization" it would bring about[1205].

The prevalence of technocratization also implies that arbitrators have not ceased to be technocratic jurists, simply that their technocratic skills have been directed towards tasks of secretariat, further reducing the need for any interpretative skills on the part of arbitrators. Indeed, being a manager of proceedings does not involve any legal interpretative abilities, simply to be good at tasks of secretariat and grasp the psychological state of mind of the parties. Furthermore, arbitrators consider nowadays that among their most important attribute, the ability to manage proceedings, does not include the ability to manage anything beyond the parties, meaning that the common good has been reduced to a nominalist collection of contractual individual goods (cf. *infra*). We will also see that arbitral governance, which could be a very helpful tool to restore a bit of authority to international arbitration under the right circumstances, currently does not include the common good in its application.

From a legal-philosophical perspective, a confirmation of this managerial trend would further remove arbitrators from equity. The reason is that, quite prosaically, management abilities have nothing to do with equity or legal interpretation *lato sensu*. More precisely, management abilities are not concerned with the management of arbitration Law or even the substantive aspects of arbitration. As such, this means that these managerial tasks do not concern the management of justice so much as they concern the management of pure formalities and the

[1204] Schultz/Kovacs p. 171.
[1205] Lalive, Commercialisation p. 167.

personalities of those participating directly to the proceedings. In other words, arbitrators would not need to display arbitral governance so much as they would need to prove themselves capable of back-office tasks of secretariat[1206].

Although the above-exposed reasoning is subject to caution, this state of affairs begs the question as to how this mentality affects the prejudices and hermeneutical capacities of arbitrators. If an arbitrator's prejudices are indeed not only of the contractual positivist type, but of the managerial type, would this mean that prejudices are first and foremost oriented towards convenience, not the legal or meta-legal? Would this not denote a state of mind whose compatibility with arbitral equity, and Law in general, we could further doubt?

C. The crisis of authority in international arbitration

a. In general

Over the course of this section, we will develop what has been seen *supra* to demonstrate the state of authority in international arbitration. Authority has many layers, and this section adds another one: authority in international arbitration.

Authority as construed in this dissertation is an eminently collective notion, and heavily depends on the common good(s) and is obviously multifaceted as anything authoritative can change from one society to the next, from one era to another. These changes, however, are generally not abrupt breaks from the past, but the continuation and progress (or regress) of what we inherit from our predecessors.

A person's authority can thereupon be defined as a person's augmentation of the inherited common good. An authoritative arbitrator therefore not only understands the traditions preceding them, but also how to create a justice best serving the common good, beyond the basic *clause compromissoire* and applicable laws, beyond the commutative justice and the contractual positivism[1207] that have pervaded the institution.

Overall, authority is a collective concept that often manifests itself individually. Its purpose is to augment (or create in the most extreme cases) something (or someone) by augmenting the common good or common foundation of a society[1208]. Applying this to arbitration means that an authoritative version of arbitration should firstly

[1206] Schultz/Kovacs p. 169.
[1207] Cf. *infra* part 3, III. 2.
[1208] Cf. *supra* part 2, II, 2 and IV with the examples of Romulus, Mandela and Augustus.

insert itself in the general frame of the common good. The notion of common good varies from one society to another, but in contemporary western European civilizations, ideas of peace, a healthy environment and respect in interpersonal relations are some of the most obvious that come to mind[1209].

In Law however, the common good and purpose of it all is justice. Very indefinite because varying from case to case, justice is what a process like arbitration should strive for, a justice serving the common good to be precise.

As such, an authoritative arbitrator should be concerned with obtaining justice for all parties, but also make sure to go beyond the arbitral and contractual clauses, by crafting an award that will also bring justice to the society in which the parties to the arbitral trial are involved.

Let us take the case of two foreign companies extracting fossil fuels based on an agreement with a now-defunct government which was notoriously corrupt and exploitative of its people. Let us also imagine that the continuation of this extraction would be detrimental to the locals, putting their ecosystem at risk. In the midst of an arbitral trial between those two companies, which are both fighting to extend their scope of exploitation to the detriment of the other, a good arbitrator would be able to craft an award just for both companies. However, in order to be worthy of the moniker "authoritative", an arbitrator should be able to take into consideration more than the simple situation of the parties, effectively factoring in the situation of the locals impacted by their award, the underlying political ramifications and circumstances in which the award will be applied, the general environmental issues when the extraction of resources is concerned by the award, the acceptability of international arbitration, not only through the eyes of the parties but also of those impacted by an award (e.g., the Libyan people do not have the same tolerance or even appetence for arbitration than say North Americans). Most importantly, an authoritative arbitrator should understand what constitutes the

[1209] Although such a disclaimer appears needless, we would still like to underline the fact that we will not dive into the rabbit hole that is the notion of common good and its components. Moreover, the times in which we live (globalization, multiculturalism and technologization) make it even harder to define the common good, as communities superimpose themselves on one another. We think that this difficulty to define what is a society's common good is both a cause and an effect of authority vanishing due to Modernity's individualization movement, a movement most prevalent in Anglo-Saxon societies, where contractualism (individual vs. individual) has been the dominant thought for centuries. With that being said, we will come back to the arbitral common good in the general conclusion of this dissertation *infra*, where we will lay out certain thoughts, problems and solutions with regard to the matter.

common good of the society concerned with their arbitral award and how to best augment it, even if it means disappointing their "clients" and going against their financial interests, especially if those benefit from a decrease of the common good of the society in which they operate.

The authoritative award once given would thus augment the society in which it inserts itself. Conversely, an authoritative arbitrator's concern with legal technicalities is only secondary, even less so if such technicalities impede the common good, a conundrum an authoritative arbitrator should be able to resolve, even if this means that they have to craft a coherent legal reasoning without using legal textual and jurisprudential references.

It is important to understand at this stage that justice between parties is not always synonymous with the common good, especially if arbitration is used to circumvent a state justice which would have otherwise delivered another verdict, closer to said common good.

Historically, arbitration served the purpose of justice, in particular as a complement to the usual state judiciary channels. Whether it was intercommunal arbitration in ancient Greece for territorial disputes to avoid bloodshed, whether it was in ancient Rome to allow equity *ex aequo et bono* to solve disputes rather than rigid procedural Law and avoid losses of reputation and authority for the slightest mistakes or whether it was in medieval Europe where state justice was corrupted by unchecked local lords, arbitration filled a gap that state justice could (or would) not fill[1210]. More importantly, arbitration concerned itself with justice rather than the laws, which is why equity was so predominant in arbitration. In other words, arbitral justice and the common good it defended relied on equity to be incarnated.

Among the characteristics and advantages arbitration had, equity *ex aequo et bono* was undoubtedly what set it apart from state justice. While Aristotle taught us that general equity was necessarily present in any legal decision[1211], the margin for action varies greatly from one case to another depending on laws, past jurisprudences and the opportunity given to legal interpreters to decide *ex aequo et bono*. In legalistic countries where legislators attempt to draft the most precise laws imaginable, equity's place will of course be lesser compared to countries with only a few written laws.

[1210] Cf. *supra* part 1, III, 3-4.
[1211] Aristotle, Nicomachean Ethics 1137a33-1137b3.

In terms of the space granted to equity, seldom has state justice come close to arbitral tribunals given that historically, arbitrators were called upon to decide *ex aequo et bono*, to find a fair solution, by stepping away from inadequate written laws if need be; why would one bother to create a different set of applicable material rules otherwise? The reason why we are encroaching on the section concerning equity (cf. *infra*) is to make sure we already see, albeit briefly, the link between an arbitrator's understanding of equity and fairness and his authority.

This link is further underscored when looking at who, historically, were arbitrators: the wise, not the technicians[1212]. As we have seen, this is something that started to change during the 19th century, all the way through the 1920s U.S. legal developments, after World War II in particular given the importance of the U.S. in western civilization.

The statistics discussed *supra* regarding the professional specialization of the ICC arbitrators are quite interesting in this regard as after World War II, they had overwhelmingly become jurists. Having arbitrators as specialists of a certain domain was already historically unusual, for they were usually people with a certain authority and known wisdom in their communities. At this point however, arbitrators had started to become specialists of certain specific domains, usually implying a loss in the consideration of the bigger picture[1213]. This was accentuated after World War II, with arbitrators being specialists of the arbitral process itself, of the form rather than the substance to sometimes fascinating degrees[1214].

Arbitrators coming from outside the community impacted by an award is also quite recent from a historical perspective, especially to this extent. If arbitrators could indeed come from outside a community during Antiquity or the Middle Ages, they were a known commodity: another city-state, a bishop, a king or the pope: all had the necessary authority to come from "outside" as they were accepted by those concerned by the award[1215].

[1212] Cf. *supra* part 1, V, 2.

[1213] This phenomenon is not unlike the one we were mentioning *supra* regarding academic hyper-specialists of a certain domain, who tend to overfocus on details all the while missing the bigger, broader and more important target (the big picture). This comes hand in hand with a very limited capacity to establish links and connect dots between situations and concepts, further atomizing them. In the end, this usually leads to the blurring of the problem, not its resolution.

[1214] Cf. Schneider who goes above and beyond to write guidelines about guidelines and a protocol about protocols. See also Reymond.

[1215] Cf. *supra* part 1, III, 4.

According to the historical developments of international arbitration, the most recent ones in particular, we understand that the "impacted community" is more than the participants of the arbitral process. It indeed consists of all those whose common good is impacted by the award, which is why arbitrators able to act in respect of it develop their authority.

Sadly, the overwhelming majority of the arbitral doctrine does not see beyond those participating in the procedure, barely mentioning the possibility that arbitration inserts itself beyond the simple arbitration clause and the signatory parties, hereby reinforcing the commutative aspect of contemporary arbitral justice[1216]. We do not dispute that most arbitrators have the parties' best interests at heart and that they try to reach peaceful issues to legal problems, but this is not the equivalent to understanding how their award will affect those outside the procedure and the common good. In truth, we have only been able to find a few[1217] members of the

[1216] Cf. Baptista p. 65; Bernardini pp. 76-77; Darmon p. 178; Dimolitsa pp. 208-209; Kleiman p. 377; Reymond; Veeder pp. 273-274; Jarrosson pp. 36, 101-110, 372; Gaillard; Lalive/Poudret/Reymond; Schultz, Ethos; Jakubowski; Aurillac; Baum; Böckstiegel p. 126; Cremades, Corruption; Donovan; El-Khosheri; Fróes; Gabriel; Grigera Naón; Hanotiau; Hunter/Barbuk; Hwang; Karrer; Kaufmann-Kohler, Online; Knieper; Lazareff p. 485; Nariman p. 554; Nouel; Paulsson p. 604; Pinto; Redfern; Schwartz; Schlabrendorff/Sheppard; Kaufmann-Kohler/Rigozzi pp. 1 ss, 370-375; Girsberger/Voser pp. 3 ss; McLachlan/Shore/Weiniger pp. 23-25, 353-358; Weigand/Baumann pp. 21-29; Poudret/Besson pp. 1 ss; Redfern/Hunter/Blackaby/Partasides pp. 12 ss, 85 ss; Born I pp. 84 ss, 793 ss; Born III pp. 2900-2901; Weeramantry; Park; Mills; Brekoulakis; Kriebaum; Mistelis; Michaels; Mbengue/Raju; Shirlow/Caron; Morgandi; Cima; Dominicé; Giardina; Grossen; Mayer, Bonne foi; von Mehren; Monaco; Perret; Sandrock; Bermann; Chekroun; Kiffer, Ancel; Jarrosson/Racine, Tercier/Patocchi/Tossens; Jarrosson, Acceptabilité; Tercier, Légitimité; Paulsson/Petrochilos. Please be advised that this list is exemplative and not exhaustive, the reason being that international arbitration literature is immense, and the crushing majority of authors espouse the line of those we have just laid out. There is a tiny fraction of doctrine authors who understand the problem, albeit partially, as they rarely go beyond the boundaries of Law, a shame given that their insights are quite sharp: El Adhab p. 219; Maniruzzaman p. 439; Lalive, Courage p. 158; Oppetit pp. 126-127. Quite emblematic of the problem is the fact that most arbitrators consider the foundation of arbitration to be the arbitral clause upon which the arbitration process is legally based. At best, they might consider a law to be the arbitral foundation, going beyond Hobbes, Rousseau and Locke's contractualism; seldom do they grasp the picture beyond legality, and even more seldom do they understand that the foundation of arbitration is much broader than said legality, that it is nested in the common good.

[1217] Stone Sweet/Grisel p. 5; Oppetit p. 127. The fact that experts directly commenting the very conclusion of Oppetit's work, the final words he absolutely wanted to write before his death he knew was imminent, completely omit the notion of common good feels somewhat

international arbitration doctrine who explicitly call upon the integration of the common good in the arbitral process[1218].

According to Oppetit:

> "[O]*n peut aussi penser que l'arbitre, en tant que juge ordinaire des différends du commerce international, ne saurait méconnaître l'intérêt général* […]; *bien plus: certains pensent que l'arbitre international, du fait de son autonomie, peut être amené à appliquer la règle morale, non seulement sur renvoi de la règle juridique, mais aussi à la place de celle-ci, voire en l'évinçant. Cette tâche de défense des intérêts collectifs reconnue à l'arbitre international inscrit alors la démarche de ce bien commun dans la réaction anti-individualiste et dans une philosophie du bien commun, qui affirme la permanence des intérêts collectifs; elle manifeste, entre autres signes, l'essor contemporain de l'éthique qui se développe souvent aujourd'hui par des voies autonomes, en marge du droit.* […] *En définitive, on peut dire que l'arbitrage international, dans sa vocation et son fonctionnement, exprime fondamentalement les valeurs de l'humanisme, encore que, sous la pression de la technique et de l'économie, il affirme aujourd'hui à un titre égal son caractère mécaniste*."[1219]

These words are extremely strong as he links arbitration and the common good, not only by rejecting individualism, but also by stating that international arbitration's purpose is the very defence of the common good. Unlike those who have rejected the use of final cause to define arbitration[1220], Oppetit uses this criterion to lucidly understand that, somewhat tautologically, arbitration is bigger than arbitration, that an individualistic perspective does not do justice to the importance of the arbitral paradigm in the quest for justice. Directly connecting the increased importance of economics, pure legal technique and individualism[1221] to the rise of influence of Anglo-American legal culture in international arbitration[1222], Oppetit considered

dismissive of Oppetit's legacy, but is the reflection of their incapacity to surpass the most basic depiction of arbitration, the positivist one (Reymond, Réflexions).

[1218] At this point, one may wonder why ideas that have been discussed by the arbitral doctrine such as ethics, good arbitral governance or the fair and equitable standard are not mentioned in company of the common good, but this a question that shall be answered *infra* in part 2, V, 5, C, *b.* For the time being, we will simply say that these notions are too narrow to properly (re)construct the authority of arbitration.

[1219] Oppetit p. 127.

[1220] Jarrosson pp. 36, 101-110.

[1221] Which happens through the contractualist doctrines descending from Hobbes and Locke.

[1222] Oppetit p. 107.

that the authority of arbitration and arbitrators was at stake when he contemplated the recent evolutions in the field[1223].

The manner in which the common good is ignored or purposely set aside in the aforementioned recent evolutions comes in multiple forms, shining through various different arguments. The most emblematic one is probably that of Gaillard, whose vision of an arbitral order removed from the states roots arbitration out of national legal orders[1224].

By removing international arbitration from national legal orders, he effectively dismisses the origins of all participants to plant them in the sole arbitral order, meaning that said participants should only have the interests of the international arbitration order at heart, forgoing anything beyond. If an independent arbitral order existed indeed, why take the trouble of attempting to describe this separation between legal orders as absolute? Why not describe it as a ramification of multiple legal orders? What would be the purpose of separating international arbitration from the very places where its awards apply?

More importantly, if what he says is true, why is international arbitration so thoroughly influenced by the various national legal cultures its practitioners hail from[1225]? Gaillard's vision is lacklustre to put it mildly, and even though he never fully commits to a single conception of the arbitral paradigm, not once is the common good even mentioned[1226].

[1223] We would like to point out that we do not entirely share Oppetit's judgement on the connection between the fall of arbitral authority and the rise of the Anglo-American mindset in international arbitration (Oppetit p. 107). We have seen *supra* that it was a catalyst for what had already been happening for quite some time under the watch of continental European and British jurists. Basically, Anglo-American jurists took the "accomplishments" European jurists and made them even worse.

[1224] Gaillard p. 60. Without needing to refer to a notion of acceptability, we can simply refer to the concept of hermeneutical prejudice (cf. *infra* part 3, II, 2, B, *b* and Papaux, Introduction pp. 137 ss), whereby human beings are intrinsically and inherently bound by their *Vorverständnisse*, which is why all legal interpreters are heavily influenced by the legal system(s) and order(s) they have studied, from which they hail and which have impacted them the most (cf. Papaux/Wyler pp. 246 ss regarding the importance of the *lex fori* in this regard).

[1225] Cf. *supra* part 2, V, 5, B, *a-c*.

[1226] Gaillard pp. 60-100. This forgetful and somewhat elitist vision of Law is probably why he rendered an award (ICC decision of the 7th of December 2003, no. 10623) where the agreed-upon seat of arbitration was rejected for reasons of personal comfort: the hearings were to be conducted in Paris rather than Addis Ababa. Gaillard later doubled down on this decision by using the international character of arbitration to justify moving the place of hearing for futile

The numerous defects of Gaillard's "international arbitral order" were meticulously torn apart by Rocafort. According to him, Gaillard's vision of international arbitration is firmly rooted in legal positivism, its transnationality notwithstanding[1227]. In order to secure legal certainty, parties enter into an agreement whereby formal and material Law is agreed upon before the occurrence of a problem[1228]. By doing so, parties participate in the construction of an autonomous order, separated from state Laws, fully reflective of their individual wills[1229].

The problem is that this model rests on univocity, whereby arbitrators lack the capacity to interpret as they are simply tasked to verify the application of the Law in accordance with the majority doctrine, all in the name of a chimeric axiological neutrality[1230]. Doing so strips the arbitrator of the main legal vector of authority, interpretation and hermeneutics (cf. *infra* part 3), and represents the epitome of legal positivism[1231].

Although it was already quite apparent, we now see how the foremost conception of international arbitration does not allow much room for a concept as collective as authority, especially given how it is commonly viewed as a restriction to individual freedoms. Furthermore, such a legal order would be centred around international commerce, hardly worthy of being called a common good or even part of it[1232].

The majority of authors typically do not mention the common good, usually because their writings focus on the most trivial aspects of arbitration: its procedure[1233]. Although scholars have recently started taking an interest in international

reasons (Schwartz pp. 797 ss). In this case, the common good was very clearly not taken into consideration, especially given how suspicious former colonized countries can be about international arbitration, and understandably so.

[1227] Rocafort p. 22.

[1228] Gaillard pp. 102-103.

[1229] Rocafort p. 31.

[1230] Rocafort pp. 66-67. Cf. also Bezat/Papaux regarding the falsehoods of univocity and part 3 regarding the impossibility of axiological neutrality.

[1231] Cf. Montesquieu and his *juge comme bouche de la loi*, whereby judges are simply tasked with the application of the law, without asking any question.

[1232] *Passim*. Such was also how ancient Greeks viewed merchants and economics: hardly worthy of scholarly attention and basically conceived as useful but not essential to a society.

[1233] There is an astounding number of authors on this list, which is why we will simply mention some of the most illustrative ones, be it because of how widespread their publications have been, or be it because they tried (unsuccessfully) to analyse the matter: Kaufmann-Kohler; Weigand/Baumann; Poudret/Besson; Born I and III; Park; Redfern/Hunter/Blackaby/Partasides; Weeramantry; Park; Michaels; Mbengue/Raju; Mills; Brekoulakis; Kriebaum; Paulsson/Petrochilos.

arbitration from a non-technical perspective, the literature still leans heavily towards arbitral technicalities.

From "grand old men" who furthered the interests of companies dealing in newly nationalized natural resources to immense law firms that vehemently defend the same companies to international arbitral institutions anchoring these practices in ever more complicated procedural rules, the overall direction of international arbitration has not changed much in the post-World War II order. The numerous cases involving South American countries, which have steadily replaced the Middle Eastern ones as the primary target of international arbitration over the past 30 years, confirms this quite clearly.

For instance, in Lanco International Inc. vs. the Argentine Republic[1234], the arbitral tribunal applied an arbitration treaty that was not effective at the time of the original contract and which went against what said contract stipulated (i.e., the competence of the Argentinian tribunals). According to the lead arbitrator, "[a]rbitral tribunals have considered that a change of tax regime is a type of indirect expropriation, as well as the modification of the laws protecting the environment."[1235], which would justify the use of arbitration to correct this "imbalance", despite being contrary to the common good. This means that investors can ask for compensation to a state, simply for exercising its basic sovereign functions, including defending its most precious resources.

This decision is typical of those involving South American countries, which have many complaints about the functioning of international arbitration. Namely, they consider arbitration institutions to lack any form of democratic legitimacy, their members being essentially occidental or coming from rich enclaves (Singapore, Hong Kong). Other criticisms include a lack of acceptability (of both the procedure and the arbitrators), defects in the transparency of the procedure, a highjack of arbitration by Anglo-American jurists, excessive costs and the nigh disappearance of the *suum cuique tribuere* in arbitral justice[1236].

[1234] ICSID case no. ARB/97/6, decided on the 8th of December 1998.

[1235] Cremades p. 137.

[1236] Cremades pp. 141-143; Stone Sweet/Grisel pp. 157 ss. Regarding the Argentinian cases, cf. CMS Transmission Co. vs. the Argentine Republic ICSID case no. ARB/01/8, decided on the 12th of May 2005; LG&E Energy Corp. vs. the Argentine Republic ICSID case no. ARB/02/1, decided on the 3rd of October 2006; Enron Corp. Ponderosa Assets LP vs. the Argentine Republic ICSID case no. ARB/01/3, decided on the 22nd of May 2007; Sempra Energy International vs. the Argentine Republic ICSID case no. ARB/02/16, decided on the 28th of September 2007; Continental Casualty Co. vs. the Argentine Republic ICSID case no.

Given that the U.S. gained in prevalence on the international arbitration scene during this period, it should not be surprising that international arbitration started to focus on its places of activity and centres of interests, especially given that South American natural resources are important to the latest technological and commercial developments (lithium in Bolivia for instance).

The post-World War II order has seen the rise of a historically odd type of international arbitration: states vs. individual actors. Termed bilateral investment treaty arbitration, this relatively new style of arbitrating has accentuated the centrality of contractual positivism and individualism in contemporary international arbitration, both serving as catalysts for the use of commutative justice as a canon rather than as a substrate of distributive justice[1237].

Bilateral investment treaties are very open about promoting contractual positivism, as the people and communities legally impacted by a multinational company's actions, legally rooted in such a treaty, cannot petition arbitrators to solve the matter, as they would in front of a domestic court. The reason is simple: they have not signed the treaty, their state has. This creates an imbalance whereby those factually involved in a problem cannot act legally in ways that are even comparable, let alone identical. Equal access to justice being denied, the very common good incarnated in Law, justice, is set aside before anything has yet to happen.

From the perspective of the legal common good, this weak point of international arbitration is probably the most problematic one. Indeed, if a person's rights cannot

ARB/03/9, decided on the 5th of September 2008; El Paso Energy International Co. vs. the Argentine Republic ICSID case no. ARB/03/15, decided on the 31st of October 2011. In those cases, the dire national economic crisis of 1999-2002 was deemed "not urgent enough" for the Argentine government to take certain economic measures to preserve itself. The awards instead preferred to protect the interests of the investors, with each arbitral tribunal failing to display much of a proportional judgement, worthy of Aristotelian distributive justice (the Continental case being an exception, although it was attacked by doctrine authors for daring to use proportionality, cf. Alvarez/Brink). The first three awards mentioned were so egregious that an annulment committee was formed in order to cancel them. It is therefore not surprising that other South American countries have denounced and left the ICSID convention: Bolivia on the 2nd of May 2007, Ecuador on the 2nd of July 2009 and Venezuela on the 14th of January 2012.

[1237] Cf. *infra* part 2, V, 5, C *d*. We do not make the distinction between international commercial arbitration and bilateral investment treaty arbitration, because, as shown *supra*, the two are tied too closely to be distinguished anymore. Both worlds are one and the same, with nearly identical actors, exceedingly similar institutions and very close legal techniques.

be used, they become *lettre morte*, and all other considerations about how justice is administered become purely speculative, because it cannot be administered[1238].

More generally, international arbitration, bilateral investment treaty in particular due to its nature mixing private and public actors, begs the interesting question with regard to the common good: has the field of arbitration become so heteroclite that *Vorverständnisse* and conceptions of the common good become incompatible to the point of impossibility? If such is the case, would we not need something to hold international arbitration together? In the context of this dissertation, the most plausible lead would be to rely on the notion of epistemic authority to bridge the gaps. However, given that the heterogeneity would be too pronounced to reach any common good, we would be stuck with the lesser version of epistemic authority i.e., the currently commonly accepted version whereby knowledge with no augmentation is sufficient.

The main problem would be that the legal core of arbitration (equity) and its purpose (complementing state litigation) would still be left in abeyance, not reintegrated within the arbitral paradigm by this authority. Indeed, this downgraded form of epistemic authority, which is closer to an ability than an authority, does not run very deep given that in international arbitration, it primarily targets formal procedural aspects (cf. *infra*).

We can add this problem that of overspecialization, whereby "epistemic authorities" are often knowledgeable of small portions of international arbitration. People are called authorities in a field, international arbitration, that they only partially master. Should someone with intricate knowledge of one specific type of arbitral procedure be called an authority on arbitration? Should this overspecialization have indeed such an effect, is there not a risk of having "epistemic authorities" unable to give an opinion on other matters of the very field in which they are referred to as authorities? Even then, at what point do super-specialists develop logical biases superseding their *Vorverständnisse* preventing them from reasoning outside of their specialty[1239]?

In effect, what is commonly referred to as "an authority on a matter" has been reduced to having specialized technical knowledge. The authoritative part has been

[1238] That being said, cf. *supra* and *infra* part 3, III for the legion of arguments lined up: costs, colonialism, individualism, etc.

[1239] Cf. *infra* part 3, where we will attempt to provide an answer to this question through philosophical hermeneutics.

squeezed out as the so-called authorities in the field of arbitration neither augment the common good through just awards, nor augment the epistemic aspect of their field by proposing constructive criticism and solutions outside of the scope of contractual positivism[1240]. Even the "epistemic" in epistemic authority is doubtful at this point.

If the field of international arbitration has indeed reached a stage where it is impossible to navigate without lining up specialists of the different steps of an arbitral procedure[1241], could we truly call this an amelioration compared to where the field stood 50 or 100 years ago, especially considering that the "advancements" (or complications to be precise[1242]) were overwhelmingly of a procedural nature? If such is really the case, the aforementioned "epistemic" part of the arbitral epistemic authority would indeed mostly represent formal procedural knowledge. In a field historically defined by the strawweight of its procedure, purposely designed to avoid the heaviness of state litigation, it would seem at the very least contradictory to call an expert on a specialized procedure an epistemic authority.

Furthermore, if arbitrators are becoming increasingly unable to grasp the generality of the arbitral field, this either means that there is a decrease in terms of talent (we do not believe this for one second), or that the field has become so complicated indeed that an arbitrator who is not overspecialized is by definition inefficient and ineffective. This state of affairs is the clearest sign that the field is indeed lacking authority-wise, for both its foundational legal essence and its purpose (justice through equity and serving as an unencumbering complement to state justice) are being lost or have been lost in the current arbitral paradigm.

An interesting example of this problematic lies in the relatively recent developments surrounding the idea of sustainability, particularly within the context of the extraction of natural resources actually or potentially causing environmental harm. As such, the notion of sustainable investment refers to an investment mindful and respectful of the environment in which it operates, and not an investment which

[1240] Cf. *infra* part 3, III, 2.

[1241] It is now very common for arbitrators to build their careers by specializing themselves in precise types of arbitration and arbitral procedures (e.g., ICC rules, ICSID rules, ICSID additional facility rules, CAM rules, UNCITRAL rules, SCC rules, CAS rules, LCIA rules, SCAI rules, etc.).

[1242] Mistaking complicatedness with subtlety seems to be an illness permeating all of academia, not just Law or philosophy, whereby scholars often-enough confound the best possible explanation with the most complicated one.

sustains itself by reaping a lot of benefits[1243]. An illustration of these recent developments are the so-called "green protocols for arbitration", one of which being the green protocol for arbitrators which attempts to provide them with the necessary guidance to minimize the impact of arbitral proceedings on the environment[1244].

At first glance, this would indeed seem like a very positive step to take in the direction of a more authoritative version of international arbitration. However, any increase in authority would heavily depend on the way the aforementioned notion of "sustainability" is put into practice. Some authors typically consider than the problem of "sustainable provisions" inside of a bilateral investment treaty is that it excessively complexifies said treaty, a consideration with which we would be inclined to agree[1245].

The problem is that far from creating a general principle all arbitrators should have in mind when deciding cases, the few inclusions of the term "sustainability" did not change much to the current predicament. Indeed, transforming what should be an important general principle into an additional positivist provision featured inside immense treaties does not strike us as moving towards more authority so much as it looks like a dilution of said principle, especially considering how arbitrators keep referring themselves to the legal provisions best befitting of the narrative they are currently crafting[1246].

[1243] Martini p. 532. Although this debate is not a part of the present dissertation, the very meaning of the term "sustainability" can in our view be subjected to many varied interpretations. As such, erecting it as a cardinal principle of international investment and international arbitration in general seems a little rash. Indeed, although we agree that imbuing international arbitration with a fundamental care and concern for environmental issues is of great importance, logic would dictate that we should at least have a conversation regarding the meaning attached to sustainability in the arbitral paradigm. This would allow us to avoid yet another drop in authority in said paradigm by using a word whose meaning is unmastered or worse, hollowed out as it already seems to be the case (cf. for instance Ansari/Bin Ahmad/ Omoola, *passim*; Cotula, *passim*).

[1244] Sadly, this protocol does not deal with the fundamental problems related to an unbridled exploitation of natural resources, so much as it imparts a frankly low-level type of wisdom with regard to the use of paper and printer toners, as well as the minimization of the use of airplanes when going to an arbitral hearing.

[1245] Martini pp. 581-582. The solution proposed would be to include legal sustainable provisions inside multilateral investment treaties such as the Trans-Pacific Partnership.

[1246] One of the reasons is that such clauses and concepts stem from the prejudices of those who conceive and concretize clauses featuring such concepts before putting them into practice, which would not be a problem if such people were capable of hermeneutical modesty and augmenting what was before them (cf. parts 2 and 3 *passim*, as well as the general

As a matter of fact, the world of international investment is notably marked by a certain bureaucratic inertia which implies that novel concepts such as sustainability have a hard time being integrated in the overall arbitral frame[1247]. To put it otherwise, relatively novel concepts in the world of international arbitration are hardly ever put into practice: "[T]reaties seem to defy conventional wisdom […]: new treaties reproduce old outcomes."[1248]

And indeed, and circling back to the concept of sustainability, which is also linked to that of Fair and Equitable Treatment[1249], arbitral tribunals widely interpret these notions through the typically unauthoritative prism of contemporary arbitrators, who, through a certain lack of self-awareness and incapacity to question their own prejudices[1250], tend to eviscerate concepts that could otherwise help them restore their own authority[1251].

The most important question stemming from this state of affairs is to know what type of arbitral justice can be dispensed in such a context. Before moving on to the different types of justice, we would like to establish certain distinctions between what many may falsely construe as the common good, or sometimes a part of it. As

conclusion *infra*). However, this is often not the case as those who draft clauses of sustainability frequently do so with treaties such as the Trans-Pacific Partnership or the North-Atlantic Free Trade Agreement in mind, as important parts of their *Vorverständnisse*, which might just be the furthest-located prejudices one could have with regard to an epistemologically sound definition of sustainability (cf. Alschner pp 27 ss and 129 ss, although we thoroughly disagree with his assessment according to which using a more detailed language would strengthen protective standards features in arbitral treaties, despite his own showing that semantics mattered little in the face of unchecked prejudices and lack of hermeneutical consciousness).

1247 Alschner, Myth pp. 62-63.

1248 Alschner, p. 41. With regard to Investor-State settlement disputes, until 2020, only 13% of the 464 arbitral awards were based on the more recent treaties with higher "social scores". Cf. for instance Railroad Development Corporation v. Republic of Guatemala ICSID Case no. ARB/07/23 decided on the 29th of June 2012; Global Telecom HoldingS.A.E. v. Canada ICSID case no. ARB/16/16 decided on the 27th of March 2020.

1249 Cf. the following section *infra*.

1250 Cf. *infra* and *supra* in the current and following sections, as well as *infra* part 3 *passim*.

1251 Cf. for instance Al Tamimi v. Oman, award, para. 390; Aven v. Costa Rica, award, para. 585; Infinito Gold Ltd. v. Costa Rica (ICSID case no. ARB/14/5, decided on the 3rd of June 2021); 9Ren Holding S.à.r.l. v. the Kingdom of Spain (ICSID case no. ARB/15/15, decided on the 31st of March 2019); Bear Creek Mining Corporation v. Republic of Perù (ICSID case no. ARB/14/21, decided on the 30th of November 2017); TenerisS.A. and Talta-trading e marketing sociedade unipessoal LDA v. Bolivarian Republic of Venezuela (ICSID case no. ARB/12/23, decided on the 12th of December 2016).

often, giving a negative definition of a concept is always easier than giving a positive one, which is how we will proceed.

b. Distinctions between the common good and certain notions linked to international arbitration

The common good is not synonymous with certain notions seemingly connected to it such as the public order. It is important to make such distinctions, if only to show how little thought was truly given to the philosophical foundations of international arbitration[1252].

The first notion is that of public order, which draws inspiration from the common good, explaining the overlaps they may have[1253]. The key distinction between public order and common good however, resides in their final cause and as is often the case, Aristotle's criterion is decisive. Indeed, the purpose of the public order is to prevent a Law from applying if certain axiological standards are not met within the legal order wherein said Law is supposed to apply concretely. The fact that the international arbitral public order is not the same as that of private international law renders this distinction harder still to draw[1254].

The common good's purpose however, is much more general; it goes further than Law and permeates an entire society, whereas the public order is only applicable in a legal context. The common good as we understand it under the light of the concept of authority, represents the centre of attention of what is to be augmented in a society. Less static than the public order, the common good is what the public order is supposed to protect, hereby meaning that the main difference between the two is their function: the common good is the core of a society, while the public order is one of the last lines of legal defence of this common good.

The next notion worth mentioning is what is called "fair and equitable treatment", which is a general standard applicable to a state's conduct, irrespective of the branch of power, whereby certain behaviours of the state can be sanctioned in front of an arbitral court by investors[1255].

[1252] Besson p. 2.

[1253] The relation between arbitration and public order is complex to say the least and will not be a central object of this dissertation. For more details on the matter, especially on the complexity of the problem, cf. Papaux/Wyler pp. 303-304.

[1254] Papaux/Wyler pp. 301-305; Bonomi/Bucher pp. 385-386; cf. also Lalive, Réflexions pp. 159 ss and 172 ss, who suggests an extension of the public order through the inclusion of cultural aspects.

[1255] McLachlan/Shore/Weiniger pp. 297 ss.

Without needing to dig any further into the matter, we can already see the imbalance between those subjected to those rules (states) and those who are not (investors). It would thus be nonsensical to even make a parallel between fair and equitable treatment rules and the common good, because those rules do not even concern or apply to all involved[1256]. In other terms, it would be like having a common good applicable to some and not to others, which is when the "common" aspect of the common good disappears in favour of a good for "some" only.

The next item that needs to be distinguished from the common good is ethics, a potentially important notion in the concretization of the common good, which sadly is too often limited to the participants in the arbitral proceedings[1257], meaning that the common good is far from being the main preoccupation of legal ethics.

More broadly, there is a serious problem regarding the definition and use of the term "ethics", whose content varies immensely from one author to the next[1258]. In international arbitration, the dominant mindset views ethics as rules of deontology: basic behavioural rules for arbitrators to follow. In other words, the way ethics is currently applied to arbitration begets the standardization of arbitrators' behaviour.

Without digging too deeply into the very complex matter that is legal ethics, it is generally seen as either the "law of lawyers" or "ethics as ethics."[1259] Unfortunately, the former usually prevails over the latter[1260], which would require a substantive discussion on the matter, one that would tie authority to ethics.

Regrettably, the state of ethics is but another illustration of how pernicious technocratization is, for certain authors consider deontology as the technical translation of ethics[1261]. As a consequence, behaviours and legal reasonings alike become standardized according to the most prevalent train of thought of the

[1256] Cf. *infra*. Cf. also Stone Sweet/Grisel pp. 191 ss: "A succession of tribunals gradually assembled these norms under a covering principle, the "legitimate expectations" of the investor. The move enables the assessment of virtually every aspect of the relationship between the investor and the host state in what is, today, a relatively stable doctrinal structure."

[1257] Cf. Schultz, Ethos who describes the antithesis of ethics as the reigning mentality in arbitration, going as far as writing that not only are arbitrators blissfully ignorant of the common good, but that even the good of the parties they arbitrate does not particularly come into consideration.

[1258] "The nature of legal ethics seems to defy precise definition." (Rogers p. 380)

[1259] Rogers p. 380.

[1260] Henry p. 714.

[1261] Henry p. 717.

moment. "*La logique positiviste de prolifération de normes conduit à la loi du plus fort ou à la médiocrité du compromis et à oublier l'essentiel: à savoir que les règles déontologiques visent à inspirer le comportement des acteurs de l'arbitrage dans l'exercice de leur* fonction, *ce qui suppose avant toute chose de comprendre le rôle fondamental de chaque acteur et de s'entendre sur les intérêts supérieurs que chacun est censé servir.*"[1262]

Ethics, when considered under a more coherent and just prism, could undoubtedly be tied to authority and the common good. It could serve as a vector of actualization for both concepts, and even promote and develop the common good in international arbitration. Unfortunately, ethics as commonly construed is a far cry from this[1263].

The final notion that is important to differentiate from the common good is what is known as global governance. Global governance basically describes the interactions between transnational actors of all sorts, and the way they solve problems of transnational magnitude. "Global governance, thus, is any purposeful activity intended to "control" or influence someone else that either occurs in the arena occupied by nations or, occurring at other levels, projects influence into that arena."[1264] Extremely broad, global governance is obviously declined in many subcategories, arbitration included.

Regarding the above-mentioned definition of governance in arbitration, arbitral governance defines how arbitration is conducted, the mindset around which it gravitates. In the more thorough studies on the matter, scholars will also link arbitration governance to global governance, indicating arbitration's role in the grander scheme of things, although always from a strictly legal perspective. Unfortunately, even when one only views arbitral governance under its most pluri-

[1262] Henry p. 721.

[1263] A connection between authority and ethics could certainly be established, but doing so would require an additional part, one too costly in time to be fully integrated here. A proper genealogy of the concept of ethics, its various currents, the place it occupies in Law and arbitration in particular, etc. are all aspects that would have to be analysed. If done properly, such research could prove very useful when mapping paths to extract ourselves from arbitration's crisis of authority, one that could very probably be used in tandem with the solution we will lay out *infra* throughout part 3. That being said, studying ethics without understanding hermeneutics first would be misguided. The latter is indeed cardinal to understanding the former, because it will always be used in the creation of ethics, particularly when we factor in the weight of culture and biases in any person's frame of mind.

[1264] Finkelstein p. 368.

disciplinary light i.e., the pluralist-constitutional model, it falls short of reaching the necessary scope to promote an authoritative vision of international arbitration. The pluralist-constitutional vision indeed promotes the idea that international arbitration should not be reduced to arbitration law, but instead be inserted in a broader frame, which is a promising start indeed.

This frame, however, assimilates the extra-legal to the legal by limiting its analysis of the extra-legal to its impact on the legal, meaning that in the end, it does not fully take into consideration sources and reasonings outside the Law. A concept like the common good is impossible to circumscribe within such a monodisciplinary frame, which is why, even in its most generous meaning, the current conception of arbitral governance fails to measure up to the common good and authority[1265]. This is unfortunate, because just like ethics, arbitral governance would have been a welcome tool in the perspective of building a more authoritative international arbitration. In this hypothetical context, arbitral governance would thus help concretize the common good, hopefully to augment it. Instead, what we do have is a governance bereft of common good, which translates into a management rather than a governance[1266], further pushing arbitration in a contractualist-commutative direction.

c. Commutative and distributive justice

(i) The basics

Many components of the arbitral authority crisis, from the viewpoint of classic legal philosophy, find their source in one of the most cardinal distinctions ever made in the field: commutative justice vs. distributive justice.

In order to paint a full-enough picture of the different types of justice, it is necessary to take a step back and start with the most encompassing distinction: general justice vs. particular justice[1267]. This distinction was first coined in the original work on

[1265] Stone Sweet/Grisel pp. 24 ss.

[1266] Cf. *supra* part 2, V, 5, B, *e*.

[1267] Those terms are directly translated from French, whose use of Plato and Aristotle's concepts is much more precise than in the anglophone literature. For instance, John Rawls renamed general justice as "social justice", which focuses on inequalities inside a society. While this is not false, we are of the opinion that justice is necessarily social, inserted in a society, which is why talking about the idea of social justice is, in our view, tautological. We would thus rather risk a free translation that better depicts the relation between both justices than use the accepted but imprecise formula. Moreover, what Rawls describes as social justice seems much more aligned with distributive justice i.e., the fair and balanced distribution of advantages, privileges, etc. In addition to this, his interpretation of distributive justice is

legal philosophy by Aristotle, who established a distinction between Law or general justice and a decision based on Law or particular justice[1268]. General justice thus reflects an entire set of values pertaining to a society and the virtues corresponding to those values as well as their overall harmony. To be very precise, general justice touches on the harmony of said virtues, their interactions on the meta level[1269].

Nowadays, general justice is usually not the focus of jurists, especially positivists, because it goes well beyond the simple understanding of legal systems. Being able to grasp general justice requires the capacity to establish connections between Law and the rest of the architectonic academic disciplines such as physics, biology, medicine, theology, philosophy, politics, linguistics, etc. Given the contemporary jurist's propensity to overspecialize in a single legal domain, it is not surprising that a convincing and pertinent analysis of general justice is seldom seen nowadays.

On an infra-metalevel, particular justice stands not as an opposite to general justice but as a complement. Inherently concerned with the concretization of Law, particular justice is what jurists usually call Law in action, *la pratique du droit*. In other words, particular justice is about human relations with other humans or even society as a whole: the meta-legal yields here to the essence of Law, its final cause, justice *in concreto*.

The notion of particular justice is intricately linked with the idea of receiving what is deserved, in other words, the merits of a case. This obviously depends on each legal relationship, hence the importance of concrete circumstances, which explains why justice as it is most commonly known can never be defined as monolithically as non-jurists often wished it were, the daily practice of the Law being dependent on quite a number of factors.

prone to stagnation, which is yet another logical error when considering that authority, inherently linked to augmentation and movement, is one the most important philosophical motors of Law. In the end, while we understand the importance of John Rawls' theory of justice in the context of the past 50 years, nothing he says is fundamentally new vis-à-vis Aristotle. We shall not analyse Rawls' justice theory for all these reasons, in addition to which it does not bring anything substantially new to the current discussion. If the words "general justice" are not particularly subject to debate, those of "particular justice" may sound a bit more odd in English. The reason we chose this wording is etymological: particular stems from *particula* (Latin for small part), which reflects very well the idea of particular justice i.e., that justice is accomplished bit by bit, case by case, on a small scale but at a high frequency.

[1268] Aristotle, Nicomachean Ethics 1134a-b.

[1269] Papaux, Introduction p. 54.

Digging deeper into the meanders of particular justice, Aristotle uncovered two types of particular justice: commutative justice and distributive justice[1270]. As particular incarnations of justice, both stem from concrete happenstances: they are reflective of Law *in concreto*.

Commutative justice is also called arithmetical justice[1271], where justice consists of an exchange of goods/services of equal value, a reflection of synallagmatic contracts[1272]. For instance, someone spending CHF 1.50 at a bakery to buy a croissant enters into and performs a sales contract whereby both parties agree to exchange goods of equal value (easily quantifiable through the monetary system). In more general terms, a 50-50 exchange.

It is very easy to see why commutative justice is so important in any given society, for it is what allows daily transactions in every human's life. These transactions might be exceedingly simple and only a microscopic fraction of them ends in front of a court of Law, but there is no doubting their importance in the conduct of a society's daily affairs.

However, if this ancient canon were to be applied to the contemporary field of arbitration, it would imply defining complex phenomena like arbitral justice through simplistic arithmetical equivalencies. A case with many parties and multiple problems spanning multiple continents will obviously never find a satisfying answer through a purely equal apportionment of what is contentious.

Broadly speaking, commutative justice is essentially the justice of contracts, as both share their main characteristic: arithmetical equality. The reason why contractualist justice is commutative is because contracts are based on the idea of equal obligations, equal performances and equal rights. Given that contracts are often composed of a service and a sum of money corresponding to said service, they are believed to reflect actions and things of equal values, with the exception of certain very "niche" contracts such as donations. In other words, being able to assign a financial value, a number, to nearly all contracts helps quantifying them, with the overarching idea being "if we can agree on the value of the contractual service, we

[1270] Aristotle, Nicomachean Ethics 1131a10-1132a8.

[1271] Commutative justice overlaps in large part with what is known as contractarian justice. However, the latter is not as broad as the former, typically excluding the Talion from it. As such, and in order to better fit the Aristotelian structure, we have opted for the notion of commutative justice.

[1272] Papaux, Introduction p. 55.

can arithmetically quantify the value of the contract and exhume an equally satisfying price".

Even from a procedural standpoint, parties to a contract generally benefit from equal degrees of protection in order to obtain what was promised in the contract. According to the freedom to contract, parties are also equally allowed to enter into contractual relations, technically at least. While contracts are the main field wherein commutative justice is concretized, there are others such as the Talion law or criminal law, both of which seek to re-establish a 50-50 equality by reducing the welfare of the individual who took advantage of another individual.

Commutative justice remains very theoretical and is very difficult to apply because cases where parties are equal in responsibility, rights, etc. are extremely rare in Law, a paradigm marred by contingency. In the eventuality of commutative justice being applied strictly, as in the Talion Law, situations can quickly escalate into endless cycles of retaliation, which do not make for very coherent nor peaceful systems of justice.

Commutative justice has often been declined in other forms of justice, the main example being the contractarian justice, in reference to the contractualist doctrine, which can roughly be separated into two currents: the Hobbesian and the Rawlsian. The former consists in contracting one's natural freedoms against the "order that civil society affords." The latter perpetuates the former while introducing the veil of ignorance, whereby individuals "lack knowledge of their own features in post-contractual stages, including their conceptions of the good", supposedly allowing them to make more rational choices[1273].

Very briefly, Rawls puts his own twist on commutative justice while adding some distributive elements to limited parts of said commutative justice. In order to exhume a societal justice, Rawls uses the notion of original position, which assumes that all members of a society, equal and equally free, decide which justice they want for their society. In order to avoid being influenced by their prejudices (cf. *infra* part 3), Rawls adds a veil of ignorance preventing people from knowledge that could distort their judgement, meaning that they can now conceive a justice best befitting their individual circumstances, despite the veil obscuring even their conception of the good. The veil does not obscure everything; hence people retain general and uncontroversial knowledge of natural sciences, psychology, economics, etc.

[1273] Buchanan/Lomasky p. 13.

Accordingly, this method allows us to exhume a universal, hence univocal, principle of justice according to Rawls: "To begin with, it is clear that since the differences among the parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments. Therefore, we can view the choice in the original position from the standpoint of one person selected at random. If anyone, after due reflection, prefers a conception of justice to another, then they all do, and a unanimous agreement can be reached."[1274]

Rather than negotiating their conceptions of justice, parties are instead presented with a list of pre-established conceptions of justice from which to choose. The distributive element featured in Rawls' theory takes the shape of the Difference principle, whereby people are granted bigger shares if they are socially more productive, the share in question being strictly economical. Even then, Rawls still advocates for the most equal distribution of wealth possible, slightly undercutting the basic idea of a *pro portio*, distributive justice (cf. *infra*; distributive justice is a matter of proportions: a/x = b/y)[1275].

Perhaps the most recent influential representative of contractarianism[1276], Rawls illustrates very well how the fundamental elements of commutative justice are used without falling into a pure, caricatural even, form of commutative justice, which is a stance nearly impossible to defend when deciding cases.

The egalitarian aspect of Rawls' theory, which is immediately materialized in the contract[1277], is the premiss: we are all equal and equally rational. Without said premiss, his reasoning cannot be logically continued. This means that the insertion of such a strict equality as a necessary premiss suffices to illustrate the problem faced when commutative justice is not properly identified as a substrate of distributive justice (cf. *infra*). Indeed, even if the Law subsequently corrects this initial commutative imbalance through adequate distributive mechanisms, the original orientation remains the reversal of commutative and distributive aspects of justice: instead of the former being a substrate of the latter, the latter become simple correctors to the former i.e., the ones that orients the entire legal apparatus.

We will see *infra* that commutative justice constitutes the frame towards which international arbitration strives, although this is not limited to this sole field of Law.

[1274] Rawls p. 139.
[1275] Cf. S. Freeman; Rawls pp. 17 ss, 75 ss, 100 ss, 136 ss, 258 ss.
[1276] Esheté p. 38.
[1277] Hence this egalitarian aspect becomes a commutative one.

Arbitration, however, is much more than a contract, which is why we should refrain from confusing the gateway to arbitration with arbitral justice and all its mechanisms. Just as in Rawls' theory of justice, what spurs commutative justice is placed at the base of arbitration, with distributive mechanisms forced to intervene *ex post* as a necessary rectification to what would otherwise be an impractical form of justice, rather than as the basis for justice. A prevalence of contractual mechanisms would squarely place arbitration inside the legal-philosophical current called contractual positivism.

We will also explain what contractual positivism is in more detail *infra*[1278], but in order to facilitate the comprehension of the current section, a short definition is in order. In essence, contractual positivism imitates legal positivism[1279], with the notable difference that the contract replaces the law as the text standing at the apex of Law, hence why following the will of the parties replaces doing so with the will of the legislator as the final cause of interpretation. One of the consequences of this shift is the furthering of individualism. Indeed, if legal positivism is clearly neutral regarding individualism, contractual positivism is clearly slanted towards it, if only because the overwhelmingly most frequent incarnation of contracts is of the following structure: one individual (person or company) v. another individual (person or company). With commutative justice incarnating itself in contracts more than anywhere else, it only makes sense that it would serve as the main justice model for contractual positivism.

Commutative-contractualist justice[1280] adds another layer to the splintering of peoples into individuals in Law. Indeed, the type of allocation featured in commutative justice (50-50, 33-33-33, etc.) does not allow for any party to stand above the other. More importantly, it does not allow any breathing room for the common good to be taken into consideration.

Indeed, given that the common good is necessarily superior to an individual good, commutative justice cannot apprehend it unless we consider both to be of equal value, at which point we could seriously ask ourselves whether the very idea of justice could even be conceived in such a lopsided society.

Considering that contracts and contractual positivism, the legal tool and doctrine in which commutative-contractualist justice is expressed, are individualist to their core,

[1278] Cf. part 3, III, 2.
[1279] Cf. *supra* part 2, III, 1 regarding the definition of legal positivism.
[1280] I.e., a commutative justice using contracts as its legal vector.

the common good reflected in commutative justice could reasonably be viewed as the sum of all individual goods. In other words, the nominalist doctrine promoted by Ockham[1281], the intellectual foundation of individualism, would find itself materialized in commutative justice.

As such, the commutative paradigm is not only one where commutative justice is the basis of justice, with distributive justice only serving as a corrector to mitigate or adapt the commutative premiss. It is also a paradigm wherein plurality is mainly considered under a nominalist prism: the common good is the sum of individual goods. Much more than the impossible strict application of commutative justice, these are the elements that have infiltrated international arbitration[1282].

Arbitration cannot be composed of solely commutative justice as it would be shockingly unfair. Furthermore, arbitration cases are often extremely complex from a factual standpoint, and as we will see shortly *infra*, this means that pure commutative justice is nearly unusable in practice for it struggles mightily to apprehend complex cases.

The problem with thinking that the basis of arbitration is a contract, an agreement which parties can freely enter into, is that it leads to arbitration being effectively oriented towards the contract and commutative justice, with distributive justice and its subsequent concepts merely serving as correctors for the contractualist-commutative premiss[1283]. This would mean that commutative justice has implicitly

[1281] Cf. *supra* part 2, III, 1.

[1282] Cf. *infra* regarding the fact that contracts are viewed as the basis of arbitration, wherein many rules are determined.

[1283] To be clear, we are not talking about the contractual (arbitration is a contract), jurisdictional (arbitration is a jurisdiction) or hybrid (arbitration is both) theories of arbitration, the reason being that these theories have adopted a binary view of arbitration. More precisely, these theories leave little place for any coloration of the arbitral phenomenon which, despite its apparent simplicity, is extremely complex. Although they could be useful as poles, the fact that they are entirely oriented towards the *ex ante* (the contract) or *ex post* (the trial) purely legal phases of arbitration means that any subsequent characterization of arbitration will be oriented towards setting aside the meta-legal, considerably reducing our potential options moving forward. In other words, using such poles would unavoidably bring us to purely legal solutions. This means that no matter which of these three theories is used, technocratization, judicialization and contractual positivism i.e., the infra-metalegal, are the only conceivable options to remedy whatever ills plague arbitration. Indeed, pure positivism (legal or contractual) is all that remains once the meta-legal has been removed from the equation. As a consequence, improving upon legal technique becomes the only imaginable way forward, the only way to keep Law intellectually alive. As we have shown, however, none of these options are viable to address arbitration's problems, but more importantly,

taken centre stage in the most factually complex cases in the world, instead of doing so for what it is really meant: very simple cases (e.g., buying an apple, parking a car or paying for a broken window).

In order to illustrate this incapacity to apprehend minimally complex cases, let us imagine a divorce, one that is not contentious and where a stay-at-home wife and a working husband both amicably agree on the separation of goods, rights and post-divorce obligations. An application of pure commutative justice would most probably fail to do justice, even in such favourable circumstances. The reason is simple: there are so many variables in a divorce, including some that are only remotely quantifiable, that deciding a divorce on the pure basis of commutative justice would most likely result in a grave injustice, and probably go against what the divorcees had agreed upon (e.g., income, housing, hobbies, future gain perspective, child care, etc.).

Even more so, from a more general point of view, the case would become undecidable, if only because proportions are essential to determine a just outcome in most cases, as prescribed by distributive justice. Furthermore, from a logico-legal standpoint, a pure commutative justice prevents the use of analogy, the one methodological reasoning around which Law revolves, favouring instead a univocal one, so incompatible with Law that even theorizing about it borders on impossibility[1284].

The example we have used is relatively simple on the legal scale. Moving to international arbitration, host of some of the most complex cases found worldwide, it becomes clear that commutative justice cannot be used to create or even measure justice. Talking about an equal 50-50 arithmetical form of justice in a context involving people's livelihood or, as we have seen *supra*, with cases involving an

none of these options targets the foundational issues from a legal-philosophical standpoint. Cf. the following sources regarding the overemphasis on the concept of contract in arbitration, which includes placing the arbitration agreement at the centre of the arbitral paradigm. This list is exemplative, our purpose being to provide a panoramic view supporting our claims, not establish an exhaustive list on the matter: Kaufmann-Kohler/ Rigozzi pp. 6-7; Born I p. 242; Montt p. 81; Binder pp. 50 ss; Weigand-Baumann p. 5; Rutledge pp. 1-11; Cordero-Moss pp. 1-4; Radicati di Brozolo p. 42; Bredow p. 156; Bernardini, Commercial-investment p. 54; Sanders p. 5. Cf. also National Broadcasting Company, Inc. and NBC Europe, Inc. v. Bear Stearns & Co., Inc. et al. (U.S. Court of Appeals, second circuit; no. 98-7468 decided on the 26th of January 1999): "Ordinarily, because commercial arbitration is a creature of contract, only the parties to the arbitration contract are bound to participate."

[1284] Cf. Bezat/Papaux.

entire country's natural resources, would be showing quite a lack of subtlety to say the least[1285]. Complex factual cases imperatively require a flexible justice, that can adapt to the contours of the problem, just as depicted by Aristotle's Lesbian rule and as we shall see *infra*[1286].

In this context, the last definition we would like to lay out is the most important as well as the other type of particular justice as conceptualized by Aristotle: distributive justice. Distributive justice does not deal in arithmetic but in geometry or, to use legal jargon, proportionality. The etymology of proportion is very instructive in order to grasp the fundamental idea of distributive justice.

It derives from the Latin *pro portio*, "per share". *Portio* was also associated with the notion of relation, bearing in mind that every person had his own portion of something. The Latin term was itself the translation of the ancient Greek word *analogia*, with *ana* meaning "up" and *logia* "reason", the reason from above. This shows quite efficiently how proportion and analogy are linked and their importance to legal reasoning, especially in complex cases requiring flexibility of Law, flexibility of mind and transcending reasonings found elsewhere to craft new legal reasonings. In short, making sense of the unknown[1287].

From a more legal standpoint, distributive justice is the allocation of rights, obligations, duties, goods and privileges in accordance with the idea of *suum cuique tribuere*[1288]. This allocation is based on multiple criteria, but the most commonly found are merit and responsibility: the bigger the merit or the heavier the responsibility, the more one reaps (honours, a good reputation, privileges, money, etc.).

An easy enough example to understand is that of the salary of a worker. In a normally functioning society, a salary would be proportional with a worker's usefulness, the difficulty of the job, the type of training you need before beginning

[1285] Speaking of natural resources, environmental Law is another legal domain where commutative justice is inapplicable, even with contractual notions such as debt and credit. How, indeed, could we conceive any form of intergenerational justice regarding the environment when we already know that one party (the younger generation) will have to bear the brunt of the actions of the other (the older generation)? Arithmetical justice is quite simply impossible to put into practice in such cases.

[1286] In order to illustrate the flexibility of laws to his students, Aristotle used the metaphor of the Lesbian leaden rule, which was flexible enough to espouse the contours of a stone wall.

[1287] Cf. *infra* part 3, II, 2, B, *d*. Further implications of this etymological trove can be found in Bezat/Papaux.

[1288] "To each his due."

to do said job, etc. For instance, a hand surgeon's salary is much higher than that of a bank clerk because of his responsibilities, the difficulty of the job or his usefulness to society. This geometrical distribution of the salary corresponds to the following proportions: a/x = b/y, where "a" is the surgeon's salary and "x" his responsibilities, while "b" is the bank clerk's salary and "y" his responsibilities[1289].

The example we have just used is an extremely basic one, yet it illustrates very well the purpose of distributive justice: *suum cuique tribuere*. Found in Justinian's Institutes, this saying was first used by the most prolific of Roman lawyers, Cicero: *"Suum cuique tribuere, ea demum summa justitia est."*[1290] The great jurist Ulpian also, had great consideration for distributive justice and the *suum cuique tribuere*: *"Iustitia est constans et perpetua voluntas ius suum cuique tribuere."*[1291]

The fundamental idea is quite simple: for justice to be served, people need to obtain what they deserve. Flexible to the extreme, the core of distributive justice has allowed jurists to apprehend all manners of complex cases over millennia. This is why some of the most historically important legal philosophers have said that justice is proportional and injustice necessarily disproportional[1292].

While the proximity between an efficient justice and the common good seems quite obvious, we would still like to analyse it further and highlight a few links.

The first link, the one between justice and common good, might seem quite manifest, but it is far from being the case. As we will see *infra*, many arbitrators only consider justice as justice for the signatory parties, a narrow vision fielded around commutative justice. Distributive justice might seem of individual nature, but contrary to the saying (to *each* person his due), it clearly and entirely serves the common good. The reason is simple: it is the legal manifestation of proportionality, without which there can be no justice, and because justice is considered an architectonic virtue benefitting all, distributive justice is not only part of the common good, but *sine qua non* to its existence[1293].

[1289] Aristotle, Nicomachean Ethics 1131b; Papaux, Introduction p. 55. Cf. also Plato, Laws 757a, who mentions distributive justice without naming it as such and without spending too much time on it either; distributive justice was actually called equality by Plato, even going so far as calling it the opposite of arithmetical equality and clearly setting a preference for the *suum cuique tribuere* variant.

[1290] Institutes Iustiniani 1, 1, 3. "To each his due, that is truly the greatest of justices."

[1291] Ulpian, Digest 1.1.1.10. *"Justice is the constant will to give each person their due."*

[1292] Aristotle, Nicomachean Ethics 1131b15-16.

[1293] Aristotle, Nicomachean Ethics 1129b19-26.

The second link between distributive justice and the common good is located on an infra-metalevel. It concerns the way the common good "intervenes" in the exercise of distributive justice. More precisely, the extent to which the common good influences the concrete determination of the *suum cuique tribuere*. Determining proportions between two parties fighting against each other requires criteria, which, if we are to strive towards an authoritative form of distributive justice, has to serve the common good, or at least reflect it. Hence, the common good should be used *a priori* to determine what is distributive justice, what is the "due" in *suum cuique tribuere*. We find ourselves in front of a tautology reminiscent of the platonic definition of "good people"[1294]: the common good cannot exist without distributive justice, yet distributive justice cannot be defined without the common good. This shows how tightly both concepts are tied together.

From a logical standpoint, distributive justice is the foremost manifestation of the analogical universal in Law. To be sure, the analogical universal is present in any type of justice to varying degrees[1295], but distributive justice is the most salient one, if only because it is a fair and convenient way of doing justice in all sorts of situations, simple or complicated. It is hence a fertile ground for analogical reasonings. Furthermore, analogical reasoning is always a matter of proportions and comparisons, as the etymological overview *supra* showed.

In essence, analogy is what allows us to make sense of the unknown[1296]. Very simply, when facing a case whose aspects are novel, jurists will use similar cases, reasonings or legal constructions in order to make sense of the new and previously unseen matter. This process is called an analogical reasoning, and only by making an analogy between the known and the unknown can we make sense of the latter. Obviously, analogies can be correct to various degrees, which will determine whether a reasoning is good or not. This, however, does not change the fact that every legal reasoning requires analogies.

[1294] Plato used to say that good people are what makes a good city, but also that a good city is necessary for people to be good (Plato, Republic 472-472c; Plato, Laws 659d).

[1295] With regard to commutative justice, one only needs to think about *sui generis* contracts: they are not defined but can be apprehended through analogies with how other contracts function.

[1296] Technically, any new case is unknown, if only because a solution has not been found yet. Cases may be so similar that a solution will quickly pop into the mind of the ruling judge, but for cases to be known, they either have to be resolved or identical to an already resolved one. The problem with the second option is that, as Heraclitus famously said, one can never bathe twice in the same river, meaning that two things are never identical, there will always be differences, no matter how small. Similarities between cases can be striking, but there will always remain aspects of the new case that are unknown.

(ii) In the arbitral paradigm

Given the above-mentioned reasons (proportionality, analogy, flexibility, etc.), it seems quite obvious that distributive justice, not commutative justice, should be used as the cornerstone of arbitral justice. The factual complexity of international arbitration has already been mentioned briefly *supra*, but we will now demonstrate why said complexity is inherent to international arbitration.

Our demonstration is based on the Aristotelian definition of the *doxa*: "*La* doxa *ou opinion publique. Bien que* doxa *renvoie à opinion, la réalité qu'elle couvre est bien différente de ce que nous entendons aujourd'hui par opinion. Est* doxa *le tissu de conjectures, d'usages habituels, de comportements les plus ordinaires de discours vraisemblables, en un mot les mœurs et coutumes d'une époque. Aucune prétention à la vérité, aucune tentation de science, mais une approximation constante de l'état de fait des choses, une sorte d'adéquation à leurs variations, à leur renouvellement, à leur invention. Mais en même temps, obligation de partage: la* doxa *n'a de sens et de puissance qu'à être le lot commun, à dire ce qui est le plus souvent et à agir comme le plus grand nombre. Elle trace la frontière mouvante, il est vrai, mais indépassable de ce qui peut être entendu et compris*."[1297]

Doxa is traditionally used to measure Law's acceptability rate among those to whom it applies or is supposed to apply. In other words, a Law that does not take the *doxa* into consideration seldom becomes acceptable, which heavily hampers any hope of being efficient. A direct reflection of habits and culture, the *doxa* varies with each society. This is why, even in very cosmopolitan and international settings, people will analyse situations through their cultural lens. Far from being a default that must be corrected at all costs, the influence of the *doxa* on human beings is inherent to who we are, which, if handled intelligently, proves more advantageous than detrimental to us as interpreters of the Law (cf. *infra* part 3).

This is typically what makes international Law *lato sensu* so interesting: the interactions between legal *doxa* reach a level such that it is impossible to disguise or dismiss interpretations on the basis of univocity, of universality[1298]. This is the fundamental reason why Gaillard's "independent arbitral order"[1299] will never come to pass: human beings are inherently tied to a culture, whether legal or general, from which we cannot sever ourselves. Consequently, each jurist's *lex fori*, the one in

[1297] Cauquelin pp. 66-67.
[1298] Papaux/Wyler, Mythe pp. 181, 188.
[1299] Gaillard pp. 60-100.

which we are trained, will automatically become the *de facto* most influential one in our interpretative process[1300].

International arbitration automatically implies interactions between multiple cultures. Knowing how difficult interactions between people of the same country but from different linguistic regions can be, there is no doubt that interactions between people of different cultures and language are even more so, in particular when all present are connected through a legal strife. And so, without even going into the technical intricacies of international arbitration, we can already see that it is more factually complex than "normal" legal disputes, if only because it is a place where different *doxa* interact.

Added to this complexity on the logical level, we find ourselves facing a factual complexity typical of international arbitration. There are many elements proving this extreme contingency inherent to international arbitration, chief among which is the difficulty to establish the legally relevant facts, which often spawn across multiple countries. These selected facts are then interpreted differently, not only because they are interpreted by different people, but by people of different legal cultures and trainings, often enough hailing from very different legal systems. Furthermore, common topics in international arbitration (transnational investments, international trade) are already complicated enough from an internal standpoint. For instance, investment treaties and financial transactions concerning energy import and export in geopolitically unstable regions are not as easily analysed from a legal standpoint than, say, a divorce agreement, an employment contract or a homicide.

Given this contingency, it is essential that justice is done in a flexible manner. We have seen *supra* how commutative justice was merely a substrate of distributive justice, a minimal reflection of the litany of proportions distributive justice can accommodate. As such, using the latter to solve arbitral matters seems like an unescapable conclusion, if only because it is the only one of the two types of justice with the inherent capacity to apprehend the unique factual and interpretative dimensions of international arbitration. It is important to understand that the *suum cuique tribuere* does not simply reflect proportionality but a fair and just proportionality, one that takes into account what each party is due in the case at hand and verify if this concrete application of the *suum cuique tribuere* fits within the overarching general justice.

[1300] Papaux/Wyler pp. 246 ss.

In complex cases, commutative justice, while potentially useful, most definitely should not be used as the main axis to decide a case. The chief reason is that it is only concerned with an egalitarian idea of justice, with no regard for the following question: what do the parties deserve? In such instances, if their case is decided in accordance with contractualist logic[1301], can we seriously say that justice has been properly done?

More broadly, commutative justice is intimately linked with a text representing the will of the parties: the contract. By placing the contract at its centre, in particular the idea of *"échange équivalent des prestations"*, commutative justice enshrines the will of the parties and a reductive vision of *pacta sunt servanda*, wherein *bona fides* has been squeezed out and replaced by the will of the parties, guaranteed by God who was then replaced by the legislator[1302].

When looking at a contract that features an arbitration clause, we have seen that the vast majority of the arbitral doctrine does not include the interests of anyone but that of those featured in the contract, under the guise of respecting the will of the parties ("I was given clear instructions"), which is typical of commutative justice. Problems arise when, by this logic, the will of the parties goes against the common good which makes for unjust, unbalanced decisions. There are of course exceptions to this, but even in such cases, decisions are hardly made in light of the common good, which is why it cannot be said that distributive justice is the primary component of our current arbitral justice[1303].

[1301] Contractualist logic rules arbitration, supposedly because it is legally based on a contract representing the will of the parties.

[1302] Cf. Supiot, Homo juridicus pp. 218 ss. regarding the genealogy of *pacta sunt servanda*. Cf. also Papaux, Introduction pp. 53-57. Usually understood as the obligation to respect a signed written agreement, which is not the case as this medieval saying encompasses the respect of all promises, including customs. Thanks to the genealogy of legal schools of thought, we know that the positivist veneration of the legal text stems from the religious veneration of the sacred texts. We also know how prevalent natural sciences have been in the development of the positivist doctrine. Moreover, for positivists, rights are above all a matter of will rather than reason (the will of God, the will of the legislator). Cf. Papaux, Introduction pp. 1-134 for a full account on the matter.

[1303] Cf. Philip Morris Brands Sàrl, Philip Morris ProductsS.A. and Abel HermanosS.A. vs. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, decided on the 28th of June 2016. This case was ultimately decided by taking the common good into account, but it is never mentioned, preferring instead to talk about a State's "inalienable rights to protect the health of its citizens." (§ 432) The dissenting opinion is fairly eloquent in this regard, excluding the very doctrine of margin of appreciation, which is drawn from art. 1 of

To be clear, we are not saying that arbitrators apply commutative justice as such a feat is either impossible, either would have made a fool out of arbitrators to the point where they would not have anything left to arbitrate anymore. What we are saying, however, is that the mindset stemming from commutative justice i.e., the prevalence of the will of the parties and contractual positivism which estrange arbitrators from distributive justice, and with it, equity, specific or *ex aequo et bono*, both of which use distributive justice as their compass[1304].

This positivist-commutative trend is quite visible to those paying attention to the last 30 years of legal history. Contracts are increasingly purported to be conceived as exhaustive, in no small part due to the prevailing mentality in the U.S., itself another remnant of the legalist positivist doctrine of the Lumières[1305], which is reflected in the contractual positivist doctrine. The idea is simplistic but efficient: the contract is a manifestation of free will and should thus not be curbed, or else it would not be – entirely – free. Consequently, the more parties insert clauses in a contract, the more they "exercise" their freedom. By striving for an intrinsically unattainable exhaustivity, they are often convinced to leave less room for dissonant interpretations[1306]. A consequence of which is the drastic reduction of the available space for distributive justice and equity for arbitrators, who will very often toe the line drawn by the contractors in order to respect the mindset of commutative justice i.e., that the contract puts parties on an equal footing, meaning that they only need to "apply" what is featured in the contract in order to do justice. Doing so will never result in a pure commutative justice, but it does indeed perpetuate the mindset of commutative justice, with arbitrators serving as correctors whose main purpose is to re-establish the contractual balance.

As such, it is not the strict application of commutative justice in international arbitration that we should be first and foremost weary of, if only because it does not have the capacity to measure, to be commensurable to the factual contingency inherent to international arbitration. Much more surreptitious is the mindset pertaining to commutative justice, which promotes an *a priori* legal security

protocol 1 to the European Court of Human Rights, on the grounds that there was no arbitral precedent. In other words, the analogical reasoning is impeded for reasons pertaining to a lack of capacity to reason in equity (§ 180 ss).

[1304] Cf. *supra* part 1, II, 2, B, *b.*

[1305] Cf. *supra* part 2, III, 1; Fabre-Magnan pp. 117 ss.

[1306] This kind of reasoning is anathema to all who understand the analogical universal in Law, especially regarding the unattainableness of univocal legal reasonings (cf. Bezat/Papaux).

through the use of "exhaustive" contracts[1307] which supposedly treat parties equally, blunts proportions and thus analogies as the way to create Law and legal decisions. The penchant for exhaustivity and the lack of appetence for the analogical figure converge to render arbitrators averse to the creation of new legal reasonings.

In an arbitral paradigm increasingly bereft of its legal essence over the past decades, equity, that which grants us the capacity to set aside commutative justice through the use of a more tailored form of proportions[1308], seems steadily more important as time passes, allowing us to mitigate the effects of the current dominant legal doctrine in international arbitration, contractual positivism[1309].

In this context, grasping the differences between distributive justice and commutative justice is very important in international arbitration, as we will see shortly, if only because it allows us to understand that notions of fairness and equity cannot come to pass when the latter is more prevalent than the former. Equity, the fundamental legal concept of arbitral justice, will continue to be very hard to justify as long as arbitrators remain inside the commutative paradigm.

Until arbitration practitioners and scholars acknowledge that the arbitration contract is merely part of the general picture, talks of fairness and equity will remain based on false premisses. It is not that commutative justice is inherently unfair, but simply that it is not adapted to the complexity of international arbitration, even more so when considering the fact that arbitration is not about winning or losing, rather about mending relationships in order for partnerships to move forward in a healthy manner[1310].

In order to do so, distributive justice has to be the heart of any justice theory based on the common good, any authoritative justice theory. The idea of *suum cuique tribuere* is indeed too intimately linked to justice for it not to take centre stage.

[1307] Let us not forget how many arbitration specialists place the arbitral agreement at the epicentre of the entire arbitral proceedings (Kaufmann-Kohler/Rigozzi pp. 6 ss, cf. *supra*).

[1308] I.e., distributive justice.

[1309] Cf. *supra* part 2, V, 5, C, *c*, (i) for a brief definition of contractual positivism, *infra* part 3, III, 2 for a more detailed one. We have also seen *supra* how frequently contracts are viewed as the basis of any arbitration, subordinating the entire arbitral process to the concept of the contract.

[1310] It is not called an alternative dispute resolution for nothing. If it is indeed an alternative to the more confrontational litigation pipeline, why would it set out winners and losers as well? Why would it strive to become exactly what it was supposed to complement through alternative means?

The very notion of proportionality is itself unremovable from justice and society, which craft proportionality according to its needs and values, the case *in concreto* and to its common good[1311].

Analogical reasoning is the key, not only to legal reasoning, but to any human reasoning[1312]. It is what allows us to see commonalities and differences between people and/or situations. We then use them to construct links and relationships, to build common goods, societies or too often, enemies. Proportionality is thus eminently collective and relational. By judging individual cases in the light of the societal common good and by fully embracing its distributive dimension, justice ensures that it remains authoritative.

We have seen so far that the crisis of authority plaguing international arbitration is manyfold: technocratization, a tool of imperialism, winning rather than healing, professional elitism, etc. From a legal philosophy perspective, technocratization is the most salient problem, as the other ones are more closely related to history, politics, international relations or psychology.

Looking at the overall history of legal philosophy, technocratization is but an offshoot of legal positivism: *bon parce que prescrit* rather than *prescrit parce que bon*. The same can be said about contractual positivism, probably the current of legal positivism most responsible for the prevalence of commutative justice in international arbitration[1313].

Although it does not bring anything fundamentally new to legal positivism, contractual positivism has proved a more efficient broadcasting medium, in the Anglo-American world in particular, whose actors have essentially retaken the ideas of Locke, Kant and Hobbes[1314].

Contractual positivism is viewed as an impartial moral theory, whereby morality is based on a contract or an agreement between individuals. According to its proponents, those party to a contract can make better decisions, based on their wants and needs *in concreto*, which are then featured in the contract[1315]. By doing so, contractual positivism depicts contracts as “morally impartial” and thus

[1311] Cf. *supra*.
[1312] Hofstadter/Sander pp. 9 ss, 601 ss.
[1313] And most definitely in other branches of Law and economy.
[1314] Cf. *infra* part 3, III, 2. We will not discuss the differences between contractual positivism and contractarianism, as we consider them cosmetic, formal at best.
[1315] Cf. Spitz.

unadulterated by politics, which is very similar to the way analytic philosophy views itself[1316].

Furthermore, by framing their theory around a unified morality, contractual positivists mistake their univocity for impartiality. One of the problems is that by choosing what is the unified, single, objective morality, contractualists sink into the logical fallacy of univocity, which, as we have seen *supra*, contradicts the very logical foundations of Law.

Univocity often translates into the depolitisation we have just mentioned, used in the name of an alleged legal science and universal morality. In the context of international arbitration's authority crisis, it has been shown many times that the depolitisation of arbitration actively participated in the erosion of its authority[1317].

The crushing majority of awards, scholarly articles and books point to contractual positivism, without mentioning it outright. Most visible is the idea that arbitration in entirely based on the will of the parties, featured in a contractual arbitration clause. In parallel, it is widely agreed that parties are most often best placed to outline and advocate for their own personal interests, which is, from their perspective, the very point of signing an arbitration agreement in the first place. An arbitrator, however, is not supposed to serve the interests of the parties, but justice, especially if the interests of one or more parties go against said justice.

As we have seen *supra*, arbitrators are quite prone to assimilate the interests of the parties with arbitral justice, especially by giving commutative justice more importance than they should[1318]. This is symptomatic of the loss of sight of the common good's legal vector, distributive justice, which is why we have been facing a sharp decrease of arbitral authority and why questions surrounding the legitimacy of international arbitration are becoming increasingly frequent[1319].

[1316] Cf. Scanlon pp. 94 ss.

[1317] Cf. Skovgaard pp. 741 ss; Bachmann pp. 56 ss; Schultz, Ethos pp. 258-259; Grisel, Elites.

[1318] Cf. Stone Sweet/Grisel pp. 185-186. While it is very probable that this is due to the historically new mercantile nature of arbitrators (an arbitrator's fees is an idea only seven decades old), we will not dwell on it for reasons of time and space. This matter, however, would deserve a more serious scrutiny than what it has received until now, especially with a historical perspective, one that would allow the reader to understand the shifts between arbitration as an honour and arbitration as a lucrative occupation.

[1319] Cf. *supra* part 2, V, 5, B.

Before moving on to the next section, let us briefly summarize the main ideas mentioned in the current section. Firstly, let us state once more that a strict application of commutative justice is already very hard in state courts and becomes nearly impossible in international arbitration for reasons of immense factual contingency. Secondly, what is important to us is the mindset deriving from commutative justice, which is intricately linked to contractual positivism due to the fact that commutative justice is typically incarnated in contracts, to the point where it is sometimes called contractual justice. We will see in the following section how equity is intricately linked to distributive justice and how to operate the separation from the commutative paradigm, an operation which will also find hermeneutical elements of response in part 3 *infra*.

d. The authority of the arbitral interpreter: distributive justice through equity

One of the most common justifications of an arbitrator's behaviour when it comes to the concretization of the commutative mindset is that they must "follow the rules", that they are bound by them, particularly if arbitration was selected by the parties for reasons of flexibility. Moreover, the "will of the parties" is very often brandished as a supposedly airtight excuse for arbitrators not to apply an authoritative justice, to remain within the commutative paradigm, once again showing the extent to which legal positivism has bled into international arbitration[1320].

This argument, an eminently positivistic one, can easily be dismissed through the use of distributive justice and equity, which is something arbitrators already do but on a scale that should be much bigger, at a frequency that should be much higher. We have seen *supra* that distributive justice was about proportions, not arithmetical equality. By nature, proportions are harder to set and more context-sensitive than a strict 50-50 equality. Obviously, going by this appreciation, distributive justice is a lot harder to lay down in written laws than commutative justice. This implies that the legal interpreter has a heavier, more important task when distributive justice is involved.

[1320] Will and the text of law are two of the more visible features of legal positivism, in particular when considering the expression "the will of the legislator" and how prevalent it is when contemporary jurists interpret laws. The will of the legislator is descended from God's will, the very thing Modernity reneged (Grzegorczyk pp. 34, 37). The sacredness of the legal text is the same as the sacredness of the holy scripture; one should never forget that the Bible, like the Torah and Quran, is a legal source. Cf. Papaux, Introduction pp. 1-134 for more details; cf. *infra* part 3, III, 2 regarding contractual positivism.

A legal interpretation can be made in a theoretical context, although it will always be rooted in practice. This is how, for instance, a sizeable portion of the legal doctrine communicates: by using cases or established knowledge and drawing certain reasonings and hypotheses, often in order to extend or reduce the scope of a legal concept.

That being said, distributive justice is inherently linked to concrete cases, if only because proportions are impossible to establish in the abstract, unless we pre-establish them mechanically as with the law of the Talion[1321]. Instead, they need to be established concretely, in light of all the concrete circumstances. As such, the key legal interpreter to establishing proportions is not the legal theoretician, but the legal practician. More specifically, those using the various declinations of equity i.e., judges and arbitrators[1322].

The notion of equity is, generally, thoroughly misunderstood by scholars of all walks of life. It is sometimes defined as "*une valeur authentiquement moderne* […] *fondée sur des theories nord-américaines*"[1323], probably thinking Rawls invented equity… Other definitions state that people do not suffer unjust disadvantages[1324], a very reductive vision as it does not include the very basic parallel of unjust advantage. All in all, equity has been subjected to some outlandish theories, including some linking it to extramarital sex or others using equations to circumscribe it[1325].

Even authors with a minimal understanding of equity usually restrain its application by associating it with certain specific concepts when, in fact, it concerns the entire legal practice. For instance, certain authors consider equity to be fundamentally

[1321] Cf. Papaux, Cosa p. 53: "[S]*i la justice distributive ne se laisse enfermer dans aucun automatisme, un œil pour un œil, un mort pour un mort, etc., le critère de la distribution n'en reste pas moins non décidable a priori, jamais 'arrêté une fois pour toutes', en aucune manière* mécanique."

[1322] The role of the theoretician is – among other things – to give sources of inspiration and imagination to the practitioner. For instance, what criteria should be central in cases with an element of corruption, what about analogous cases, etc.

[1323] Löwy pp. 36-37.

[1324] Ballet/Carimentraud p. 113.

[1325] Cf. Kellerhals/Coenen/Modak pp. 21 ss and the quoted references. While the absurdity of it all was genuinely funny, it is equally frightening to see that the authors of this theory based it on the fact that equity stems from contractual relationships, and because marriage is legally based on a contract, they used contractual positivism to justify the use of equity to explain extramarital sex.

related to equality, and while this is not wrong per se, it is reductive, in particular when said authors add that equity *"apparaît de plus en plus dans les textes afin de déroger à la règle de droit."*[1326]

This latest quote is typical of how people, even jurists, view equity: that which allows judges to go against the law, or at best, to complete it in the unusual instances where there are legal deficiencies and loopholes[1327]. Quite often, equity is also assimilated to ethics, which is understandable to a small extent, because one's ethics may influence one's equity. Equity in Law, however, goes way beyond ethics: it is intrinsically related to Law and cannot be separated from it.

Despite being oft-forgotten, equity's importance in legal practice cannot be understated. We know that general equity is what allows a law (general and abstract in nature) to apply to a case (particular and concrete in nature)[1328]. In more simplistic terms, general equity is the bridge between legal theory and legal practice and is necessary to the concretization of Law; it is the most axiologically neutral of all three types of equity. As inherent to justice as general equity, albeit not as omnipresent, specific equity generally represents what is just and equitable, implying more pronounced axiological choices than general equity on the part of the legal interpreter. Finally, unlike its brethren, equity *ex aequo et bono* does not use legal sources as its starting point, being instead completely dependent on the sole authority of the one deciding *ex aequo et bono*. While general and specific equity also rely heavily on authority, they do not do so exclusively.

Equity as a general concept is a balance, an optimum between the justices seen *supra*, which is why it cannot ignore any type of justice. Even more so, it is the very concept serving as the compass of justice, which explains why legality without equity is unjust, why equity without legality is just. In the end, this is why any semblance of justice cannot be seriously conceived without the inclusion of equity[1329].

The type of equity used notwithstanding, when acting equitably, an interpreter's first task is to handle the legally contested proportions, in the hope of doing justice in the concrete case. Commutative justice on the other hand, can only deal in a single proportion: arithmetical equality (50-50, 25-25-25-25, etc.), which is why it is only

[1326] Jappont p. 158.
[1327] Cf. Perrin, art. 4 *in* CR CC I.
[1328] Cf. *supra* part 1, II, 2, B, *b.*
[1329] Aristotle, Nicomachean Ethics 1131a10-25.

relevant in very specific cases, usually when the parties agree on the equal value of two items or performances.

Taking it a step further, commutative justice can easily become unjust given the high number of instances where arithmetical equality is insufficiently flexible and lacking in justice. In such cases, typically when commutative justice has been enshrined in a contract, specific equity can and should correct unjust instances of commutative justice. Doing so may require, in international arbitration, going against the will of the parties. Even so, an arbitrator's duty is to dispense justice, not to satisfy a customer, a customer who, incidentally, mandated him to do just that: justice.

This is typically where the concept of common good can and should be invoked by arbitrators to justify putting a distance (which can perfectly be minimal) between them and the letter of the contract. Doing so is not synonymous with an open confrontation with the parties regarding their contract and arbitrators could very well, depending on the situation, fulfil their mission of distributive justice by simply tweaking one of the contractual clauses. Being able to do so, however, already requires putting some distance with the mindset of contractual justice. Distributive justice requires the arbitrator to not only step away from the contract, but also from the commutative mindset, although this is much easier said than done, as we have seen with the numerous awards favouring former colonial powers to the detriment of newly independent poorer countries[1330], wherein even a 60-40 allocation in favour of the decolonized nation would be unfair, unsatisfactory in the eye of the *suum cuique tribuere*.

An intrinsic part of legal practice, equity is undoubtedly part of any Law's general principles. Its application is thus not necessarily conditioned by its inclusion in a contract or a treaty. Even more so, it cannot be excluded from Law[1331], unless the parties demand general legal advice with no link to any case whatsoever (and even then, such advice will be subject to interpretation). The question then becomes: to what extent are arbitrators ready to use specific or *ex aequo et bono* equity, not only to correct injustices *inter partes*, but also with regard to the common good, frequently ignored by the parties when signing an arbitral clause?

An authoritative international arbitration requires a justice respectful of the common good, which does not always coincide with the common interest of the parties as we

[1330] Cf. *supra* part 2, V, 5, B, *a-c*.
[1331] Cf. *supra* part 1, II, 2, B, *b.*

have seen *supra* with the awards concerning the nationalization of natural resources by newly independent countries. Commutative justice is a model whose inspiration is the contract and it is very hard to imagine its application in any different legal domain, with the exception of criminal law. Even then, it is only usable when the parties are in agreement, because the moment a legal strife begins, contractual equality will vanish in favour of proportionality.

Indeed, as mentioned *supra*, international arbitration is probably the most factually complex and complicated field of Law. As such, we have yet to find a single award respecting commutative justice to the letter and deciding on a perfectly even split of what is in play, not because it would be the right proportion, but on principle. The interpretative process is far from corresponding to the top-down application of the Law to the case cherished by positivists[1332]. Much more than that, it is an intricate process combining the abductive reasoning which uses facts, clues, hypotheses and rules to verify or disprove candidate theories emitted beforehand, and, when hermeneutically sound, it involves a constant vigilance towards one's own *Vorverständnisse*[1333]. The term "abductive" implies "abducting" neighbouring concepts, facts and rules in order to draw analogies and verify or disprove the candidate theory. This means that legal interpreters are always using the analogical reasoning, which makes a very heavy use of proportions, the foundation of distributive justice, in order to adapt to new situations and new cases. And considering that there are no two identical cases, all unresolved cases are by definition, "new".

Arbitration, despite being much more than that, has been amalgamated to a contract over the past decades, thereby catalysing the importance of commutative justice in the field. The common good is often assimilated to the common interest, the parties' that is. We do not contest that the signatories' common interest is of prime importance in a contract, but it is completely different from the common good, and arbitrators should never use common interests as the measuring stick for an authoritative justice.

For example, certain authors argue in favour of excluding the application of basic human rights in any potential future dispute between the parties[1334]. While this might serve the parties' common interests (usually from a short-term financial

[1332] Cf. *supra* part 2, III, 1 and *infra* part 3, III, 2 and 3.
[1333] Cf. *infra* part 3, II, 2, B, *b.*
[1334] Cf. Bollée.

standpoint), it is extremely easy to argue that such an arbitration clause would amount to an assault on a greater common good. To be precise, we do not consider human rights a faithful reflection of the common good, we are merely saying that they represent it much better than the common interests of the parties featured in a contract.

We do not think, for instance, that contracts with an arbitration clause signed between Glencore and the litany of ultra-corrupt presidents of the Democratic Republic of Congo regarding the extraction of cobalt to the detriment of their impoverished population can be considered as respectful of the common good, especially if said contracts allow them to skirt around Congolese tribunals and laws and even though the common interests of the parties are undoubtedly well safeguarded by this manoeuvre. Easy enough to understand, this sort of example has been replicated hundreds, thousands of times even, since the end of World War II, nigh-always between a western company extracting natural resources and southern, poorer and often ill-informed governments[1335].

In such cases, a sense of specific or *ex aequo et bono* equity coloured with a strong understanding of distributive justice centred around the common good could easily balance out the most pernicious aspects of the bilateral investment treaties creating these situations. From a more meta-legal perspective, doing so may help to stem the ever-increasing flow of positivistic reasonings in international arbitration[1336]. In addition, it would also allow arbitrators to focus on justice and the fundamental aspects of each case, rather than waste time on endless procedures, something long lamented by senior arbitrators, to this day[1337].

For the time being however, positivism's tendency of overdeveloped procedural technique, of putting formalities over substance, has crippled equity to a point where its place in arbitration has been drastically reduced, with equity *ex aequo et bono* bearing the brunt of the attack.

[1335] Dezalay/Garth, Market pp. 785-791.

[1336] As has been demonstrated and talked about very often in the arbitral doctrine, investment and commercial arbitration are the two sides of the same coin, with the very same actors in both branches of arbitration. The difference between said branches is thus not the content, but the scale of the legal problems, which are bigger and politically more sensitive in international investment arbitration. Cf. Roberts and Grisel, Elites.

[1337] Lalive, Réflexions; Lazareff pp. 477-483; Oppetit pp. 10-11, 26-28, 63, 79, 107, 109, 117-120, 124-127.

We already know that wisdom has been set aside in favour of superficial legal knowledge, and the sacralisation of the legal text undoubtedly hampers an arbitrator's capacity to do justice by standardizing the arbitral process. According to Henry (p. 709): *"A l'origine, l'arbitre n'éprouvait nul besoin de normativiser son comportement. Il était choisi pour ses qualités intrinsèques et il était comme une évidence pour les parties que la sagesse présumée de l'arbitre lui servait de guide de comportement, autant qu'elle lui inspirait la solution à donner au litige."* In our view, restoring wisdom to arbitral equity and equity *ex aequo et bono* as the main tool of arbitral justice seems like the best path to re-establish an authoritative form of international arbitration[1338].

Deciding, judging, forming an informed yet personal opinion, daring to displease both parties for the sake of justice, understanding the stakes beyond written documents: all seem like very basic elements of a decent arbitral justice to us. Moreover, given that general equity is the link between Law and facts, between the abstract and the concrete, it stands to reason that an interpretation of both is required to bring them on the same plane. This interpretation is any deciding person's responsibility: judges and arbitrators.

Interpretation without prejudice is impossible, because every single human being's interpretative skills are affected by an individual's life experience. This implies that in any given legal situation, there will be as many interpretations as there are

[1338] To be clear, this problem is not unique to international arbitration. Even more so, it is a general trend seen among western jurists, even amongst scholars, that the analysis of Law has become so technocratic that there is now a lack of courage regarding the criticism of anything non-technical. According to the former authoritative arbitrator, academician and professor Jean-Denis Bredin: "[La discipline du droit] *gagne sans doute en précision, en méticulosité, en adéquation. Mais elle perd en distance, en espace, en imagination*. [L]*a réflexion juridique se meut mal et s'étiole dans un champ trop étroit*. […] *Elle est étouffée par les contraintes de l'efficacité*. […] *Le Droit s'essouffle vite à ne pas rencontrer la philosophie, la sociologie, l'histoire, l'économie. Les grands juristes de ce siècle et du siècle passé, oppressés dans le domaine apparemment clos du Droit, s'en sont vite évadés. Que dire des pollutions de la spécialité! Quand il faut, à la réflexion juridique, les larges horizons, l'effacement des limites favorable à toute synthèse, la distance d'où se prend un regard qui ne soit pas borgne, et ces longues perspectives qui portent l'imagination, que dire des spécialisations qui, si dignes d'intérêt qu'elles soient, bornent, rapetissent, et finalement réduisent la doctrine à un rôle technicien, utile certes, mais forcément secondaire*. […] *Nous sommes, pour la plupart, devenus de consciencieux garagistes*." (Bredin, Remarques pp. 115-116).

people[1339], which goes to show how chimeric univocity, equivocity and objectivity really are[1340].

Given its centrality in the process, the interpretation of an arbitrator is not equivocal to that of the parties or their attorneys. This interpretation, the vector through which equity materializes itself, is the very foundation of the arbitral award that'll soon follow. This is precisely one of the reasons why technocratization is such a problem in international arbitration (and Law in general): by pretending that legal theories and reasonings are objective and free of political opinions and biases, it stifles arbitrators, limits their ability to create legal interpretations and angles them toward supposedly "risk-free zones", where the parties' interests supersede the common good, where the easier commutative justice is – supposedly – applicable[1341]. Ironically, what arbitrators perceive as objective and risk-free is a lot riskier for those with whom they do not have direct contact.

In this context, Arendt had already seen how problematic this mentality could be: "Also, he [Nietzsche] was well aware of the profound nonsense of the new "value-free" science which was soon to degenerate into scientism and general scientific

[1339] To be clear, there are limits to interpretation. In Law, there are some interpretations that will be discarded immediately for being too remote, absurd or unrelated to the matter. Likewise, there are limits to the analogical reasoning due to the intrinsic limitations of human beings and the boundary between logic and the lack thereof (Eco, Limites pp. 368 ss).

[1340] Once again, univocity comes from *uni voces*, one voice in Latin. A univocal interpretation would thus mean that there is but one way to interpret a text of law, a situation, choosing the correct solution, etc. On the other hand, equivocity comes from *æquus* (equal, flat) and *vox* (voice), equal voices in Latin. Equivocal interpretations are therefore interpretations of equal values, meaning that concretely, the interpretation of a legal text by a jurist, an economist or a car salesman are equal, which is obviously untrue.

[1341] Cf. Ost/van de Kerchove, Savoir-faire pp. 32 ss, who summarize very well some of the problems encountered by the legal doctrine, especially the scholarly doctrine, the one best placed to show hints of reflections, of criticism, on a meta-level. Without expecting it to offer axiological criticism of their field in Habermas-like fashion, which would be very interesting and insightful, the overwhelming majority of the legal doctrine is stuck in what Ost and van de Kerchove call day-to-day updates. The purpose of the legal doctrine has indeed mutated to the point that one could even call unauthoritative: if the *modus operandi* of authority is the augmentation of inherited foundations through the common good, then the role of an authoritative legal doctrine is to improve Law and laws. Updates are merely functional; they do not serve any purpose other than technical assistance. As such, it would not be very controversial to say that the way the current legal doctrine operates is yet another consequence of technocratization, although it has reached a point where it has steadily become one of the prime enablers of technocratization. Overspecialization is yet another reason why the legal doctrine is in such a quagmire, fuelling the incapacity of jurists to analyse more than technicalities in their chosen field.

superstition and which never, despite all protests to the contrary, had anything in common with the Roman historians' attitude of *sine ira et studio*. For while the latter demanded judgement without scorn and truth-finding without zeal, the *wertfreie Wissenschaft*, which could no longer find truth because it doubted the existence of truth, imagined that it could produce meaningful results if only it abandoned the last remnants of those absolute standards."[1342]

She adds that: "Unpredictability is not a lack of foresight, and no engineering management of human affairs will ever be able to eliminate it, just as no training in prudence can ever lead to the wisdom of knowing what one does. Only total conditioning, that is, the total abolition of action, can ever hope to cope with unpredictability."[1343]

Arendt touches on one of contemporary arbitration's most sensitive points. In order to be hired, arbitrators argue that they must have a certain degree of predictability, otherwise parties would not hire them. This predictability, however, is defined by legal security and an unreachable exhaustive objectivity of the law, to the point where it prevents arbitrators from ever really acting in equity, specific or *ex aequo et bono*, preferring instead to toe the line of the ever-increasingly important text of law, which is merely made of words.

The problem with this mentality is that arbitrators go from "people who do justice" to "people who do what they are hired to do", their integrity lying with those paying them rather than justice. Let us remember that at least until the end of the first half of the 20th century, arbitrators were not paid, or if they were, gave all their earnings to charity. To be clear, earning money is not problematic in and of itself, but when it corrupts the nature of a task (doing justice), sometimes even becoming the purpose itself, it needs to be addressed[1344].

Before moving on to the general conclusion of this second part on the concept of authority, let us summarize a few points concerning the role of the arbitrator with regard to distributive justice. Arbitrators cannot simply avoid applying distributive justice[1345], otherwise, they would be predominantly using commutative justice, putting them in the commutative impasse mentioned in the section *supra*. However,

[1342] Arendt, Tradition p. 34.
[1343] Arendt, History p. 60.
[1344] Dezalay/Garth pp. 777-781; Bachmann pp. 217-222.
[1345] Cf. for instance the U.K. Statutory guidance to arbitrators about the exercise of their functions under Part 2 of the Commercial Rent (Coronavirus) Act of 2020, wherein arbitrators can determine whether tenants should be granted debt relief for Covid-19

arbitrators should always examine their case in the light of the common goods involved concretely, not simply analyse their case under the spectrum of the contract in which features the arbitration clause. Circumstances such as Covid-19, the environmental crisis or the neo-colonial appropriation of natural resources typically give arbitrators very good reasons to put some distance between them and the contract in order to satisfy more important needs of distributive justice and equity.

reasons, leaving arbitrators to conduct such inquiries. Although this power of appreciation might seem interesting at first, the U.K. department for Business, Energy & Industrial Strategy still emitted a 71-page document to indicate quite precisely how arbitrators should proceed.

VI. General conclusion on authority and hermeneutical transition

Until Arendt's seminal work, authority had been all but forgotten from philosophy, politics, history and most importantly, Law. Even among all the creative, weird or beautiful legal constructions human beings are capable of, international arbitration stands out as a particular beast, the one with the fewest restraints.

We have seen so far how arbitration has evolved historically, what its initial purpose was and how it has just recently transformed to the point where it has changed entirely. The question was then: what had changed? Authority and all that it entails, that is our answer. However, the type of authority we have been thinking about since the beginning was never the shallow version used by a majority of jurists, but a concept ingrained much deeper in society, one advocating to care for other people including unborn future generations, one where individuals are last in importance. A proper genealogy of the concept of authority was hence necessary in order to demonstrate the extent to which it had been wrongly used for centuries.

In the course of this demonstration, we have seen how authority started deteriorating with the advent of positivism, and with it, the advent of individualism. However, due to a lack of usage of arbitration at the time, the repercussions of this transformation would not be felt in arbitration before the beginning of the 20th century. And yet, there were still certain barriers which prevented arbitration from falling to its current point such as the gratuity of the proceedings and the exclusion of jurists for fear that they would "technocratize" the field. Moreover, arbitration was still aimed at local private people rather than globalized public structures.

After World War II came the decolonization movements, where people understandably wanted independence from those who had plundered their lands for centuries, the chief legal concern being the natural resources in their soil being extracted by and to the benefit of the colonizer. Given the tense political climate, foreign actors sought to use arbitration in order to legally settle these issues quietly and quickly, and so began the era in which we still find ourselves, that of intense legal text creation, of a monetarized arbitration and the downfall of arbitral authority.

The freefall was not over yet, as the U.S. legal actors entered the doors of international arbitration, and along with them an influx of oversized legal offices and hyper-aggressive litigators in the relatively gentlemanly world of arbitration, according to Lazareff at least. Everything problematic became more pronounced, more brazen and more well-known in non-initiated circles.

While there have been some "old" scholarly writings on the matter such as Garth and Dezalay's, critical works on the substance and purpose of international arbitration are usually not more than a decade old. This means that for over 60 years, the authority crisis in international arbitration went unchecked, unchallenged. Bearing this in mind, it is not surprising that the situation devolved to such a state.

There are certainly many other measuring sticks that can be used to look at the arbitral situation, but authority is undoubtedly the one making the most sense. It reinserts a sense of collectiveness, equity, distributive justice in international arbitration, avoiding the delusions of independence and self-sufficiency. It also reaffirms the importance of human relationships and the common good. In parallel, authority helps us debunk certain myths and problems such as technocratization, scientization, individualization, the false equivalency with power, common interests, etc.

Most importantly, it helps the legal philosopher reaffirm the importance of the legal interpreter in Law. We have seen how important equity is in this regard, and in the next and final part of this work, we will see how interpretation, via hermeneutics, in constructed. In other words, we have answered the question "what is the problem?" and will now do the same with the question "how can we solve the problem?": how can one reaffirm the importance of the legal interpreter in Law, which would help restore the authority of international arbitration? Our answer is: through philosophical hermeneutics.

Before diving into this matter however, we wished to emit a firm warning regarding this upcoming part 3. Hermeneutics is a scholarly domain of tremendous proportions, spanning all human cultures and languages. At no point in this dissertation have we contended that our work was exhaustive, and we would easily need one more PhD to properly explain the use of philosophical hermeneutics in Law.

As such, the aim of part 3 is, very modestly, to lay out some of the paths we can travel in hope of solving the crisis of authority in international arbitration. It will therefore be relatively short compared to the other two. As often as possible, we will enunciate the problems we see and understand, although we will not necessarily fully tackle them over the course of part 3.

Part 3: The hermeneutical sketch of possible solutions

Introduction

This third and final part concerning hermeneutics is by no means an in-depth study of the field, even when restricting said field to the sole legal hermeneutics. The reason is quite straightforward: legal interpretation and hermeneutics have been the topic of an abundant literature. An in-depth analysis would unquestionably require multiple dissertations. The sole aspect of the genealogy of legal interpretation has already filled a more than 600-page doctoral dissertation, brilliantly written by Frydman.

Our purpose here is to offer perspectives, tentative solutions whose further exploration seem interesting to us, eventually underscoring other problems we might encounter linked to our general dissertation. To be clear, the relative brevity of this final part is not because we deem it unimportant, simply because we need to make aware their existence and mechanics. If we were, however, to write an addendum PhD on the matter, these concepts would undoubtedly be thoroughly and happily analysed.

The main solution we offer is grounded in legal philosophy and addresses the overarching problem of international arbitration: its lack of authority and the tentative steps to restore it. There are undoubtedly many more solutions that could be brought to help solve this matter, but these are closer to legal sociology than legal philosophy. We will however highlight those we consider helpful to solve the problem we brought forth, albeit succinctly (the "employment of arbitrator" issue for instance)[1346].

[1346] The idea that an arbitrator is paid by the very people they judge has been anathema historically speaking, roughly until World War II. These costs then became bloated because of the complexification of arbitral procedures instigated by big law firm litigators (cf. *supra* part 2, V, 5, B, *c)*.

Overall, this final part is divided in two sections. The first one is the outline of the problem and its translation in hermeneutics, as well as the pertinent hermeneutical concepts. We will then analyse how these concepts are triangulated between hermeneutics, equity and the arbitral authority crisis.

I. Arbitral authority: a restoration through hermeneutics and equity?

1. The general problem

As seen *supra*, the lack of authority threatening the arbitral paradigm is manyfold: the legislative inflation, the disappearance of equity, rampant individualism, the fact that the common good is barely taken into consideration, the extreme proceduralization and technocratization of the field, the employment of arbitrators, etc.

Common sense dictates that a plurality of problems requires a plurality of solutions, especially if, as is the case here, said problems potentially span multiple academic fields. Exploring all the possible solutions would be highly interesting, although it would require multiple researchers with different specializations. As far as this dissertation is concerned, we will remain within the boundaries of one of legal philosophy's most classic themes: interpretation. Hermeneutics in its philosophic-legal variation to be very precise[1347].

Of all the problems enumerated over the course of this dissertation, the most legally salient is the disappearance of equity and the authority of the interpreter that goes with it. Hermeneutics is in our view a key component to rehabilitating equity and

[1347] Cf. *infra* part 3, II, 2, B, *c* regarding a more complete definition of hermeneutics. In order to set matters straight and avoid any immediate confusion resulting from a lack of clarity regarding definition, we propose the following temporary definition. Hermeneutics is generally considered as the science of interpretation of texts. It has a wide variety of currents, some of which are diametrically opposed (cf. *infra* part 3, II, 2, B, *a, b* regarding the gap between normative hermeneutics and philosophical hermeneutics) and can be traced back to Aristotle's notes on interpretation. The purpose of hermeneutics is to craft the best possible interpretation of a text and, according to Gadamer (p. 494), to adapt said interpretation to the concrete situation related to which the text is applied.

authority in international arbitration, which is what we will attempt to demonstrate hereafter. Other than that, hermeneutics can help us solve the issues of technocratization, excessive proceduralization, the lack of common good and the restoration of distributive justice.

Unlike other fields of Law and unlike judiciary procedures, arbitration still enjoys a certain degree of flexibility. Additionally, influences external to the arbitral actors are much scarcer, which means that the role and influence of the aforementioned actors is more important when compared to judiciary procedures. Consequently, those holding the most sway over the proceedings, arbitrators, have the potential, in our view, to shift the course of international arbitration and revert it to its rightful path, one with authority aplenty.

As noted by certain legal philosophers, hermeneutics is the main instrument of legal philosophy to restore authority, not only regarding some aspects of a legal dispute, but to entire fields[1348]. Walking this path implies clearing certain misunderstandings and misconceptions related to hermeneutics in general, legal hermeneutics in particular. Luckily or not, it suffers from problems similar to that of legal authority, in addition to finding the source of said problems in similar eras and places. As we will briefly see *infra*, Modernity and legal positivism are heavily involved in the way legal hermeneutics as a whole is now construed, for the better but especially for the worst.

Whether it is the sacralisation of both the text of law and the will of the legislator, a certain penchant for univocity to the detriment of analogy and the fact that the text is at the centre of the interpretative exercise all are hallmarks of legal positivism and its offshoots. The consequence of this situation is that the interpreter has been removed from their central position in the effectuation of Law. It is thus our hope that by reaffirming its position in the arbitral process, the interpreter will – even occasionally – free himself from the shackles of positivism, which have caused him to be scared of crafting legal reasonings[1349].

Like Frydman, we consider that a certain modesty is required when approaching Law and crafting legal interpretations[1350]. The objective of Law will always be to do justice in the concrete case, not to attempt a universally accepted and applicable

[1348] Cf. Frydman; Papaux, Introduction; Gadamer.

[1349] Cf. *supra* part 2, V, 5, B, *d*; Henry.

[1350] Frydman p. 682. Cf. also Grondin, Universalité p. 175; Marchal pp. 296-297; Dezalay/Garth pp. 192-193.

interpretation of a concept at each passing opportunity. The idea that a jurist must strive to find the univocal, universally accepted definition of a concept is nonsensical, in particular when bearing in mind the importance of prejudices in the interpretative exercise and the importance of concrete elements of a case ("it depends")[1351].

More importantly still, changing the way arbitrators interpret would allow them to regain control of the arbitral narrative, one that has been hijacked by dilatory procedural manœuvres, legislative inflation and the loss of the common good. This narrative is the same as in any legal domain: how to do justice. In other words, why is legal hermeneutics so seldom centred around honesty and justice[1352]? This might seem basic, trivial even, but this question is well worth asking for it can change the current trajectory of arbitral interpretations, all the while keeping in mind that these interpretations are the building blocks of equity, the very legal vector of authority[1353].

Given the junction of both topics, mention of the argument from authority is unavoidable. Its rehabilitation is clearly not the purpose of this dissertation, although there are some fascinating aspects as exposed *infra*. Interestingly, the argument from authority is emblematic of the overarching problems concerning authority, this time in the context of interpretation. Understanding the weight and problems of the argument from authority ultimately helps us to make sense of the way international arbitration should be conceived and the potential help it could provide to legal interpreters.

In the end, Law is governed by extremely simple ideas such as: the spirit of the law is superior to the letter of the law, justice is superior to the will of the legislator, or the interests of society trump individual interests (or so one would hope). Said ideas are the compass for authoritative legal interpretations, careful to augment the common good and which in turn, are the building blocks for the hermeneutical doctrine most adequate for the mindset international arbitrators should strive for. This doctrine unabashedly uses many of Hans-Georg Gadamer's developments on

[1351] Cf. *infra* part 3, II, 2, B, *c* regarding Gadamer's philosophical hermeneutics. Before moving on, we would like to issue a quick warning regarding the words used in relation with the notion of prejudice. We will move freely between the terms of "prejudice", "pre-knowledge", *"Vorverständniss"* or "pre-acquired knowledge". This is done so in order to periodically remind us that the term "prejudice" is here used entirely differently than in pure Law (a damage), in psychology or in sociology (a bias), and in a more positive way.

[1352] Frydman pp. 73-74.

[1353] Cf. *supra* part 2, V, 5, C.

philosophical hermeneutics, yet also contains elements of the Brussels pragmatic model developed by Frydman in his seminal doctoral thesis on the history of legal interpretation. The pragmatic model is largely based on ancient rhetoric, but also on certain modern principles such as the critique of authority, or more precisely, questioning it with an open mind and a certain modesty when necessary[1354].

2. A quick overview of hermeneutics

A. General disclaimer and some of the unfeatured problems and concepts

Before going any further on the matter of hermeneutics, we would like to draw attention to yet another occurrence of human finitude and certain concepts and intellectual reasonings closely linked to our topic, but that will not be analysed for reasons of time, space and purpose. We will list those hereafter, all the while explaining why we have elected not to fully analyse them.

a. The genealogy of hermeneutics and comparative hermeneutics

The first aspect of hermeneutics around which we will skirt is its genealogy. To be clear, it is impossible to avoid mentioning certain notable events and developments in the field, as they shape some of the current discussions and frame many of the problems encountered in contemporary hermeneutics. What we shall avoid, however, is the establishment of a full genealogy of hermeneutics. Firstly, because it has already been made quite thoroughly and quite recently by Frydman, but also because even if we deemed the work he authored insufficient, the genealogy of interpretation has historically been the item of more scrutiny than authority. Besides, such a task would not prove necessary given that hermeneutics is a solution to arbitration's crisis of authority, and not the heart of the problem and the dissertation itself.

Allusions will obviously be made to this genealogy throughout this section, but we intend to keep them brief and precise. Their purpose will be to lay out a minimal context when required, especially when establishing links between interpretation as a whole and authority. This manoeuvre includes the exclusion of non-western European hermeneutical theories. Although there is absolutely no doubt that traditions of other regions could prove insightful, fruitful and intelligent (the Chinese, east-European and Persian schools of hermeneutics in particular), a smart

[1354] Frydman pp. 677 ss.

comparative analysis would remain out of our reach for trivial language reasons, as only fragments of this knowledge have been translated[1355].

b. Hermeneutical controversies

The next point we will not cover are the various controversies and disproved hermeneutical theories. We will indeed limit ourselves to the bare useful minimum with regard to our main topic. This dissertation is not on linguistics or semiotics, nor is it its purpose to lay out the controversies of such a massive field of academia. The complexities of many of these controversies would not only require an immense amount of time to peruse, but also specialized knowledge we do not yet have[1356].

Corollary to this, current debates among hermeneutics scholars will mostly be occulted, in particular the one involving Gadamer, Derrida, Habermas and others like Ricoeur[1357]. The reason being that the field of hermeneutics is extremely dynamic, with scholars from all walks of life participating (physics, Law, theology, politics, etc.). We will also avoid going into too much detail over some of the technical terms used. The notion of abduction[1358] for instance, that has been – regarding certain aspects – picked up by some such as Føllesdal under the terms "hypothetico-deductive method", typically belongs to the realm of discussions partly avoided, especially when this implies having to restate entire debates and expose multiple complex concepts[1359]. Again, we draw inspiration from the models developed by Gadamer, Ricoeur, Eco and the Brussels legal philosophers (cf. *infra*).

[1355] Cf. Marchal pp. 286-288, with whom we agree: hermeneutics has been a preoccupation of scholars since millennia and did not start with Schleiermacher. The hermeneutics of tradition, for instance, has been well and alive in sub-Saharan Africa for quite some time (Onaotsho Kawende pp. 149 ss), as well as in Hebraic cultures.

[1356] For instance, the debate surrounding the place of the author in hermeneutics is undeniably useful, although a full account is clearly not necessary in order to grasp its underpinnings and impact on this dissertation. More remote examples would be the debates around the absent structure, the various functions of the sign, the links between syntax and semantics, etc.

[1357] Vallée pp. 61 ss; Mendelson pp. 49 ss; Bernstein pp. 587 ss.

[1358] Cf. *infra* part 3, II, 2, B, *d*.

[1359] Føllesdal pp. 255 ss. The very words used to describe this method are misleading: from a hypothesis is abducted a *théorie candidate*, which then needs to be verified by facts, clues or other rules, which would make it hypothetico-inductive, not deductive. The entire debate surrounding deduction, induction and abduction is a fascinating one from which jurists could draw both fundamental knowledge and wisdom (cf. Papaux, Qualification pp. 184 ss, 483 ss). However, the roots and ramifications of this debate are extremely deep and complex, as are the problems caused by certain misconceptions. And while any jurist would benefit from understanding this matter more thoroughly, any worthwhile essay on the matter would need to focus primarily on this topic, not treated as a "side dish" in another study.

For obvious reasons of time, space and purpose, we do not develop our own hermeneutical model of legal interpretation[1360].

Consequently, and considering the scholars around which our analysis revolves, necessity dictates that we limit ourselves to occidental schools of hermeneutics. While doing so is enough to indicate solutions and draw conclusions, it is very unfortunate as it limits the scope of this dissertation. Other than the fact that hermeneutics is only presented as a way to soften the authority crisis of international arbitration around which this dissertation revolves, this choice is dictated by linguistic incapability such as reading Chinese, Hindi, Farsi, Russian or Arabic. The vast majority of hermeneutical works in these languages has not been translated in a language accessible to the author of these lines, and reading the few translations on the matter would most definitely not do justice to schools of hermeneutics sometimes more ancient than the Greek one[1361].

c. Methods of interpretation

In addition to history and controversies, we will also avoid the methods of interpretation (historical, teleological, etc.) and their application. There is already an abundant literature concerning legal interpretation methods including many tribunal decisions with variably clear definitions of the many methods[1362]. The same can be said about the way these methods apply, which have been the item of intense scholarly scrutiny since ancient Rome at least.

However important methods of interpretation may be to jurists, they do not help us make sense of the arbitral authority crisis. Additionally, their application heavily depends on the mindset of the arbitrator, which is where the problem lies; methods of interpretation are only as efficient as their wielder. Indeed, the mindset is much

[1360] Furthermore, given the prevalence of these authors and the controversies they have sparked over the years, we do not engage in technical debates concerning their bodies of work. Gadamer most of all, has his share of critics ranging from the justified (Marchal pp. 295-296) to the absurdly groundless (Lindahl), like every storied author throughout history. Considering that Gadamer is often used as a starting point, critically or not, in hermeneutics, the compilation of all books and articles related to him would be endless and more importantly, pointless. This is why we limit this brief hermeneutical part to the points we deem most salient and pertinent.

[1361] In many ways, this is quite a pity as one of the biggest schools of thought in history, Confucianism and neo-Confucianism, are quite in line with the general Aristotelian accent of the present dissertation.

[1362] E.g., ATF 145 IV 17; *arrêt de la Cour de cassation du 3 juin 2021* 20-15.545; ECHR Correia de Matos v. Portugal 56402/12.

more important than the methods, especially in complex fields like international arbitration and in light of the notion of *Vorverständniss*[1363].

d. Interdisciplinarity, semiotics in particular

The field of interpretation is immense, even when sticking solely to hermeneutics. In order to avoid the dilution of the upcoming analysis, interdisciplinarity among the various domains of interpretation will be reduced to the strictly necessary. Chief among these domains is semiotics, the study of signs (written and non-written), perhaps the most fundamental, overarching and complex of all. Broader than hermeneutics, it serves as its base by studying signs that are then understood according to hermeneutical methods which result in an interpretation[1364].

This is evidently quite unfortunate, because understanding the basics in semiotics should be required from any jurist in order to ensure that the interpreters of the Law see and seize the problems and difficulties behind the articulation of symbols and channels of communication[1365]. These basics have often been articulated around a trifecta of notions first laid out by Ogden and Richards[1366] and picked up/adapted by many in semiotics: symbols, thoughts and referents. The symbols are what signifies *(signifiant)*, the thoughts are what is signified *(signifié)* and the referents are what is referred to by both symbols and thoughts *(référents)*.

Despite the prevalence of this triangle in many semiotical writings, we usually err on the side of caution in this matter. The criticism of Eco is particularly sharp and astute: *"Toute tentative d'établir ce qu'est le référent d'un signe nous oblige à définir ce référent comme une entité abstraite qui ne recouvre qu'une convention culturelle."*[1367] Given the difficulty (often faced in Law) cultures have establishing a constructive dialogue[1368], the weight of each person's *Vorverständnisse* and the fallacy of univocity (and hence universalism), reducing the complexities of

[1363] Cf. *infra* part 3, II, 2, B, *b* and III, 2.

[1364] We are intentionally simplifying the interactions between semiotics and hermeneutics in order to render them more understandable. A proper account would take too much space and time and would require excellent knowledge of semiotics, which we still lack.

[1365] Cf. Probert's excellent article on the matter, especially regarding law students' critical skills. A shame that his counsels have remained vastly unheeded.

[1366] Ogden/Richards p. 11.

[1367] Eco, Structure p. 63.

[1368] Even inside a single country, cf. the interactions between Swiss Germans and Swiss Latins, Parisians and non-Parisians, northern Italians and southern Italians, French Canadians and English Canadians, Tokyoites and Kansai-jin, etc.

human language interactions to a mere three notions seems indeed excessively ambitious[1369].

While links between semiotics and this dissertation could justifiably be established, they would deviate us too far from our original topic. Given not only this broadness, but also the purpose of this third part (i.e., proposing a solution to international arbitration's authority problem), semiotics will be avoided if possible. Full developments on semiotics would indeed require a thick addendum in order to be properly integrated. If not done appropriately, the link between authority and interpretation would probably be blurred and very hard to convey.

B. Selected useful definitions

In this section are featured the definitions of the more central concepts of part 3. Namely those helping us to make sense and solve some of the problems mentioned *supra*. For the sake of both concision and precision, technical details are avoided when possible, but mentioned when necessary. Given the transversality of this dissertation as well as the nature of this third part, avoiding Daedalian reasonings and explanations is all the more cardinal as the final conclusions draw ever closer.

a. Normative hermeneutics

Before defining normative hermeneutics, we would like to emit a small disclaimer regarding the variety of terms used to describe currents and types of hermeneutics. In hermeneutics, depending on the author or the era, denominations can change entirely. For instance, philosophical hermeneutics, has been sporadically and wrongly named "normative hermeneutics"[1370]. The same author then proceeded to name what we call normative hermeneutics, "descriptive hermeneutics." Normative hermeneutics has also been deconstructed in other subcurrents such as "literalism" or "scientific policymaking", both of which exist in harmony with our version of normative hermeneutics[1371]. Likewise, what is here called normative hermeneutics has also been called the "philological model", borne from the work of Hobbes and Spinoza[1372], and probably corresponds the most to our definition of normative hermeneutics. The definition of normative hermeneutics being multiple, we will use

[1369] Eco, Structure p. 59. Cf. *infra* part 3 II,2, B, *b.*

[1370] Dinkler pp. 127 ss.

[1371] Garet pp. 37 ss.

[1372] Frydman pp. 324 ss, 404 ss. Normative hermeneutics has also been called "methodological hermeneutics" (Gjesdal p. 356).

it in accordance with what is described hereafter, for the simple reason that those terms are the most widely encompassing ones.

Normative hermeneutics can be described as the science of interpretative rules. Its purpose is to establish the rules and methods to follow when one wishes to interpret a text scientifically, excluding all traces of subjectivism and arbitrariness from the interpretation. Even more so, interpretation is only required when the text is not clear, hence drawing from the Latin saying *in claris non fit interpretatio*[1373].

The scientific aim of normative hermeneutics already shows a closeness to legal positivism, further reinforced by the fact that both consider univocal interpretations not only to be possible, but constituting the vast majority of cases. If Law is indeed a science, as postulated by legalists, its purpose is the truth. It consequently does not need to be interpreted, merely uncovered. Once uncovered, it only needs to be applied according to the ruling univocal perception: law is truth, so why bother to interpret it[1374]?

The problems of normative hermeneutics are legion, but the main consequence in Law is that whatever results from normative hermeneutics is bound to be extremely static. Because normative hermeneutics views Law as the science of legal texts, it remains the same until something new is discovered, without taking into account the evolutions of the society to which said Law applies[1375].

[1373] Papaux, Introduction pp. 163-165; Grondin, Herméneutique pp. 6-7, 22 ss; Frydman pp. 404 ss.

[1374] Frydman pp. 395 ss; Ricoeur, Cinq pp. 28-30. What is indeed univocal, absolute, does not need anything but its very existence to be understood. This cuts to the heart of our problem regarding authority and its collective dimension: how could a method of interpretation so ignorant of human differences, relations and contingency be used to exhume a common good from whatever positivist ashes are left?

[1375] Paillé/Mucchielli p. 115. This may be reminiscent of the U.S. Supreme Court's conservative justices' originalism, which consists in applying a text of law (the U.S. Constitution here) according to the way its authors had designed it at the time the text was created. Although there are a few differences, such as the fact that originalism implicitly admits that there can be multiple interpretations of the same text and that it emphasizes to the extreme the will of the author rather than focusing on the text above all, both doctrines refuse any application of non-written sources. The main difference, however, is the fact that originalism is a legal doctrine whose application is largely limited to U.S. Law, whereas normative hermeneutics is much broader and not limited to Law, although it is its main field of application. To be clear, this static vision of science is also quite false, although it is even more widespread in natural sciences than Law, which is again, quite the irony for people convinced of having their primitive state (cf. Heinzmann pp. 324-325 for instance).

The second main consequence of normative hermeneutics is directly tied to the first: the univocity of legal interpretations. As mentioned *supra*, the purpose of normative hermeneutics, on the rare occasions it needs to be applied, is to indicate what is the true interpretation of a text i.e., the "right answer" (univocal, "one voice", one correct answer). The problem is that the very notion that a text only has one interpretation, or even one reasonable interpretation, is extremely reductive and completely ignores the complexity and contingency of human relations and human Laws[1376].

Further still, the metaphysics of univocity precludes us from apprehending some of the most basic subtleties any field of academia can deliver, even more so in Law, nuanced discipline par excellence. Univocal notions are absolute, meaning that they can be removed from any context, all the while remaining applicable to any context. They are unaffected by time and space as they are the only possibility, also meaning that they are necessary, removed from contingency and any choice or debate[1377]. Completely lacking in subtlety, the quasi-canonisation of univocity by legal positivists and legal contractualists poses immense problems to legal interpretations, whose interpreters remain stuck in a binary paradigm: either the law is applied, or it is not. The effectuation of the Law is never questioned, because identifying the will of the legislator/co-contractors is enough, as it "simply" needs to be applied.

Quite bluntly, univocity is only conceivable in theory and could never be applied practically. Every time a judge is solicited, it is precisely because there is a plurality of legal interpretations, usually regarding the very item over which parties and lawyers fight. A univocal interpretation removes contingency, withdrawing the judge's most vital characteristic: to choose and decide[1378]. The upcoming Gadamerian *Vorverständnisse* add yet another argument to the practical impossibility and theoretical defects of univocity, the analogical nature of the notion of cause especially[1379].

[1376] Ost/van de Kerchove, Savoir-faire p. 29; Papaux, Qualification pp. 45 ss; Gadamer, Philosophy p. 121.
[1377] Papaux, Qualification pp. 47 ss.
[1378] Cf. Bezat/Papaux for relatively summarized explanation.
[1379] Papaux, Qualification p. 64; Aristotle, Metaphysics 1016b34-1017a3.

b. Vorverständnisse

Vorverständnisse are construed in their broadest sense i.e., all knowledge that influences a person's thoughts, the reflection of their personal history[1380]. They mostly constitute the individuality of each jurist and are visible in international arbitration more than anywhere else because of the diversity of legal interpreters and their frequent interactions. In light of the contingency inherent to humans, each person's *Vorverständnisse* are different, and this difference becomes more pronounced the wider the cultural gap is, especially if only because of linguistic roots and structures[1381].

Their mere existence shows how removed from practical reality univocity and normative hermeneutics truly are. Continuing Gadamer's endeavour, *Vorverständnisse* are the reason why philosophical hermeneutics is much more adapted than normative hermeneutics to interpret Law, if only because it offers a pragmatic approach to legal interpretation, far less static, ideological even, than its normative counterpart. Reflecting a dynamic conception of interpretation, philosophical hermeneutics is also sometimes called "hermeneutical ontology"[1382]. Before giving a definition of philosophical hermeneutics however, the notion of *Vorverständnisse* needs to be better understood.

Loosely translated from German as "pre-knowledge", "pre-judices" or "pre-judgement", *Vorverständnisse* are the baggage people carry with them before interpreting a message, the knowledge we all have before reading or hearing

[1380] Gadamer pp. 379, 394, 436-454, 529, 570, 628 ss.

[1381] Bredin, Remarques pp. 114-115; Amselek p. 12; Grondin, Universalité pp. 166, 174; Paillé/ Mucchielli pp. 110 ss; Bachmann pp. 184-186.

[1382] Cf. Frydman for instance. The question as to why the term "ontology" can be used to describe Gadamer's theories is fascinating and would have been discussed quite openly had hermeneutics, not authority, been at the centre of this doctoral dissertation. Very quickly however, Gadamer developed what had been laid out by his former professor, Martin Heidegger, in *Sein und Zeit*, and further elaborated on the matter, taking a resolutely linguistic approach, something which Heidegger avoided, or probably did not care enough to add it to his reflexions on the subject and the object (Grondin, Universalité pp. 158-159, 162-164). More precisely, by using the distinction between the subject and the object, he provided an answer as to how we could enter the hermeneutical circle: through prejudices. These prejudices belong to all who can define themselves as historical beings, as subjects, with regard to other subjects or objects. In the end, according to Ricoeur, language and text interpretation are only second to the definition of our being in relation with its constitution of being, which is why Gadamer's hermeneutics are deemed ontological (Ricoeur, Cinq pp. 38-43).

anything. They affect both our entry and our stay in hermeneutical circles[1383]. *Vorverständnisse* are of all types and do not necessarily match the field of what is being interpreted at that moment[1384]. They can be fleeting or the result of years of intellectual debates with others or with ourselves[1385]. They are each reader's or listener's personal history, the sedimentation of one's general intellectual makeup and sometimes reductively thought of as biases[1386].

In this context, the impact a society has on its dwellers is very heavy, as it is the frame within which each citizen evolves[1387]. Whether a person feels comfortable or not in a society impacts their prejudices negatively or positively, but the impact remains. This is painfully obvious to anyone who interacts with people from other societies, especially if doing so involves different languages or different skin tones. A historically famous example involves Marco Polo who, upon seeing rhinoceroses for the first time, thought he had glimpsed a fabled unicorn[1388].

Vorverständnisse are the prime reason why the idea of an international arbitral order is nothing but a fantasy, quite the sad one at that, alongside notions of universality and univocal interpretations[1389]. We do not need to study the various currents of legal philosophy to identify why, as the comprehension of linguistics and hermeneutics gives us a very peremptory answer: individual experiences are too different and cultures too varied and numerous to univocally define even the most basic of freedoms such as the freedom of speech.

While international arbitrators probably have commonalities due to them belonging to the same professional circles, their origins, cultures, languages, etc. vary immensely. By virtue of the sole existence of prejudices, let alone their impact on each's vision of arbitration, an independent arbitral order is not conceivable. The variations among arbitrators, the various ways arbitration is received in each country, the way an award is enforced, economical balances, historical stigmas, etc. are all factors precluding this idea. Even the notion of common good, if it were constructed by members of this phantasmal order, would not hold up: how does one build a truly coherent common good when all the other members of the arbitral

[1383] Petev pp. 58-59.
[1384] Amselek pp. 12-13.
[1385] Grondin, Herméneutique pp. 57-61.
[1386] Cf. Sussman, who freely moves from biases to prejudices to blinders.
[1387] Plato, Republic 419, 462b-462e.
[1388] Eco, Ornithorynque pp. 81 ss.
[1389] Cf. *supra* part 2, V, 5, B and C.

order hail from various societies, each not only with their own rules, but their own conception of the common good[1390]?

Even if we were to lower the bar to the point where an unauthoritative version of international arbitration was ideal, like the current one, the idea that there could be an independent arbitral order remains widely impossible to conceive because of prejudices. This is why, if a solution to international arbitration's problems is required, it would need to factor in the multiplicity and the immense number of prejudices floating around among scholars and practitioners of international arbitration, hopefully coalescing them around an authoritative common good[1391].

A case presided over by a famous Parisian arbitrator[1392] serves as a reminder as he fell in this trap as president of an arbitral tribunal. Very quickly, a European contractor (the claimant) was opposed to an Ethiopian public office (the respondent), and the arbitration clause specifically indicated Addis Ababa as the place of arbitration. The arbitral tribunal, however, without providing any justification, decided to move the place of arbitration to Paris. Even worse, the tribunal decided to move on with the proceedings despite the respondent filing an appeal on the matter, to the point where the European contractor themselves

[1390] Given the prevalence of individualism in contemporary occidental societies, defining the common good of a single country, by its nationals or habitants only, is already an exceedingly difficult task (cf. *infra* in the general conclusion). The very mindset to adopt when facing such a task would vary from person to person: do we use the common good as a floor under which we cannot sink at any cost, or do we use it as a compass indicating the general direction a society must take in order to become as virtuous as possible? The aporias are numerous to the point where we have begun to wonder why one would want to establish, even shoddily, such a community. To scrub and erase differences to suit the needs of the dominant thought current inside said community? For an artificial attempt at univocity? For the sake of creating a big club? For childish dreams of self-aggrandizement?

[1391] We can genuinely ask ourselves, at this point, whether a common good can actually be defined in the current international arbitration paradigm. Indeed, the actors of international arbitration are so heterogenous that the only aspects of arbitration they seem *a priori* capable of defining as common are its procedural ones. The problem is that procedure has never been part of a society's common good, despite the fact that it can surely reflect some of its important aspects through rules like the right to an attorney or the right to be heard. However, this "universal" procedure is merely the lowest common denominator between actors of the arbitral world, which only admits the most superficial harmonization of arbitral actors i.e., a formal one. This is all the more regrettable given the frequency of important arbitral cases, not only financially but also from a societal and economic standpoint, meaning that opportunities to augment the field are abundant enough to initiate the necessary profound changes to restore international arbitration's authority.

[1392] ICC arbitration no. 10623. Cf. the summary *in* Schwartz pp. 797 ss and 21 ASA bulletin 59 (2003).

withdrew without final award to settle. Later on, the president of the arbitral tribunal doubled down on his reasoning[1393], showing a limited capacity for self-reflection, quite the troublesome issue given the importance of wisdom in arbitration[1394].

This kind of behaviour, far from serving international arbitration, directly participates in the crisis it is suffering from. More than unauthoritative, this decision was simply bad practice, one where an arbitral president is unable to overcome his prejudices to the point where even the most basic and simplistic form of justice, commutative justice, cannot be fulfilled[1395].

Without reconstructing the entire genealogy of *Vorverständnisse* (sometimes also called *Vorurteile*), it is generally accepted that their negative image is yet another inheritance from Modernity[1396]. Prejudices[1397] are, quite like authority, very widely accepted under the negative light Modernity shone upon them: *"Le préjugé étant un 'jugement porté avant d'examiner, il est clair que toutes les opinions religieuses et politiques des hommes ne sont que des préjugés, vu qu'ils ne peuvent examiner les premières sans crime, et les dernières sans danger'."*[1398]

Generally speaking, prejudices are nearly always used interchangeably with biases, the latter often being used to define negative thought penchants in international Law and international arbitration in particular. Prejudices, however, are not biases as the latter point toward something resolutely negative, while the former are much more neutral, basically designating any type of prior knowledge. Biases should allegedly

[1393] Schwartz p. 801; Gaillard, Interférence pp. 90 ss.

[1394] Cf. *supra* part 1, III, 4, B and C for instance.

[1395] Cf. Habermas p. 145, who understood well how prejudices rendered objectivity inherently estranged to the human mind.

[1396] Gadamer p. 436. Cf. Delon who traces this genealogy back to Modernity, through the writings of César Dumarsais.

[1397] Shifting to psychology, the notion of prejudice is somewhat confusingly construed as "thinking ill of others without sufficient warrant" (Allport p. 6), adding a distinction between prejudgements (reversible) and prejudices (irreversible, Allport p. 9). Reinforcing the confusion is the fact that Allport indicates the etymological root of prejudice, *praejudicium*, which is literally a pre-judgement and regroups both his definitions of pre-judgement and prejudice, blunting the distinction. Overall and in accordance with the brief definition given, the perception of prejudices is resolutely negative, as the main example to describe them is that of ethnic prejudice, to which Allport seems to assimilate the general notion of prejudice (pp. 6-9). Furthermore, he views negative emotions such as frustration, anxiety, aggression, guilt and projection as the main sources of prejudices, a far cry from the notion of *Vorverständnisse* developed by Gadamer (Grondin, Universalité pp. 166-167).

[1398] Delon p. 145 quoting Dumarsais.

be avoided at all costs in the name of objectivity[1399], but this is not the case of *Vorverständnisse*, whose usage is actually necessary in legal interpretation. Since Bacon, prejudices have been denounced for impeding "true" scientific research, one without prejudice, solely focused on facts. However, herein lies the problem: *Vorverständnisse* are inherent to human beings[1400].

Before continuing our reasoning concerning prejudices, it is important to firmly establish their distinction with cognitive biases[1401]. The reason to do so is because the notion of bias has been widely talked about, and for good reasons, in other fields of academia such as criminalistic. It is also because the limits between biases and prejudices are porous to the point where, not unlike authority, concepts become difficult to use. As we will see shortly, the main difference between both is that biases are inherently negative, while prejudices are a broader, more neutral concept, sometimes positive, sometimes not depending on the situation. Consequently, addressing our cognitive biases is strongly recommended to become a better interpreter, while ridding ourselves of our prejudices, although impossible given their inherence to our human condition, would severely hinder our interpretative and hermeneutical capacities.

Thanks to the research in cognitive sciences, we know that our brains work on an information before it can even reach our consciousness[1402]. This means that we cannot fully control our thought process, which starts before we even finish receiving a piece of information. Even at birth, our brain is not a *tabula rasa* as it contains, among other capabilities, the capacity to establish proportions, to the point where we can reason by analogy by the time we are three months old[1403]. In addition to this biological makeup, there is also our own personal experience of life i.e., our cultural and personal frame. Their combination shapes the way we interpret, whether we are talking about the input or output of information, as well as the links and connections we establish between bits of information[1404]. Both are central to the

[1399] Cf. *infra*.

[1400] Gadamer, Philosophy pp. 122-123.

[1401] We understand that "cognitive bias" is a very general term featuring many subcategories such as interpretation biases, memory biases, attentional biases, etc. However interesting it would be to analyse all of these subcategories, our present purpose is to dissociate biases from prejudices. As such, using the common denominator of all these subcategories i.e., cognitive biases, is enough for said dissociation, which is why we will not be venturing into the meanders of the various types of cognitive biases.

[1402] Toscani p. 74.

[1403] Toscani p. 77.

[1404] Toscani pp. 74 ss.

formation of our biases and *Vorverständnisse*, although this does not mean that they evolve identically.

Cognitive biases can be defined as "une organisation de pensée trompeuse et faussement logique, dont la personne s'accommode pour prendre position, justifier des décisions, ou encore interpréter les événements."[1405] The Cambridge dictionary defines biases as: "the way a particular person understands events, facts, and other people, which is based on their own particular set of beliefs and experiences and may not be reasonable or accurate." More neutrally, "By cognitive bias, we mean cases in which human cognition reliably produces representations that are systematically distorted compared to some aspect of objective reality."[1406] In light of these definitions, biases should hence be avoided, not in the name of a biologically unattainable objectivity, but in the name of the interpreter's credibility and authority, which would be severely dented should they be unable to temper their biases, especially if those reflect irrational thoughts.

With that being said, and as already briefly stated *supra*, how do we keep biases in check when they are inherent to our condition as human beings[1407]? Furthermore, if biases are a negative influence on our interpretative process, what of the useful knowledge accumulated through our lives that influences us? In Law for instance, one's university studies and legal practice are typically part of a person's prejudices. Depending on the context, these prejudices can even become mandatory (for instance, only an attorney can plead a case in front of the Swiss Federal Tribunal). At what point do these prejudices start turning into biases, if they indeed do so? More difficult still, how do we discard biases without outright rejecting prejudices as well? We will see shortly how important prejudices are, essential even, in the way we process knowledge, even more so when holding complex and long reasonings.

[1405] Toscani p. 76.

[1406] Haselton/Nettle/Murray p. 968. These authors, however, seemingly insert themselves in a less confrontational perspective wherein biases are fairly similar to prejudices: "Viewed in this way [the way of evolutionary psychology], if a cognitive bias positively impacted [ancestral] fitness, it is not a design *flaw* – it is a design *feature*." (p. 968)

[1407] Dyèvre p. 81. For the sake of clarity, we shall, from now on, operate the following distinction between biases and prejudices: the former will correspond to the definition drawn from Toscani *supra*, while the latter will be defined *infra* and answers to a more "neutral" definition regrouping both good and bad *Vorverständnisse*. Reading on the topic made us indeed realize that prejudices are rarely, if ever, distinguished from biases. The reason is probably because doing so requires compounding neurology, linguistics, psychology and Gadamerian philosophical hermeneutics, an unusual mix of academic fields.

The ability to separate biases from *Vorverständnisse* and retaining only the latter is something experts are currently still working on and is thus the subject of a volatile and intense scrutiny. For now, and without any background in neuropsychology, the most adequate answer we can elaborate to these questions may appear trivial, but it has the merit of being readily accessible. This would be the development of one's own *esprit critique* to the point where we become capable of learning and unlearning, constructing and deconstructing what we come across in our studies[1408]. Admittedly, there inevitably comes a point where doing so becomes impossible, where we reach the limits of our mental capacities. Vaguely reminiscent of Descartes' *tabula rasa*, the idea of developing our *esprit critique* by deconstructing learned and tried structures of the mind presents the advantage of having to re-apprehend something we already think we know in order to actively re-construct it, meaning that this time, our understanding of an idea, a situation, a problem, is not passive. This already seems like a more appropriate mindset to have when applying philosophical hermeneutics, particularly one resting on the "dynamism" of prejudices[1409].

In any case, we understand that using *Vorverständnisse* means that there can be some confusion with cognitive biases. And although we have laid out two separate definitions, we recognize that there may still be similitudes and overlaps, especially if we start digging deeper into the neuropsychology of both notions. Our purpose, however, is to make sure that the difference between both is firmly understood. Under the light of philosophical hermeneutics, prejudices or *Vorverständnisse* are not inherently good or bad the way cognitive biases are[1410]. We will, however, see that they are intrinsic to human beings in ways similar to certain cognitive biases, meaning that whether this option looks appealing or not, they need to be taken into consideration, and that far from being something negative, these prejudices help us build our analogical reasonings[1411].

[1408] Toscani p. 80.

[1409] Papaux, Introduction pp. 165 ss. It is worth noting that any reconstruction undertaken will necessarily be impacted by prejudices as well, but this time, the interpreter should be more aware, more sensitive to their own prejudices.

[1410] Even then, we have seen *supra* that certain fields such as evolutionary psychology do not consider biases to be necessarily negative. We will, however, retain the more generally accepted definition of "bias" for clarity's sake.

[1411] Cf. *infra* part 3, II, 2, B, *d*.

Certain legal authors[1412] unabashedly assimilate biases to blinders without extracting prejudices from the "bias category" while advocating for objective judgements. However, objectivity is far from attainable in any field, Law especially with regard to the current dissertation, which is why tribunals are quite often composed of multiple judges[1413]. The arbitrators' various *Vorverständnisse* ideally temper each other to diminish the part of subjectivity in the final decision. Given the inherence of prejudices to human nature, being objective and striving towards univocity is once more shown to be close to a vanity project, considering its impossibility to concretize[1414].

As per Gadamer, an individual's prejudices, much more than their judgements, constitute the historical reality of their being. Accordingly, prejudices are not inherently negative or positive. Determining which are what belongs to Reason and varies according to the concrete circumstances and context of each interpretation. Gadamer's stance on this matter stands in stark opposition to that of the precursors of Modernity such as Spinoza, who considered prejudices to be an impediment to intelligent reasonings. More particularly, he viewed the prejudice per which all things act according to their final cause to be the most detrimental. According to Spinoza, this is because such a prejudice prevents us from doubting anything that acts in accordance with our perception of said things' final cause. He also framed the prejudice of authority in a similar perspective i.e., a prejudice causing us to not use our Reason at all, whereby we succumb to the mindless application of an authority's interpretation of a situation[1415].

[1412] Sussman p. 46; Bachmann pp. 184-186.

[1413] Cf. *supra* part 2, III, 1 and part 3, II, 2, B, *b*.

[1414] The relation between objectivity and univocity is an interesting one yet avoided in this dissertation for reasons of time and purpose. Very quickly however, objectivity can be described as both the condition and, to a lesser extent, the purpose of univocity. The result of a univocal interpretation is one so close to perfection that it renders any other interpretation non-existent, or at least irrelevant. Reaching such a state of quasi-perfection requires an objective state of mind, or else the interpretation is tainted with the interpreter's subjectivity, their biases to use their word. Furthermore, in addition to being a condition, objectivity has become a purpose through the epistemological change of Law from *ars iuris* to *Rechtswissenschaft*. Truth has indeed taken precedence over justice in the legal paradigm, which is why objectivity has become as prevalent in Law as in natural sciences (cf. Papaux, Introduction pp. 1-134 for the full exposé). The purpose of legal interpretations is thus to reach an objective solution, necessarily univocal, according to the dominant positivist legal thought.

[1415] Gadamer pp. 445-449; Spinoza pp. 123 ss. We will see *infra* part 3, III, 6 that the reason why authority was vilified in the field of interpretation was mainly because of the argument from authority. Although the rehabilitation of authority in hermeneutics would be an interesting

The misinformation surrounding prejudices is remarkably similar to that surrounding authority: both are rooted in an effort of *tabula rasa*, of severance from the past. Indeed, traditional authority was considered by modern scholars as an impediment to the advancement of science, which caused them to reject both tradition and authority, in Law as well, despite it not being a science[1416]. From a more hermeneutical standpoint, this idea of severance from the past[1417] was akin to a severance from *Vorverständnisse*, which represent each person's hermeneutical past, their own personal history. This scientific infatuation of Modernity caused intellectuals to think that they could reorient the act of interpreting towards objectivity (and in turn univocity) and away from prejudices[1418]. Effectively, the Cartesian methodology of research consisted in the *tabula rasa*, which meant a severance from the past in order to ensure that intellectual demonstrations were not tainted by any fallacy committed by past thinkers and the underdevelopments of science[1419]. Other than the obvious problems related to the atomization of both thought and human, the *tabula rasa* implies immense losses of time every time one starts a reasoning. If indeed, we cannot assume anything, this means we need to

topic, and an important one, it will not take centre stage here despite us establishing an important distinction *infra* on the matter. While it remains important to avoid any blind belief in the argument from authority, it is just as important to recognize its value if we are to understand our own prejudices in the interpretative process.

[1416] Cf. *supra* part 2, III, 1-3.

[1417] One could even argue that this intellectual era was looking for a re-foundation of authority. Given that the most important institution in Europe for a millennium, the Roman Catholic Church, was going through a period of turbulence (schism, unauthoritative popes such as Alexander VI, the Spanish Inquisition, etc.). The ensuing loss of authority (cf. *supra* part 2, III) was never compensated as Augustus once did; because many intellectuals opposed what the Church represented, and concepts such as authority and tradition fell into disrepair, in spite of an importance and a history going beyond monotheism and the Church. This loss would explain why concepts such as the univocity of science and Law, as well as the objectivity of the scientific methodology became so prominent: they were used in an attempt to replace God and the Church in their roles as centres of authority in European medieval societies (Steiner pp. 8, 12). This would tend to confirm our hypothesis according to which human societies cannot exist deprived of authority without falling into a thorough version of nominalism (cf. *supra* part 2, III, 1).

[1418] Grondin p. 54. Other authors who witnessed this trend in real time came to similar conclusions as ours: *"Dumarsais marque bien le lien entre les préjugés intellectuels qui cherchent un modèle dans l'Antiquité et la tradition, et les préjugés sociaux qui font dépendre l'individu de sa naissance. La solidarité semble définitivement établie entre préjugés et passé."* (Delon p. 145)

[1419] Cf. *supra* part 2, III, 1.

verify everything, an admittedly impossible task for any human being, whose finitude usually hits him after eight decades nowadays[1420].

A beautiful, relatively recent example is the demonstration of Fermat's last theorem by Wiles, who, in order to succeed, used the work of Taniyama, Shimura, Frey, Ribet, Kolyvagin, Iwasawa, Galois, etc. Had Wiles decided to go the Cartesian route, he would have never been able to demonstrate Fermat's last theorem, instead he travelled a path of authority, one where he inherited then augmented the work of other authoritative figures of the past.

In the arbitral context, where interpretations need to be made in a matter of months at best, of minutes at worst, it becomes very obvious that the strategy of ridding ourselves from anything belonging to the past is impossible: it is the thread of history. In turn, prejudices, which are the reflection of a person's history and thus their past experiences, are an integral part of our capacity to apprehend what surrounds us and interpret the information we receive. The consequence of which can be both positive or negative depending on the case and the interpreter.

As we now stand, prejudices are far from being "blinders" but are part of the historical and personal frame of everyone. They do not incarnate something we need to avoid at all costs, simply because doing so is humanly impossible. No matter how much one may indeed try to shed one's self from one's self, getting rid of prior knowledge and experiences to the point where we discard our personality, our subjectivity from our judgement, is not feasible[1421]. Doing so is not even desirable. We have seen that, historically, arbitrators are chosen for their propensity for fairness and wisdom. This has not been the case for a few decades but even so, the choice of arbitrator rests on each "candidate's" personal history, what they have accomplished. Their prejudices are actually why they are chosen or not.

Understanding the weight of prejudices is the pre-requisite step to tempering them. Seeing and grasping how important the past is to the present is not synonymous with being trapped in the past and by arguments made by previous authors, simply that even Augustus, when he renewed Rome's foundations, could not discard it, which is why he accepted the title of Augustus but refused that of Romulus[1422]. It is only

[1420] Delon p. 149: *"L'individu solitaire ne peut parcourir seul l'histoire de l'humanité, il lui faut accepter l'héritage de 'l'expérience et du temps'."*

[1421] The very distinction between objectivity and subjectivity is never as clear-cut as jurists of all walks of life tend to think. There is a good reason why this distinction is one of philosophy's *summa divisio*.

[1422] Bredin, Remarques pp. 114-115; cf. *supra* part 2, II, 2.

after such a step is taken that we can attempt to distance ourselves from those prejudices and avoid the excesses of our own subjectivity, or at least question them. Even so, prejudices can never be discarded and most of the time, acknowledging them is as far as we can go, establishing the slightest of distances is already a monumental undertaking for even the most seasoned jurists.

A good legal example illustrating this theory is the Roper v. Simmons case decided by the U.S. Supreme Court[1423]. More precisely, what interests us are the interpretative steps taken by Anthony Kennedy, the decisive swing vote in this matter. This case is the legal continuation of another decision from the U.S. Supreme Court 16 years prior[1424], and in which the same Kennedy was part of a majority which "rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group." 16 years later, however, Kennedy reversed the prior decision, and in his delivery of the opinion of the court, he demonstrates how the national consensus around the death penalty for juveniles under 18 evolved during this 16-year span. More importantly for the present dissertation, it shows how Kennedy's prejudices evolved over this stretch.

By using more recent and repeatedly demonstrated sociological, psychological and neurological studies, Kennedy was able to change his *Vorverständnisse* to the point where, when Roper v. Simmons landed on his desk, he was able to formulate a more complete and just interpretation of the matter: "[o]ur determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. […] It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." The difference with the Stanford decision of 1989 is quite notable: "[a]lso insufficient is socioscientific or ethnoscientific evidence tending to show that capital punishment fails to deter 16- and 17-year-olds because they have a less highly developed fear of death, and fails to exact just retribution because juveniles, being less mature and responsible, are less morally blameworthy."

This very basic and hypothetical example illustrates why we have elected not to establish categories: the contingency is overwhelming. For each individual, criteria

[1423] Roper v. Simmons (543 U.S. 551 decided on the 1st of March 2005).
[1424] Stanford v. Kentucky (492 U.S. 361 decided on the 26th of June 1989).

change, and although we may very well seize on repetitions and commonalities, we would remain at the hypothetical phase of abduction, without the means to verify anything much. There are too many axiological directions offered to us, not only denoting that categories would be difficult to fill in, but that the very choice of how the categories are established would prove strenuous, dictated by our own prejudices, hence causing a methodological conundrum from which extraction would require at least a consistent inter-subjective effort.

Those carrying prejudices impeding the conduct of legal proceedings will obviously need an additional effort to set them aside or risk being taken off their legal stage. Very quickly, we could think about open racism or misogyny, insulting behaviour, etc. Time is an excellent indicator of the worth of a prejudice[1425]. In Law, this is typically characterized by the evolution of jurisprudence, as the example of Anthony Kennedy *supra* showed.

Prejudices are not so easy to shed however, particularly when drawing close to cognitive biases. Very often, people will hide them rather than face and distance themselves from them. This is summarized quite convincingly by Ost and van de Kerchove, when they state that the legal doctrine, far from being objective, contributes to the maintenance of certain demonstrably false prejudices, such as the fact that the legislator is rational or that one should unconditionally obey the law[1426]. More critical still is the reproach Bredin addresses to scholars using their academic position to defend their legal vision in a case where they are involved as counsels[1427]. While this *modus operandi* leans much more towards an open conflict of interests than a prejudice in our opinion, those taking such situations for granted, without questioning the morality of it all, reflect prejudices whereby academics can use their knowledge for purely monetary and self-serving purposes.

This has typically been the problem in international arbitration since the beginning of decolonization, where under the cover of "procedural equality", the "rule of law", arbitrators would favour western multi-national corporations[1428]. Even when

[1425] Grondin p. 56.

[1426] Ost/van de Kerchove, Savoir-faire p. 30.

[1427] Bredin pp. 111 ss.

[1428] Cf. *supra* part 2, V, 5, B, *a, b*; Dezalay/Garth, Market pp. 789 ss; Cima pp. 819-823; Vastardis pp. 625 ss. This is quite nakedly visible with the fair and equitable treatment (cf. *supra* part 2, V, 5, C, *b)*, a standard of protection used solely to shield foreign investors, which are predominantly occidental. The case between Texaco and Libya was a symptomatic example of this conundrum. According to the royal Libyan decree of the 9th of November 1961: "[A]ny amendments to or cancellations of [the petroleum] regulations shall

statistics mention that "such country won the case", the definition of winning is already slanted considering that in the face of what could be conflated with theft, arbitral tribunals still allowed the thieves to keep part of the haul[1429].

Understanding the difference between appearances and one's true self illustrates very well why any distance a person takes from their prejudices will be very hard-fought, which is something often heard in Japanese culture (本音と建て前, *"honne to tatemae"*, "the true sound and the building facade"). It is widely acknowledged in Japan that the "true sound" is entirely different from the "facade of the building". The former is hidden behind the latter, generally to avoid causing inconveniences to others, but also because changing the appearance[1430] of the facade to better fit in society is much more accessible than altering one's true sound[1431].

It is important to note that prejudices are not definitive. Similarly to medieval university professors like Thomas of Aquinas, even the most experienced legal interpreters regularly question themselves and test their hypothesis with other jurists. The interpretative effort is endless, and while prejudices play a heavy role in the way this effort is conducted, the interpret should always keep a critical and open mind, especially towards their own interpretations.

Finally, a note on traditions, which play a central role in the formation of each person's prejudices. Central to both authority and prejudices, they have been discarded by Modernity which saw them as oppressive, unreasonable and removed from the truth. We do not deny that their weight can indeed become unbearable as

not apply to the contractual rights of the Company except with its consent." Already contractualist in nature by placing a contract above a change of internal Law, this decree becomes all the more problematic considering that Libyan royalty had been overthrown by the time of the award, severely denting the authority of royal decrees in the process. In his preliminary award, the arbitrator made no secret that he would side with the application of the decree, hence the contract signed by a private company and a defunct government, which is why the Libyan Republic settled the matter by providing USD 152 millions in crude oil to Texaco Overseas Petroleum Company over a 15-month span (Texaco Overseas Petroleum Company vs. the Government of the Libyan Arab Republic decided on the 19th of January 1979).

[1429] Cf. Dezalay/Garth, Market pp. 785-791; Cima pp. 819-823.

[1430] This is typically done by showing noncommittal yet visible approval for others' actions and ideas, in spite of our disagreement with it. This may also be done by not showing negative emotions, remaining very courteous, even towards people acting contemptuously.

[1431] This is typically where one requires awareness to one's own prejudices in order to do so. The "true sound" as we understand it corresponds to what one really thinks and feels. Prejudices would thus orient the "true sound", hence why any alteration of one's "true sound" would require acknowledging our prejudices.

we have seen with the transition from the Roman Republic to the Empire and as was often the case in the French *Ancien Régime* for instance. However, they can also be virtuous and serve as a base for peaceful cohabitation inside a society as we can attest to on a daily basis, especially in Western Europe.

This is a point with which Gadamer did not disagree, although in a somewhat sibylline way, probably because he was in the middle of rehabilitating tradition through *Vorverständnisse*[1432]: while tradition can sometimes be oppressive indeed, it is not necessarily bad, nor inherently conservative, contrary to one of Habermas' most central criticisms of Gadamer[1433]. More importantly, it is a part of us whether we like it or not. Rather than discarding or ignoring it for epistemologically wrong reasons of "untruthfulness", it is much healthier and logical to understand its impact on the formation of our prejudices, how it fits with the interpretation currently underway, but most importantly, to what extent the interpreter uses it to determine the extent common good in order to reach an authoritative interpretation. Whether it entails a conservation, an extension or a fundamental questioning of the tradition is a matter of concrete circumstances[1434].

In short, to recognize the weight and importance of tradition is necessary, not only to grasp the spectrum of our prejudices, but also to better determine the location of the common good in the interpretation operation. The efforts to set tradition aside for the past centuries add yet another difficulty to distance ourselves from our prejudices. Even then, we probably cannot fully discard them, meaning that we might as well use them to our advantage, which is far from an easy undertaking and why the role of interpreters, legal in particular, can never be downplayed[1435].

At this point, the link between prejudices and authority is already visible. On one hand, prejudices are the reflection of a personal history. On the other hand, authority is the incarnation of a common history, that which circumscribes and defines the values of a society. Both concepts are thus founded upon a historical and traditional dimension: societal for one, personal for the other. More importantly, both allow us to to determine proper courses of action for the future,

[1432] Grondin p. 57.

[1433] Aguirre Oraa pp. 208 ss, 230 ss; Frydman, Dworkin pp. 298-299; Brouillet p. 132. It is worth noting that in the end, Habermas rallied to Gadamer's position on the matter of tradition, our necessary insertion in it and the fact that tradition is not inherently conservative, that it manages to live on "through creative application to new situations" (Mendelson p. 59).

[1434] Gadamer pp. 435-458; Frigerio pp. 227 ss.

[1435] Cf. Grondin pp. 167-168; Onaotsho Kawende pp. 127 ss; Vallée pp. 61 ss.

and in both cases by building upon pre-existing foundations, hopefully to augment them.

It is not an act of randomness that prejudices have such a high degree of importance for interpretation, not only from an intellectual standpoint but also from a cultural one. Indeed, the sedimentation of personal experiences, personal development, traits of character, insertion in society, family background, as well as that of the professional and academic paths we travel are all part of our *Vorverständnisse*. Probably the most profound yet readily accessible reflection of each person's own history, prejudices are exactly what allowed ancient Romans and Greeks to forge societies where the augmentation of the common good is of prime importance.

By having a much clearer vision of their common good than contemporary Occidentals, it is very probable that ancient Romans developed a near-instinctive idea of their common good and how to augment it, to the point where it was fully included in their *Vorverständnisse*. This might explain why a concept as important as *auctoritas* was not featured more widely in ancient Roman sources. The stronger the ties between a person and their society, the more deeply a person's prejudices will incorporate the common good of said society, to the point where a person's daily interpretations become inherently tied to their society and its common good. Far from being a scarecrow for individual expression and freedoms, the common good enhances, augments even, our sense of self by granting humans a place to be in accordance with our inherent nature of *zoon politikon*[1436] and develop from individual to citizen.

In the general interpretative process used at every moment of our waking lives, prejudices are what allow us to integrate ourselves in our society, even in atomized ones like contemporary European and North American societies, albeit to a lesser extent. Far from being static, prejudices evolve alongside us, faster than the traditions supporting our society, but not so fast that our values and mentality shift regularly. In a society where the common good is left in abeyance and thus without the most important, fundamental even, recipient of authority, prejudices lose in importance with regard to our insertion in society, albeit not for our understanding of it.

[1436] I.e., a socio-political animal. As regrettable as this episode has been, the Covid-19 lockdown and the emotional distress it has engendered is an excellent example of our social nature, of our incapacity to remain isolated from our fellow human beings for extended periods of time.

To be sure, these prejudices still retain their full weight in our individual apprehension of our *Umwelt*, our surroundings. However, as they become removed from the traditions and history of our society, the personal history they incarnate thus loses the richness of traditions, which become in turn more static for lack of integration in our daily interpretations, hence why tradition is nowadays commonly seen as a stagnant vestige of intolerance. In other words, the lack of adequation between the *doxa* and tradition has rendered our prejudices less capable of apprehending the common good (and thus authority), which is then reflected in our interpretative process, further accentuating individualist doctrines such as contractual positivism. Authority and prejudices both insert themselves in a historical paradigm, wherein we reach for past events to apprehend new ones through analogies and abductions, with authority being the purpose and prejudices an important part of our means. Consequently, our personal inability to reach into our society's history has impoverished our capacity to apprehend our own personal history, hence why questioning one's own prejudices is probably harder than it was in a now-distant past[1437].

Prejudices are critical to grasp the overlying notion of philosophical hermeneutics, which is the interpretative exit to international arbitration's crisis of authority this dissertation focuses on.

c. Philosophical hermeneutics

Having laid down the notion of *Vorverständniss*, it is now time to define more comprehensively that of philosophical hermeneutics. The premiss of the contemporary version of this current came into existence through Schleiermacher, whose footsteps were followed in by Droysen and Dilthey among others. *"Schleiermacher souligne plusieurs fois qu'il faudrait élaborer une théorie générale de l'esprit universalisable et non liée à un seul peuple comme les théories antiques*. […] *Manifestement, une telle universalisation ne se produit pas sur le mode légaliste ou 'limitatif' présent chez Kant: il s'agit au contraire d'une corrélation générale dans un ensemble au sein duquel chaque individualité,*

[1437] This is typically where overspecialization makes us lose sight of the infamous "bigger picture with broader perspectives". Far from allowing us to focus more on our individual prejudices (to specialize in), the impoverishment of a collective and societal history diminishes our ability to put ourselves into perspective, to contextualize our interpretations. And as jurists know too well since Aristotle, context and concrete circumstances are the most important elements to any given legal situation, that without which there is no Law.

qu'elle soit singulière ou communautaire, peut participer avec sa contribution particulière."[1438]

Although Schleiermacher neglected the many general hermeneutics of past centuries and presented his project as the "first general hermeneutics"[1439], there are fundamental differences between his and Gadamer's hermeneutics[1440], the latter laid down the path travelled by the former in the sense that what people say or write must be interpreted by placing the interpreted item in its general context, including the customs and "context" of the author and of their language[1441].

This not only concerns the intellectual faculties or the scholarly formation of the interpreter, but also the place and epoch in which they were born and the impact their culture has on them and their comprehension and apprehension of the language used to interpret. If we consider that any type of speech rests on an *ex ante* thought or system of thoughts, there can indeed be no doubt that, in order to grasp the meaning of said speech, we need to understand what the thoughts of its author were and in which context they were born[1442].

In essence, Schleiermacher considered that the idea of a universal hermeneutics was based on the fact that the possibility to misunderstand the unknown is common to all humans. The faculty to misunderstand is universal in the sense that it is a generalized trait found in every person. However, it is also specific given how all individuals' life experiences are different from one another, meaning that misunderstandings are different from one person to the next. For Schleiermacher, hermeneutics is the art of avoiding misunderstandings, which are no accident but an integral part of the interpretative process. In order to do so, he considered that we needed to go back to the origin of the misunderstanding in order to elucidate it[1443].

Given that misunderstandings are general, but that their apprehension is unique to each individual, Schleiermacher recognised that particular genres necessarily obeyed to a more general one. This means that a person's *Vorverständnisse* are

[1438] Brino p. 250.
[1439] Grondin, Universalité p. 80.
[1440] The centrality of the will of the author for instance, was much more prevalent in Schleiermacher's writings. Furthermore, Schleiermacher was guided by the romantic conception of the individual, meaning that his hermeneutical project was more intent on aesthetic hermeneutics than philosophical hermeneutics, contrary to Gadamer, who held the opposite stance.
[1441] Grondin, Universalité pp. 89-90.
[1442] Grondin, Universalité p. 88.
[1443] Gadamer pp. 281 ss, 299 ss.

necessarily respondent to the *Umwelt* in which they were born and evolved[1444]. This also means that an interpretation cannot be atomized or absolute, but that it is a fragment belonging to a whole, that any "bigger picture" required assembling multiple fragments in order to even consider attempting an escape from subjectivity through inter-subjectivity[1445].

More recently and more predominantly, philosophical hermeneutics was more deeply developed by Gadamer, who remains the most influential figure of this current, but also, to various degrees, by Ricoeur and the Brussels new school of rhetoric. Philosophical hermeneutics widely draws inspiration from ancient models of dialectic, rhetoric and argumentation[1446]. In the parallel field of semiotics, Eco displayed the same transversal mindset, in particular when demonstrating the limits of analogy and the fact that the freedom of the interpreter is never as wide-ranging as many modern intellectuals thought when they started promoting the idea that the law should never be interpreted, simply applied[1447].

[1444] Thouard p. 215.

[1445] Thouard pp. 220-221.

[1446] Cf. Frydman pp. 43-78 for a detailed summary of the matter.

[1447] Cf. *supra* part 2, III, 1-3. Cf. also Eco, Limites pp. 368 ss. *"En tout cas, dès que la communauté s'est accordée sur une interprétation donnée, on a la création d'un signifié qui, s'il n'est pas objectif, est du moins* intersubjectif *et est, de toute façon, privilégié par rapport à n'importe quelle autre interprétation obtenue dans le consensus de la communauté. Le résultat d'un processus de recherche universelle va dans le sens d'un noyau d'idées communes* […]. *La pensée ou l'opinion qui définit la réalité doit donc appartenir à une communauté d'experts, et cette communauté doit être structurée et disciplinée en tenant compte de principes supra-individuels*. […] *En réalité, les symboles s'accroissent, mais ils ne restent jamais vides*." (Eco, Limites pp. 381-382) Further explanations are featured *infra*, once the notion of philosophical hermeneutics has been properly laid out. Very briefly however, philosophical hermeneutics serves as our basis and from there, the works of authors such as Perelman, Ricoeur and Eco shall be used to underscore certain aspects of Gadamer's overall theory, in particular with regard to Law. To be clear, we consider semiotics to be the basis of hermeneutics and not the other way around. Indeed, before there can be any interpretation, we need signs to interpret, keeping in mind that signs are not only written or oral words, but also pictures, facial expressions, sounds, etc. Gadamer himself admitted that *"C'est ainsi que la tâche constante de l'interprétation est de risquer des projections justes et conformes à la chose, c'est-à-dire des anticipations qui doivent être corroborées 'à même les choses elles-mêmes'"* (Gadamer, Philosophy p. 77), where we understand that *"les choses elles-mêmes"* are those very signs serving as the basis of any interpretative process. This shows that he was very conscious that the penetration of the hermeneutical circle could not be done through pure imagination. The link between interpretation and signs needs to respect a minimal level of coherence and proximity, meaning that analogies cannot be conducted if this link is too outlandish, if we exceed the limits of semiosis (Eco, Limites p. 383).

Summarily, philosophical hermeneutics is not centred around the intention, the will of the author, as is the case for normative hermeneutics, but around the interpreter's own prejudices, and more broadly, around the historicity of the interpreter, the text and overall context. This is why philosophical hermeneutics is also called ontological hermeneutics: because it implies a reconsideration of the very notion of subject in interpretation[1448]. According to Ricoeur, before any relation with others stands the relation with our own perception of the world, which moulds the subsequent relations with others, otherness even. This change in the perception of the being is the ontological change Gadamer brought about with his conception of hermeneutics, the ontological anteriority[1449].

The will of the author is but an element among others serving the interpreter on their path to discover the best possible meaning of a text. Philosophical hermeneutics' main objective is to: "[…] *mettre en lumière le rôle fondamental du langage dans notre expérience du monde. Il s'agit plus particulièrement d'éclairer notre appartenance fondamentale au langage à partir duquel se déploie toute compréhension et tout travail d'interprétation*."[1450] More broadly, "[l]*a thèse directrice de Gadamer* [philosophical hermeneutics] *sera que l'apport scientifique des sciences humaines*[1451] *'se laisse mieux comprendre depuis la tradition du concept de* Bildung *[formation ou éducation spirituelles] qu'à partir de l'idée de*

[1448] Ricoeur, Soi-même pp. 345 ss.

[1449] Ricoeur, Cinq pp. 38-41; Onaotsho Kawende p. 149. For Ricoeur, this ontological anteriority reflects an anteriority of self over interpretation. In other words, the being and its prejudices are anterior to the interpretations said being does. However, the movement between ontology and hermeneutics does not stop there. Rather than developing a unified or direct ontology, Ricoeur pursued a fragmented ontology, with the notion of "fragmented" having similar implications to that of Schleiermacher's hermeneutics quickly seen *supra*: we need many ontological fragments in order to build a more complete ontology through inter-subjectivity. And because we are facing fragments reflecting the diversity of human beings, these fragments require a "dialogue" in order to even begin forming a whole, a fragmented ontology is thus resolutely hermeneutical. This process then becomes subject to the ontological anteriority mentioned earlier, creating a circle where it becomes hard to say which precedes which, with ontological fragments being located in-between conflicts of interpretation, between what is interpreted and the interpretative process (Vallée p. 183). To be clear, we do not entirely agree with Ricoeur in the sense that semiotics is already necessary to apprehend and understand all types of signs including our parents' facial expressions for instance.

[1450] Vallée p. 62.

[1451] To be truly Gadamerian, we would need to talk about "humanities" rather than "human sciences", in particular because of the modern stigmas attached to this latter appellation (univocity, objectivity, scientific methodology, etc.).

science moderne'. […] [L]*e dépérissement de cette tradition résulta d'une 'esthétisation' fatale des concepts directeurs de l'humanisme, notamment du jugement, du goût et du sens commun* […]."[1452]

In other words, philosophical hermeneutics attempts to reinstate authority in the interpretative process, which is sensibly different from the will of the author[1453]. The idea behind this shift was to rehabilitate humanities in the face of natural sciences, to reaffirm the non-necessity for humanities to have an objective methodology. According to Gadamer, researching humanities requires savoir-faire rather than a rigorous method, which is where authority comes into play[1454]. As discussed *supra* throughout part 2, authority consists in augmenting inherited foundations through the common good, and humanities typically use authorities in various fields to accrue their savoir-faire, their tact. To be sure, this does not mean that scholars should relinquish their *esprit critique* in the face of historically acclaimed authors, simply that they should build on what these authors have said and done to continue augmenting the field, be it by criticizing or agreeing with them.

In Law, this implies going further than simply trying to decipher the will of the legislator, or simply trying to build a logically coherent reasoning. Being content with such targets means that the legal interpreter has forgotten the first purpose of Law: justice in the case at hand. To demonstrate this, let us use an example already seen *supra*, the arbitral cases where international arbitration was weaponized against decolonization. In a case such as Texaco v. Libya[1455], rather than following the terms of a decree issued by a government whose authority was so poor it was overthrown years before the arbitral trial, a renegotiation of the accord between the occidental oil company and the newly formed government would have been more mindful of the political context at the time. Furthermore, if Libyan royalty was overthrown for excessively hoarding riches, a redistribution of revenues stemming from natural resources would seem like an excellent way to compensate this. Moreover, the general political context throughout the African continent after World War II was one of liberation, not continuous exploitation. In addition to this, the horrors of World War II were a very strong push in the direction of a more pacific Europe and

[1452] Grondin, Universalité pp. 162-163, himself quoting Gadamer.

[1453] Frydman p. 645.

[1454] Grondin, Universalité p. 161. Cf. also Ost/van de Kerchove, Savoir-faire pp. 28 ss.

[1455] Texaco Overseas Petroleum Company vs. the Government of the Libyan Arab Republic decided on the 19th of January 1979.

an increased importance of fundamental rights. Understanding what were the causes of this war, in particular the humiliation suffered by the "losers" of World War I which ended up driving both Germany and Italy into the arms of those who would drive Europe on the warpath once more. Had arbitrators such as the one from Texaco v. Libya had the capacity to understand how nefarious their prejudices were, how incapable they were of questioning themselves as legal interpreters, the result of this case might have been different. Likewise, the opposite example of Anthony Kennedy's evolution regarding the death penalty for underage convicts shows the extent to which the application of philosophical hermeneutics to legal interpretations can be authoritative[1456].

This is why interpreters unable to question their prejudices are often satisfied with simply commenting on their legal system rather than fundamentally analysing, criticizing or actualizing it do not deserve the moniker of "authoritative", as they do not augment anything[1457]. In this context, philosophical hermeneutics typically affords many more opportunities to act as such than normative hermeneutics, whose application typically translates into the aforementioned article-by-article comments[1458].

One of the ways in which philosophical hermeneutics does so is through the use of open textures, which are the best way to ensure the dynamicity of a text of law or a tradition and their adaptation to societal changes, in particular in the face of dire problems such as an environmental and food crisis[1459]. On a more meta-level, this dynamicity implies the transcendence of the final cause, which evolves from a compass partially orienting a law to a compass for the entire interpretative process by selecting and highlighting what authoritative purpose an interpretation is supposed to follow for the various sources of the Law. To fill in these open textures is the role of legal interpreters: attorneys and prosecutors to a certain extent, judges and arbitrators to a bigger extent. Ideally, interpreters understand the

[1456] Cf. *supra* part 3, II, 2, B, *b.*

[1457] Ost/van de Kerchove, Savoir-faire p. 30; Bredin, Remarques pp. 111-112, 117-118; Jestaz p. 90; Ricoeur, Soi-même pp. 349-350.

[1458] The first example springing to mind is the commentary made of art. 3 of the Swiss CC concerning the *bonne foi subjective* (Bieri/Steinauer, art. 3 *in* CR CC I), consisting in a list of jurisprudential decisions without explanations of the overarching concept, of the fundamental aspects of *Guter Glaube* or of the way we could expand its reach to further improve the Swiss legal and judicial order.

[1459] Papaux, Introduction p. 168; Vallée pp. 64-65.

need for authority, in particular in fields where it is lacking such as international arbitration[1460].

Philosophical hermeneutics also allows legal interpreters to avoid a few of the interpretative defects jurists have inherited and perpetuated since Modernity, namely scientization, technocratization, a lack of creativity, excessive rigidity, etc. The most troublesome of these defects however, is univocity, which is at the centre of all others[1461].

As seen *supra*, univocity does not tolerate interpretations differing from the one of reference[1462], which is exactly what philosophical hermeneutics avoids, particularly by acknowledging that human beings are ontologically plural, each with their own prejudices[1463]. By reinstating the authority of the text and the interpreter through open textures i.e., by setting aside the single, unique will of the author as the only criteria, philosophical hermeneutics shifts legal interpretation from an extremely rigid paradigm into a very flexible one, much more appropriate to fast-paced interpretations like the legal ones, which, unlike many others, requires the interpreter to decide at the end of the hermeneutical process.

This is further enhanced by the way strict methods of interpretation lose in importance, and how a mindset rather than a method supplants them in the hierarchy of interpretation[1464]. More than flexibility, this creates a broader spectrum of "discussion" between the text and the interpreter, with the latter daring to "ask" more questions to the former. This dialectic between the interpreter and the text

[1460] It is worth noting that there is no panacea in hermeneutics, as far as methods of resolution and understanding go. If there were, geopolitical problems would be quite rare.

[1461] Univocity is itself tightly knit with objectivity. Summarily, proponents of objectivity often attempt to find the one best solution, and if someone truly reaches an objective state of mind, the solution they exhume is not debatable. Objectivity, however, is only something to strive for, but cannot reach. An objective state of mind would imply doing research without motive, but questioning a field without any objective is void of any scientific interest. Researchers always have either a clear motive or an inkling as to why and how they conduct their research, which may or may not be successful, but in no case do they have no expectation, nothing to look for, no *Vorverständniss* (cf. Grondin, Universalité pp. 178-179).

[1462] Cf. Bezat/Papaux and Papaux, Qualification pp. 39 ss for extensive developments regarding the basic logical fallacies of univocity. To those convinced that Law, like science, can be perfectly univocal, the political, legal and scientific crisis brought forth by Covid-19 has undeniably shattered their pretentions. Indeed, even sciences, which are much less flexible (in theory) than Law, have proven to be surprisingly twistable.

[1463] Papaux, Qualification p. 39.

[1464] Cf. Ost/van de Kerchove, Hermès regarding the way directives are meant to be supple rather than rigid.

becomes all the more cardinal when factoring in the type of reasoning used to search for something, in Law in particular: the analogical reasoning[1465]. This does not mean that methods of interpretation are useless or even detrimental to interpretation, simply that one should be aware of their limits in order to go beyond what said methods can offer. Just as prejudices help us greatly to conduct a reasoning, in particular through an acceleration of the process by not re-doing the entire intellectual path of their study, methods of interpretation give jurists (and hermeneuts as a whole) a first foothold to start their analysis, without having to rethink the entire process every time.

Put differently, legal methods of interpretations are but a prejudice tailored to the work of legal interpreters. More precisely, they are tailored to the work of the legal interpreters of a determined legal system. For instance, the Swiss literal method of interpretation, which involves reading a text of law in all three official languages (French, Italian and German) and comparing them to see whether there are differences between them, does not make much sense in countries with only one official language in which Law is written such as France, Italy or Germany. In addition to the literal method of interpretation, there are three others (systematic, teleological and historical) used in Swiss Law. Interestingly however, the Federal Tribunal does not juxtapose the results obtained through each method. Instead, it melds them together into what is called the eclectic method (or *Methodenpluralismus*), which consists in the general appreciation of all four basic methods, balancing them to extract a global appreciation.

This eclectic method is perhaps one of the most honest admissions of a "shortcut prejudice" found in Law. The idea behind the eclectic method is that depending on the situation, the relevance and weight of an interpretative method vary in our general balance. Sometimes the historical method will be decisive to exhume the best possible interpretation, while sometimes it will be the teleological method[1466]. When reading the general jurisprudence of the Federal Tribunal, we quickly notice that it hardly ever uses all four interpretative methods, preferring instead to develop the one or two methods most relevant to the case at hand. However, if we consider

[1465] Without going too deeply into the details and quite roughly, the type of dialogue and dialectic mentioned here and throughout this 3rd part is based on the Aristotelian model rather than the Platonic one: it is not a matter of going from concept to concept in order to find the true idea, but a matter of arguing based on considerations and information which are more or less accurate and correct, in order to make the most sense possible (Gardies pp. 171-172).

[1466] Cf. for example ATF 127 IV 198; ATF 6B_543/2010 decided on the 29th of November 2009.

that the Federal Tribunal is always applying the eclectic method and simply exposing its most important and decisive components in its final published judgement, the "effectuated selection" makes more sense. Why, indeed, waste valuable time and resources detailing interpretative methods with little to no impact on the interpretation of the Law in the case at hand? As such, after serving as a balance, the eclectic method serves as a convenient, and frankly intelligent shortcut straight to the most pertinent interpretation methods. In other words, the eclectic method serves as a shortcut to the effectuation of the first foothold of the interpretative process.

d. Analogical reasoning and abduction

Although the purpose of this dissertation is not the exegesis of logical legal reasoning, it is nonetheless interesting to take a quick glance at how hermeneutical reasoning inserts itself in the most fundamental legal reasoning: the analogical one. Very briefly, an analogical reasoning tautologically consists in the use of analogies, which are comparisons of at least two factual situations: one familiar to us and another unfamiliar to us[1467].

Analogy is a very well-known reasoning method in Law and allows jurists to extend and reduce legal categories, basically the heart of legal activity. Abduction on the other hand is much better known by linguists than jurists, despite the fact that the latter use abduction on a daily basis. Unrelated to kidnapping, abduction consists in reasoning logically with a hypothesis as a starting point, using facts to reach a conclusion[1468]. It is typically used by judges to establish facts or by attorneys when building their legal playbook for a case. In other words, analogy is an overall reasoning and abduction is its vector. The purpose of both is to apprehend the unknown[1469].

Progress in an analogical reasoning is made through abductions, which exclude the use of deduction and go further than inductions. The starting point of abductions are facts, and through the use of hypotheses, we attempt to produce a conclusion, which can be a general theory (e.g., research, a law, a legal qualification) or another more overarching fact (e.g., criminal investigations)[1470].

[1467] Cf. Secrétan for more details.

[1468] As opposed to deduction, whereby a reasoning starts with an abstract idea (e.g., a text of law) that is then applied to a concrete situation (e.g., a legal case), and as opposed to induction, which follows the trajectory opposite to deduction (we induce laws and rules from the cases).

[1469] Peirce pp. 136 ss.

[1470] Eco, Limites pp. 260 ss; Papaux, Qualification pp. 184-185.

To conduct abductions requires interpreting facts and putting them in a "discussion" with the more plausible hypotheses, the latter also requiring the intervention of an interpretation, or at least of prejudices, to be crafted. If the interpreter is constrained by rigid methods from which they cannot escape, the hypotheses, "discussions" and subsequent interpretations become less varied, more uniform, oriented towards univocity rather than analogy, although never quite reaching it[1471]. Both abduction and analogy are used in tandem to expand any intellectual field, from natural sciences to humanities. According to Henri Poincaré: *"Si un raisonnement ne fait qu'utiliser ce qui est déjà connu, comment peut-on espérer trouver quelque chose de nouveau?"*[1472].

Both illustrate what is detailed *infra*[1473]: the importance of a flexible mind over a strict method. The most salient specificity of the analogy-abduction couple is the apprehension of the unknown, which by definition, requires the interpreter to extend the field of their knowledge, to look for what is not there, at their disposal. It is their combination with prejudices that dispels any notion that univocity or equivocity are attainable in legal interpretation, rendering positivism untenable as a legal theory.

More importantly for this dissertation, they are a key to exiting a situation marred by univocity and lacking in authority[1474]. Despite the diversity of actors, international arbitration is prey to the positivist univocity. We know how entire reasonings were perpetuated through the mechanisms of arbitral jurisprudence, pushing towards a harmonization of the various awards, reducing the equity with which arbitrators operate[1475] and pushing arbitrators to adopt like-minded approaches to international

[1471] Cf. Bezat/Papaux for more details on the matter.

[1472] Ghys p. 9.

[1473] Part 3, III, 2 and 3.

[1474] Papaux, Qualification pp. 391 ss, 484 ss; Eco, Structure pp. 253 ss; Gadamer pp. 520 ss; Secrétan.

[1475] Cf. *supra* part 2, V, 5, B, *d*. Cf. Stone Sweet/Grisel p. 152 who show that the average number of jurisprudential references in arbitral awards has more than doubled between 1999 and 2015, confirming our own research *supra* in part 2, V, 5, B, *d*. Far from constituting a base for authoritative analogical reasonings, this heavy usage of arbitral precedents consistently attempts to extract the political i.e., the axiological, from awards. Although we now know that such an undertaking is inherently impossible for human beings due to the importance of their prejudices in the interpretative process, these constant attempts at extracting prejudices from interpretations and removing anything deemed irrelevant in the pursuit of legal objectivity from awards inevitably leads to a thinning, a decrease in the interpretative options available to an arbitrator. Furthermore, let us never forget that the choice of pursuing objectivity is already a subjective choice of interpretation. Consequently, this self-

arbitration, something which caseload statistics seem to confirm through the concentration of a relatively small number of individuals responsible for the lion's share of international arbitration mandates[1476].

In this context, international arbitration has lost much of its authority, in part from excesses of univocity, which translates into monolithic visions of what is good arbitration governance, the general consensus that fair and equitable treatment only applies to foreign investors or the fact that judges paid by the parties is not shocking. More problematically still, are the ramifications from the standpoint of legal philosophy: the overbearing presence of contractual positivism, the weight of commutative justice and the general decrease in the use of equity[1477].

It is the combination of all these criteria with a few more that have resulted in the current crisis of authority, a crisis from which we now need a different vision than the current prevailing one, whose rigidity is its hallmark. To escape from this seemingly hermetic frame, flexibility is of the essence, and what better way to inject flexibility into international arbitration, to discover new frameworks adapted to the current need for distributive justice than the logical tandem whose very purpose is to apprehend the unknown?

"Nous ne pouvons pas ignorer le caractère évolutif des phénomènes de la communication, et si on l'ignore on tombe dans des utopies élégantes mais naïves. Il est inutile de croire en la stabilité des structures et en l'objectivité des séries signifiantes auxquelles elles aboutissent, si au moment où l'on définit ces séries on se trouve à l'intérieur du processus et que l'on considère comme définitive celle qui n'est qu'une phase du processus."[1478] According to Eco, the very semiotical structure of a reasoning cannot be viewed objectively from the moment someone

imposed limitation of interpretative options leads down a narrower path, one where legal interpreters artificially restrain the options available to them and thus create an arbitral paradigm wherein the idea of univocity becomes ever-more plausible to them. This is an extremely serious problem on two fronts, both of which have been regularly underscored over the course of this dissertation: the self-limitation of interpretative paths leading to a diminishment of equity, and the self-inflicted delusion that univocity is indeed possible, desirable even, in a paradigm as plurally received and conceived as the arbitral one.

[1476] Grisel, Elites pp. 270-272 and p. 275 who demonstrates how a small group of arbitrators absorb important shares of both commercial and investment arbitrations, generally for procedural reasons; Stone Sweet/Grisel pp. 71-72 who show that in 2015 ICSID arbitrations, the top 10% of arbitrators were mandated for 46% of the entire caseload.

[1477] Cf. *supra* part 1, V, 2, part 2, V, 5, B, *d* and C, *d*. Cf. also *infra* part 3, III, 4.

[1478] Eco, Structure p. 405.

participates in its inception or its reception. To use his own words, this is what renders positivism a stable and objective structure, an elegant utopia.

e. Intertwinement

As mentioned *supra* the notions of authority, of philosophical hermeneutics and all those underlying them are various parts of the hermeneutical circle, meaning that the comprehension of one cannot be fully accomplished without that of the others. As is the case for any hermeneutical circle, the question then becomes: how do we enter this circle? For us, through the genealogy of arbitration.

An authoritative interpretation augments not only the text by extending its reaches, enriching its meaning or establishing pertinent connections with other texts[1479], but also subsequent interpretations of the same text. This is how an authoritative interpretation participates in the common good: by serving as a reference for further interpretations to keep on building through praise and criticism. In the best cases, authoritative interpretations become *Vorverständnisse*, facilitating future mental constructions and raising interpretations of a given topic to new heights. This is how the argument from authority was construed, before Modernity came and went. The great philosophers of the past remain open to reinterpretation, especially if their theories have been shunned by the systematization and simplification of their thoughts, as is the case with Plato who, of all people, became associated with the German National-Socialist regime[1480].

Let us also remember the example of the quodlibetic sources[1481], which were oral, emanated from figures of authority and challenged on a regular basis by students. When a theory had weathered enough challenges, it became taught in courses *ex cathedra*. This example shows how tenuous, non-existent even, the link between authority and univocity truly is. The former is built on a multitude of intellectual exchanges and continually evolves, while the latter does not tolerate dissent, remaining as static as conceivable, thus becoming less commensurable with society the more it changes. This is fairly ironic since univocal solutions were supposed to derive from science, preoccupied only with the truth[1482].

[1479] Although always within the necessary limits of the analogical reasoning (Eco, Limites pp. 368 ss).

[1480] Ricoeur, Soi-même pp. 346-347.

[1481] Cf. *supra* part 2, III, 1 and V, 3, B, *a*.

[1482] Cf. Paperon concerning Talmudic sources, which work very similarly but on a much bigger temporal scale.

The link between authority and philosophical hermeneutics goes even further than this. By redefining authority as strongly historical, an inheritance from past generations that future generations must cater to, never ceasing to augment it, we have added further weight to Gadamer's historical dimension of hermeneutics. Authority is not simply the reflection of the tradition influencing us and our *Weltanschauung*, but the very segment in which we insert ourselves ontologically speaking. Therefore, the comprehension of prejudices implies the upstream understanding of what is authoritative in our own society.

This exercise has been rendered much more difficult than it should because of the atomization of western societies. The more people are convinced to be individuals first and citizens last, the more complicated it then becomes to conceptualize the balance of our society, what has been the common good guiding for so long, how it has shifted over the course of history. Most importantly, understanding this is crucial to deciphering the separation between personal biases, personal *Vorverständnisse* and inherited commonly shared *Vorverständnisse*. The latter, in yet another ironic twist of Modernity's defects, are probably the best mirror, not of the unreachable objectivity, but of the heavily sought-after inter-subjectivity, one involving present and past generations in the interpretative exercise. As the consolidation of many generational strata, authority enables us to reach a higher degree of inter-subjectivity than we would without it, involving, so to speak, the dead. Moreover, it does so all the while setting the most critical line on the axiological agenda, the common good.

Mistakenly believing that authority was akin to subjective imbalance, lacking in scientificity, Kant and his successors proceeded, alongside the crushing majority of modern intellectuals, not only to discard the idea of authoritative interpretation, but of authority as a whole[1483]. Replacing authority and tradition's perceived subjectivity, modern authors veered towards objectivity, the natural result of a scientific approach to interpretation, or so they thought[1484]. With objectivity in mind, they applied the methods of natural sciences to humanities, ironically voiding it of any pretension to scientific worth[1485].

[1483] Cf. *supra*; Frydman pp. 257 ss; Gadamer pp. 436 ss; Grondin, Kant p. 8.

[1484] Frydman pp. 373-378; Ricoeur, Cinq p. 24. Another consequence was the shattering of traditional metaphysics, which caused it to remain discarded for a long time, setting the stage for the much more reductive analytical current (Gadamer, Philosophy p. 121).

[1485] Grondin, Universalité pp. 178-179.

Indeed, the purpose of humanities became the same as that of natural sciences: the truth, which the scientist simply had to uncover, to observe, in lieu of seeing it as multi-faceted, dependent on a great number of criteria, all of which are elements of the richness of humanities, of its scientific and intellectual dimensions. This was coupled with the development of the individual, which meant that the author of the text and their will only, were the sole aspect of the text worth understanding, as it contained the "true" intent of the author of the text. The idea of a dialog between the text and its interpreter was shunned. As a consequence of this newly found thirst for objectivity, scientization and the absolute will of the author, univocity suddenly became the purpose of interpretation[1486].

Contrary to what the commonly misconceived notion of authority could lead us to believe, univocity is not the fruit of authority, for authority allows, encourages even, the plurality of interpretations. The idea of an authoritative interpretation is to enable further interpretations, to serve as the building blocks for future augmentations, not to set one interpretation in stone for eons. This is where we can see that the very movement of constantly seeking improvement is the axis around which authority revolves. Furthermore, and contrary to popular belief, what is authoritative can

[1486] Equivocity, contrary to univocity, is not even conceivable theoretically, "on paper." Indeed, if the process of creating univocity could be imagined (by comparing various interpretations and "selecting" the best which will then, naturally or artificially, be generalized), its practical application cannot, for it would imply people with similar, identical even, prejudices concerning open textures and concepts requiring a balance of interests and proportionality. Far from being the opposite of univocity, equivocity is what happens when univocity is taken a step further, quite like how contractual positivism shares a big part of its structure with legal positivism, all the while going further with regard to individualism. If univocity is indeed what happens when a single interpretation prevails, equivocity is what happens when all interpretations prevail. The prejudices of interpreters become irrelevant. They can, in fact, be widely different or identical, because they do not impact the worth of an interpretation. If all interpretations are indeed equal (*equi voces*, equal voices), *Vorverständnisse* and years of practice become meaningless. From a more logical standpoint, the theoretical impossibility of equivocity goes further, because it considers that interpretations can widely differ yet are necessarily of equal value. This simply does not make any sense from a basic logical standpoint: how could different interpretations indeed be the same? Even if logic admitted this impossibility, how could humans admit that, for instance, the legal interpretation of a seasoned jurist be equivalent to that of a banker? The latter have often never read a text of law, so why would their interpretation be of equal value to that of someone who spent years of training reading dozens of legal texts every day? On a smaller scale, closer to this dissertation, this would imply that an unauthoritative interpretation is equal to an authoritative one. This is obviously untrue because impossible. Developments on equivocity, being doomed from the start, are not worth exploring or taking into consideration.

change or, to be quite precise, it is in the nature of authority to be able to change and adapt depending on the circumstances (cf. *supra*). Augustus' renewal of the foundations of Rome was not random. By that time, the Roman Republic was in such disarray that he was left with a simple choice: to leave the authority of Romulus and the founders of the Republic untouched and risk a global collapse, or adapt these foundations to his era in order to consolidate them. He obviously chose the latter. This historically important example teaches us that even in the land of *auctoritas*, a rigid hierarchical nation, authority needs to evolve in order to maintain a society in an authoritative state, where the common good is constantly augmented. Once an authority is too rigid, immovable, what it is attached to starts to perish, which is also what happened in Rome when her emperors stopped caring for the Roman common good and Rome's foundations.

In Law, the loss of authority and the promotion of univocity engendered the imposition of a particular methodology to interpretation, and the unification of the purpose of all interpretations (i.e., discovering the truth) made the *ars interpretandi* lose a big part of its essence, as the transition to normative hermeneutics commenced[1487]. The "what?" was reduced to the truth, and the "how?" was limited to scientific methods, even in Law[1488].

The capacity to establish analogies, to apprehend the unknown and extend the boundaries of the Law through abductions were the main casualties of this turnaround. Quite the sad outcome seeing that they are also the most efficient concepts to apprehend one's own prejudices and temper their defects. Moreover, they are also the tools to construct abductions and therefore analogies, the logical foundations of flexibility of the mind. Implementing a single dominant methodology to legal interpretation thus increased the chances that interpreters would fall prey to their own prejudices, with fewer people able to contradict them, another irony for a field whose moniker sometimes is *la science du contradictoire*[1489].

[1487] Ricoeur, Soi-même pp. 346-347.

[1488] Frydman pp. 66 ss, 257-274; Papaux, Introduction pp. 99-134; Popper, Objective p. 288. The notions of truth and the scientificity of the methods of interpretation shall not be debated here for time and space reasons, as well as being very arduous topics to cover properly.

[1489] Papaux/Cerutti pp. 60-61. This is mentioned in more details *infra*, but these are the reasons why we think that a good mindset is much better than a good method, at least when interpreting. It seems that such was also the opinion of Gadamer, although he never explicitly stated it (Grondin, Universalité pp. 186-188).

Addressing this problem, the switch from normative to philosophical hermeneutics would bring about the following turnaround: the disappearance of univocity, a re-ignition of the jurists' capacity to construct their own legal reasonings without fearing new reasonings, striving for "as good as possible in the concrete case" rather than an unattainable perfection, the reinstatement of the authority movement consisting in continually augmenting the interpreted legal texts and the re-establishment of the argument from authority as a positive in legal interpretation, the latter which would probably accrue the importance of the legal doctrine. To be sure, this is not a plaidoyer in favour of a pure application of philosophical hermeneutics as it has, like any human construction, many flaws. One of the aspects developed by modern thinkers, scepticism, would in our view benefit from an accrued use compared to how medieval scholars used it in regard to arguments of authority[1490].

Philosophical hermeneutics should serve mostly as a compass, not an end to all debates[1491]. Although we do not necessarily agree with some of the criticism formulated by Habermas against Gadamer's theory, in particular regarding the so-called universality of Gadamer's theory[1492], it is important to keep an open mind to criticism, especially considering that Gadamer himself ended his *opus magnum* by quoting the human finitude as viewed by Plato[1493]. The use of philosophical hermeneutics or the Brussels pragmatic model[1494] also favours the adequacy of the legal interpretation vis-à-vis the case, the mindset vis-à-vis the method and more importantly, how to do justice in the case.

As already noted, the mindset remains more important than the method employed[1495]. Any type of interpretation method applied dogmatically can easily

[1490] Frydman pp. 204-205, 208-211.

[1491] Frydman pp. 679-681.

[1492] Cf. Grondin, Universalité pp. 186 ss for an excellent explanation of Gadamer's somewhat liberal use of the term "universality".

[1493] Gadamer pp. 767-768.

[1494] Cf. Frydman pp. 679-682 for a general summary.

[1495] We can see for instance how this entire dissertation was conducted in a multitude of hermeneutical circles, which all fit into one overarching one. The entry point into the circle was the crisis of authority in international arbitration, which necessitated a historical contextualization not only to determine the magnitude, but the nature of the crisis. This genealogy not only guided the subsequent research regarding authority, but was conducted according to the small yet persistent *Vorverständniss* that contemporary international arbitration was lacking something on a fundamental level. Once the genealogy of international arbitration had been conducted, the genealogy of authority became a necessity, and it allowed us to see how both deviated from their original paths and how they might

lead to poor interpretations anytime it is inadequate. On the contrary, a good mindset can deploy valid interpretations stemming from a lacklustre method, in particular by adapting the "bad" method, overriding it even, to reach an intelligent conclusion.

A classic example in Swiss Law concerns a case of criminal law where a woman was threatened into fellating a man[1496]. According to art. 189 para. 1 of the Swiss penal code[1497], *"Celui qui, notamment en usant de menace ou de violence envers une personne, en exerçant sur elle des pressions d'ordre psychique ou en la mettant hors d'état de résister l'aura contrainte à subir un acte analogue à l'acte sexuel ou un autre acte d'ordre sexuel, sera puni d'une peine privative de liberté de dix ans au plus ou d'une peine pécuniaire."* The key word here is the term *"subir"*, which implies sustaining or suffering something passively. In this case however, the victim did not passively suffer the sexual act, playing instead an active role in it. In other words, the victim was forced to perform, not forced to suffer the fellatio. If we were to dogmatically apply normative hermeneutics and limit ourselves to the legal text, there would have been no crime committed. However, the Federal Tribunal did not stop there and decided that based on the purpose of the norm and the context of the case, a sexual assault was indeed committed by the accused.

Although this example might seem a little obvious, it shows very clearly how an interpretation method used by every jurist around the world (reading a law) can lead to extremely unfair and unjust results if applied dogmatically, without a hermeneutically attuned mindset. Another example would be the Texaco v. Libya[1498] case seen *supra* where we saw that Libya was shoehorned into an unbalanced settlement with Texaco under the pressure of an arbitrator who wanted to strictly apply a Libyan royal decree issued by a then-defunct and unauthoritative government. Unlike the previous case of criminal law, this arbitral procedure was

hopefully be restored. Hermeneutics may have seemed like an outlier, but after the quick overview done so far, not only do we realize that it is connected to authority and its evolution, but also on a meta-level, as the entire dissertation has based itself on the mindset of philosophical hermeneutics to reach the current stage of the discussion. Concerning international arbitration and hermeneutics, we will see *infra* that philosophical hermeneutics would enhance the role and the weight of equity in the arbitral process, hereby endowing arbitrators with more latitude to decide with justice in sight rather than the respect of formal prescriptions and overcomplicated legal technicities (cf. *supra* part 2, V, 5, C regarding equity and the "lack of courage" often shown by arbitrators when deciding cases).

[1496] ATF 127 IV 198.

[1497] RS 311.0

[1498] Texaco Overseas Petroleum Company vs. the Government of the Libyan Arab Republic (19th of January 1979).

led by an interpreter unable to understand the context in which the unjust text was applied and adapt his interpretation correspondingly. While the initial method applied was the same in both cases (reading the text), one interpreter showed a good hermeneutical mind by not limiting themselves to it, while the other one did not so. As a result, one decision has weathered the test of time without any problem, while the other one has become part of a general unauthoritative trend in international arbitration.

Obviously, not all methods can correspond to the proper, critically open mindset required to interpret Law, and so the inspiration drawn from one method to the other can indeed be extremely impactful, but the underlying mentality will always prevail over the choice of method. Typically, applying philosophical hermeneutics with the mindset of law and economics will usually lead to very poor results, as the short-sighted economic prism used to interpret Law is in large part responsible for the very downfall of arbitral authority[1499].

Among the numerous arguments in favour of philosophical hermeneutics and its offshoots, the mindset is probably the most important one of all. In particular, modesty in the face of one's own finitude in accordance with the ancient Greek mentality is what affords the greatest flexibility to the interpreter, and philosophical hermeneutics forces just that, by making the interpreter insert themselves in a much broader historical context rather than an individualistic pseudo-auto-foundational one.

Modesty is what grants them the capacity to admit their own mistakes and their fallibility, to avoid being blindsided by prejudices they thought infallible. Most of all, human finitude shapes everything we do, including interpreting. This means that we cannot attain perfection, conceive it even, which further underscores the comparative importance of a great mindset over a great method, as the latter often aims toward some sort of perfection, usually in the "perfect" or "correct" application of the method[1500].

[1499] Frydman pp. 532-533; Supiot, Homo Juridicus pp. 232 ss; cf. *supra*.
[1500] Gadamer pp. 767 ss.

II. Hermeneutics and equity: exiting legal positivism to restore arbitral authority

1. Introduction

Slowly but surely making our way towards the end of this dissertation, it is now time to use what has been discussed so far in a more legal, arbitral context. Recalling the problems facing international arbitration, they were legion, and probably not exhaustively discussed in this dissertation[1501]. Instead of highlighting these issues separately, we have elected to look at them as transversally as possible, hence the focus on the authority of international arbitration, which regroups many characteristics of international arbitration, but also forced us to look at the overall evolution of international arbitration, hopefully to understand in which direction it will keep going and how to avert some negative effects.

The crisis in which international arbitration finds itself is due to a combination of many factors: the prevalence of commutative justice, the inability of arbitrators to seize on the common good, the use of arbitration for colonialist purposes, the remuneration system, the lack of equity *ex aequo et bono*, the drastic decrease of specific equity, the hermeneutical rigidity of arbitrators rendering them unable to properly assess their weaknesses, etc.

Obviously, hermeneutics cannot single-handedly resolve all of those problems, some of which would require enormous geo-political influence. It could, however,

[1501] The economic and political aspects could be developed further, in particular by doing a geographical segmentation of the problems encountered by the use of of international arbitration. One of the main issues with international arbitration is not only the relative lack of data, but also the lack of reliable data. A good arbitral settlement is very often unknown to those who were not privy to the case, and appeals in front of state jurisdictions are often very limited in scope and magnitude when international arbitration is involved.

shift the balance towards a more flexible form of arbitration, one that is not captured by technocratization and obsessing over legal logic rather than arbitral justice. "Legally" speaking, this would mean an accrued importance and use of specific and *ex aequo et bono* equity in international arbitration. By making good use of specific and *ex aequo et bono* equity, arbitrators could restore arbitration to a stage where legal texts are not perceived as mandatory references as to what their conduct should be.

The most cardinal aspect of this shift, however, would be that arbitrators could focus on justice once more. Through philosophical hermeneutics, univocity would indeed cease to be viewed as an option, which would push arbitrators to dissociate themselves from previous subpar decisions justice-wise. Hopefully, international arbitrators would also seize this opportunity to better grasp the importance of history and historicism, which demonstrate how arbitration has been led astray by practitioners and theorists[1502].

All in all, the purpose of selecting hermeneutics as the highlighted solution to international arbitration's authority crisis is to show how, on the most basic level (language), we can find solutions to the above-mentioned wide array of problems. In addition to that, and in good Aristotelian bottom-up logic, it is essential to solve a problem by taking care of the base, the bottom, and moving upwards towards the less important issues. This better ensures the solidity of the edifice and the accessibility of future "reconstruction projects".

2. The myth of the flexibility of contractual positivism: equality is not justice, merely the substrate of commutative justice, itself a seldom occurrence of distributive justice

The first step in this analysis is comprehending the general frame in which we find ourselves. Forgoing this step would mean proposing a solution to a problem whose key underlying aspects are ignored. As seen *supra*, the mindset is more important than the method, and if this overarching philosophy is not understood on a

[1502] Cf. *supra* part 2 regarding the recent (abuses of formalism and technicities) and less recent (arbitrators becoming tools of imperialism) problems of international arbitration, all of which could be tempered with a minimal use of historicism (cf. Ricoeur, Cinq p. 28; Nadel pp. 314 ss). Briefly, and without entering into the semantical debates among historians, we consider historicism under the guise of its most basic definition: the use of history to better understand phenomena (cf. Ruelland pp. 29-30; Devoto pp. 260 ss; Bevir pp. 658 ss; Nadel pp. 291 for instance).

fundamental-enough level, any subsequent proposition will lead us into further logical aporias, something illustrated by the fundamental miscomprehension of legal positivism, which has led many to the incapacity of even conceiving the filiation between legal positivism and contractual positivism. This might seem exceedingly circular an approach, but a consequential part of the hermeneutical solution we are moving towards is already contained in this general frame, as the numerous references to other parts of this dissertation will illustrate.

As alluded to during the developments concerning commutative justice *supra*, contractual positivism is quite clearly the legal-philosophical doctrine with the strongest ties to today's international arbitration, in addition to being the dominating political theory[1503]. As a general notice, what we call "contractual positivism" corresponds to the latest evolution of legal positivism, mainly consisting in the promotion of individual interests through the instrument of the contract. More precisely, it points to the replacement of laws by contracts in legal positivism, which thus becomes known as contractual positivism, the natural replacement to legal positivism, drawing a lot of inspiration from Supiot's work on the subject[1504].

There are many theories named "contractualism", most of which concern the moral element of a non-existent contract (Scanlon's work for instance). These "contractual" doctrines, quite frankly, do not interest us. As in legal positivism, the moral dimension of a contract, its axiological components, vary depending on people and societies, which is why they cannot be deemed essential: an essence changing from case to case, sometimes in brutal fashion, is interesting but mostly fantasized, contrary to both the Platonic essence and the Aristotelian substance[1505].

To be clear, we are not downplaying the importance of axiological criteria in the application of the Law and the general practice of arbitration. We already know, for instance, that these have had a tremendous negative impact on the authority of arbitration when arbitrators decided to declare a country's natural resources not entirely theirs to dispose of[1506]. However, these criteria do not help us pin down the

[1503] Spitz p. 475.

[1504] Cf. *infra* part 3, III, 2.

[1505] Ricoeur, Essence pp. 23 ss; Plato, Laches 191e; Aristotle, Metaphysics 1017a10-1017a25.

[1506] Cf. *supra*, with the example of Texaco v. Libya, wherein contracts were signed between Texaco and the former king of Libya. The monarch was then deposed by his people after it became known that he used his position to personally enrich himself and his friends. This brought about a new government which stood axiologically on the opposite end of the spectrum. Cf. also *supra* regarding the way a former prime minister of Iran was chased from

philosophical foundations of international arbitration as said criteria vary from case to case depending on the context and those involved[1507]. They are obviously important for the person deciding *in casu*, but we consider abstract axiological judgements to be quite dangerous in terms of logical reasoning, as these often force their iterator into a posture whereby overcoming prejudices becomes all the more difficult. What truly matters is to know that there is an axiological judgement, to be analysed *in concreto*, the general results yielding the sociological aspects of international arbitration, which are then used to support or repel meta-criticism on the matter.

Somewhat peculiarly, it seems that quite a few contractualist theories involve actual contracts, which consequently makes us question whether they were aptly named in the first place, although it splendidly illustrates Supiot's contractualization theory by branding as a contract what is not contractual, artificially inflating the field. These other "contractual" theories are generally regrouped under the banner of contractualism. They often emanate from fields that are neither Law, nor legal philosophy, although the very notion of contract emanates from both of them[1508].

In spite of the fact that links with legal positivism are getting stronger the more laws are enacted and the more technical they become, international arbitration's centre of gravity remains, for the time being at least, contracts and not laws, which is where the arbitration clauses are. This explains our current focus on contractual positivism, the latest stage in the evolution of legal positivism. To know what hermeneutical solutions should be referred to requires the comprehension of this intellectual movement, in particular given the fact that international arbitration is based on the

power by foreign institutions after a failed arbitration attempt and due to his departure from the previous regime's politics regarding the extraction of natural resources by foreign companies.

[1507] The same could be said about equity, which is heavily dependent on axiological criteria to define justice *in concreto*. However, such is not entirely the case with general equity because its purpose is to operate the passage from the general and abstract plane to the particular and concrete plane, although, to be very clear, axiological criteria will necessarily colour the way general equity is used thanks to each person's prejudices and the values of the society in which both the decision and the legal interpreter insert themselves. This is precisely why, when we defined the three types of equity *supra*, we did not use axiological criteria, for as important as they are in the conception each has of equity, they cannot be used to give a general legal-philosophical definition of what is equity. They are, however, of prime importance in its application.

[1508] A comprehensive analysis of those thought currents is too off-target to be conducted, leading us astray for what we anticipate to be a minor result in the grander scheme of this dissertation. This is why we do not attempt a full presentation on the topic.

instrument of the contract[1509]. Obviously, the specificities of contractual positivism vis-à-vis legal positivism are important to understand, chief of which being the extremely individual nature of contractual positivism.

Although there are very clear connections between legal positivism and the rise of individualism, neither is the direct cause nor consequence of the other. While they have fed off of each other, often used to validate the other's existence, strict links of co-dependency between them are ethereal at best. This can be seen by looking at past instances such as ancient Greece and Rome, as well as modern-day England. In both ancient Greece and Rome, the common good superseded that of an individual. Even more so, the very notion of individual human did not make much sense in a society where people were defined by their citizenry. The collective notion of *auctoritas* was in big part perfected by the Romans, and we have shown *supra* that we have good reason to believe that it existed in the Greek culture as well. Against this collective backdrop, many traces of written laws from this era were found, and even more were mentioned by ancient authors. Canonical examples of written laws include the XII Tables, the Draconian laws, the Athenian constitution, etc. In parallel, and at the other end of the spectrum, we have seen that some of the first to promote individualism in modern times were Locke and Hobbes, who both came from England, a country not particularly known for its written laws, but rather much more for its oral Constitution. Contractual positivism, on the other hand, is the main juncture point between legal positivism and individualism.

Nowadays, individualism is so widespread in western societies that it necessarily affects the way philosophical hermeneutics is put into practice; it also impacts the various incarnations of positivism like contractual positivism. In a society governed by individualism, it is only logical for members of said society to be affected by individualism, or to integrate it in their way of thinking, intentionally or not. This is shown by how popular the advocates of individualism have been over the past

[1509] It could very well be argued that laws and rules (both general and abstract in nature) have replaced the contract (particular, with a hybrid status hovering between abstract and concrete) as the main vector of arbitration. The reasons for this paradigm change seem, *a priori*, quite numerous: the will to attract a lucrative market, political lobbying, legislative thirst, the explosion of arbitral institutions, the creation of parallel appeal procedures to accommodate deals that would otherwise be struck down, the use of *potestas* to compensate for a lack of *auctoritas*, etc. Although this will probably be the topic of a future publication, it is not what interests us for the time being, which is why we will not focus on this hypothetical evolution of contractual positivism and international arbitration.

decades, whether in Law or in political sciences: Rawls, Raz, Scanlon, Kelsen, Hart, etc.[1510]

Stating that an individualist society breeds individualism is a tautology worthy of Plato, but properly analysing why would not be relevant enough for us to include it in the present dissertation. Indeed, although numerous studies have been conducted on the matter[1511], they would not bring more to this dissertation than what has already been shown through the genealogies of arbitration and authority, which have demonstrated quite thoroughly how exclusive arbitration has become in the face of entire societies, and how the common good vanished from authority.

Moreover, we have seen in part 2 *supra* how commutative justice had pervaded arbitration. Given how commutative justice reflects arithmetical equality rather than fairness, contracts rather than Law, individualities rather than communities, it is not a surprise that the contractualist doctrine has taken centre stage in the promotion of commutative justice, in the field of arbitration more particularly.

Having already explained the general frame of commutative justice, we will focus here on detailing how commutative justice jeopardizes the hermeneutical exercise by, unlike what some might think[1512], rigidifying the frame of interpretation. Whether it is from an allotment perspective (50-50) or from a mindset perspective (contractual equality above all), commutative justice narrows to the extreme the possibilities of interpreting and deciding. In a legal field like arbitration where the starting point usually takes the form of a contractual provision, the ability to surpass contractual positivism is all the more important because the legal base is already quite narrow from the outset.

There are probably more ways to tackle this problem, but in the context of both the theme (legal philosophy) and the topics developed in this dissertation (philosophical hermeneutics, legal positivism, etc.), it is appropriate to focus on the following two solutions to this problem. The first is to demonstrate that commutative justice is but

[1510] Examples include the disappearance of the common good from our hermeneutical prejudices due to our status as individuals first, citizens second, eventually; the tendency to conceive what is collective as the sum of individualities; in Law, as demonstrated by Frigerio (pp. 390-391), the difficulty to conceive collective rights and legal concepts on the basis of our individual subjective rights.

[1511] Piketty's book for instance is basically a giant study of the matter from a socio-economic standpoint.

[1512] Cf. Rocard pp. 179 ss, whereby the former French prime minister proudly digresses on the direction taken by France under his stewardship concerning the contractualization of the entire State apparatus. *Contra* Serverin p. 115.

a mere subspecies of distributive justice. The second is the use of distributive justice as a prejudice for philosophical hermeneutics to temper the penchant for commutative justice and contractual positivism of the dominant arbitral doctrine and horde of practitioners. Hopefully, these two solutions will give us a solid-enough exit strategy from the influence of commutative justice on arbitral hermeneutics.

Before detailing these two solutions however, we would like to further elaborate on the notion of contractual positivism, which has been conveyed and accelerated by the contractualization tendency. We will not go into the details of the contractualization movement, for it involves many aspects of society and would require a broad interdisciplinary study to comprehend. There will, however, be some allusions to this trend, especially to explain the growing importance of the contractual positivist doctrine. More overarchingly, discerning the general context in which a reasoning is located has been the bedrock of our methodology from the outset.

Contractual positivism[1513], is the current prevailing legal doctrine in which is immersed our general problematic of international arbitration, hermeneutics and authority. It is also the most individual-oriented legal doctrine borne from occidental legal currents so far, the last stage of legal positivism at the moment. Its construction is very close to that of legal positivism in the sense that it simply substitutes the law for the contract and the will of the legislator for the will of the parties. There are a few notable changes we will see *infra*, but for the most part, its fundamental aspects are the same as those of legal positivism. These changes reflect the acceleration of legal positivism, showing that the occidental perception of Law has not undergone any notable shift since Modernity. This tranquil flow can only be seen with a proper understanding of legal positivism's most fundamental characteristics, which have remained steady for centuries.

Without clear perception, legal theorists are prone to mistaking contemporary theories as having overcome legal positivism, misperceiving the theories they advocate for true intellectual breaks with legal positivism when, in fact, there is a permanence in the fundamental elements of these "new" theories and currents[1514].

[1513] Given the variety of movements and currents floating under the – rather – generic banner of "contractualism", we prefer to call this movement "contractual positivism", which is more precise, but also more honest regarding the intellectual affiliations of this doctrine.

[1514] Cf. *infra* part 3, III, 2 for a few examples.

Based on our definition *supra* of legal positivism, the fundamental elements of contractual positivism can be determined as follows: the analysis of the legal phenomenon under a scientific spectrum; univocal interpretations, which thus become unnecessary in the majority of cases; and considering that the main purpose of Law is to be organized in a single coherent system rather than a network to use the terms of Ost and van de Kerchove[1515].

By far the most emblematic example of such misconceptions, contractual positivism poses some serious problems to non-jurists. Uneducated in the basic notions of Law such as the definition of a contract, many intellectuals use the term "contractualism" to define variations of Rousseau's *contrat social*. Most of the time, this miscomprehension is paired with a misinterpretation of legal positivism. To be absolutely clear, jurists are susceptible to making the same mistakes. Most of the time however, they neglect legal philosophy in favour of a technical approach of Law, very much resembling an attorney's daily activities, which is why they often misapprehend theories involving both Law and philosophy[1516]. This being said, we have yet to read a jurist calling Rousseau's doctrine "contractualism."

Let us give a few examples of the conundrum in which contractual and legal positivisms find themselves by taking for instance Waluchow, who writes dozens of pages on the "many faces of positivism" without once mentioning the importance of the contract in the way the positivist mindset has mutated in the 20th century[1517].

Likewise, when Dyzenhaus starts his genealogy of legal positivism by referencing Hobbes, Bentham and Austin as the initiators of the movement[1518], contractualization obviously becomes less apparent given how small the historical field of vision is and how it already featured prevalently in their works. Most importantly, he fails to capture the fundamental aspects of positivism and Law: the "many currents of positivism" he mentions all share common characteristics: top-down, objectivity-seeking, borne-from-natural-sciences and formalist aspects. This inability to delineate the contours of legal positivism is probably why his definition is so subdued: "Positive law, properly so called, is not merely law whose existence is determined by factual tests but law whose content is determinable by the same sort of tests, here tests which appeal only to facts about legislative intention […] [i.e.,]

[1515] Ost/van de Kerchove, *passim*.
[1516] Bredin, Remarques pp. 111-113.
[1517] Waluchow *passim*.
[1518] Dyzenhaus pp. 41 ss.

tests which do not require moral evaluation."[1519] If one bases themselves on such a definition, understanding the contractualist trend of positivism borders on the impossible as none of the criteria he uses help comprehend why contractual positivism descends from legal positivism and what separates them from one another[1520].

We have indeed seen *supra* that legal positivism was first and foremost defined by its desire for objectivity, whether in the analysis of Law and legal concepts or in its methodology to organise said analysis. This leads the legal positivist to consider the will of the legislator as an object, something objectively describable because external to all interpreters of the Law. From a logical standpoint, this seems somewhat counter-indicative of what a doctrine centred around the concept of contract would point to.

Indeed, contracts are nearly always signed by two individuals, two subjects of the Law. This would mean that understanding the will of the parties would require understanding each party's personal, subjective will. According to legal positivism, however, the will of the parties must be analysed objectively, as an object we would describe in nature. This would mean objectively analysing something inherently subjective.

As such, where contracts are at their most incompatible with legal positivism is where the methodological turn of objectivity strikes hardest, transforming the contract from the combination of at least two subjective wills into something objectively observable, which includes the will of the parties, despite their inherent subjectivity[1521].

[1519] Dyzenhaus pp. 45, 50.

[1520] Cf. *infra*, after we finish looking at the various authors misconstruing the foundational elements of legal positivism.

[1521] Cf. Morin § 104 ss, art. 1 *in* CR CO I who typically speaks of the "objective interpretation" of the will of the parties. Likewise, the Swiss Federal Tribunal also makes mention of the objective interpretation of a contract to determine what the objective will of the parties is (ATF 144 III 93, c. 5.2.3). This assessment is not limited to Swiss Law, as the objective theory of law is "the dominant approach for determining whether there has been a mutual assent to the formation of a contract", to the point where it is "overwhelmingly followed in common law jurisdictions" (Barnes pp. 1119-1120). Engel pp. 235 ss is much more measured in his assessment, stating that legal expressions attract various interpretations, although quite often in contracts Law, the interpretative effort will be quite small when we are interpreting daily sales or loan contracts. More subtle, he does not mention the "objective will" of the contractors, but their "intersubjective will." (Engel p. 237)

Should we use the criterion set out by Dyzenhaus *supra* ("tests which appeal only to facts about legislative intentions" i.e., "tests which do not require moral evaluation"), we would have no means of knowing how we went from subjective intentions to an objective analysis of the contract, of linking legal and contractual positivisms. Would the parties' intentions even qualify as "legislative intentions"? If such is not the case, any chance of link between the two positivisms would be inexistent. If such is indeed the case, however, this would entail that there is no place for subjective intentions, which are necessarily moral[1522], in the sense that they always imply an axiological choice stemming from prejudices, rendering them incompatible with the positivist view that the intention of the legislator is an objective factor in the process of legal creation (cf. *supra*). Considering that we have seen *supra* in part 2 that morality was widely excluded from legal positivism, this would prevent us from establishing any link between Dyzenhaus' definition of legal positivism and contractual positivism, let alone comprehending that an entire underlying, recent legal doctrine can be subsumed under legal positivism.

Singh is yet another author convinced that legal positivism started with Hobbes[1523]. Sebok's musings are slightly more elaborate than most[1524]. Yet, he omits contracts as a vector of positivism, again, because the criteria he uses are not fundamental, in particular because he focuses on the political ideological conflicts surrounding legal positivism. For instance, he considers that "throughout the past century American positivism has been into the service of conservatism"[1525]. The fact that political considerations are involved in the crafting of a legal doctrine becomes easy to understand the moment one sees the importance of philosophical hermeneutics in axiological discourses, obviously not something limited to legal

[1522] According to some scholars, morality in positivism has nothing to do with tradition in the way we understand it as stated *supra* in part 2. Instead, any reasoning is moral from the moment it involves anything axiological such as ideas of what is good or bad (Greenawalt p. 3). This is where, in our definition of legal positivism *supra* in part 2, we mentioned that the separability thesis was but a substrate of the objectivity chimera of positivism. By excluding morality from Law, and hence axiology, legal positivism targets the notion of choice, cardinal in Law, by removing what it sees as the contingent aspect of Law: subjective opinions and personal choices, both of which are, by definition, incapable of being objective. Incidentally, what is widely called "morality" by positivist scholars seems to include anything related to *Vorverständnisse*, as these are, by definition, subjective. Consequently, this would mean indeed that hermeneutics is excluded from being applied to legal positivism.

[1523] Singh pp. 29-30.

[1524] Cf. Sebok p. 2058 for example.

[1525] Sebok p. 2058.

positivism. Unsurprisingly, he uses the same tropes as many other authors to construct a weak genealogy of legal positivism, which was apparently invented by Austin and Bentham[1526]. This prevents him from fully apprehending the most fundamental elements of positivism we have underscored *supra*. A parallel with natural sciences, for instance, would go a long way to understanding the true weight of axiology in positivism all-around, not just in Law.

According to Mitrophanous, only strict positivism is strong enough to properly separate Law from morality. The postulate that Law can be removed from morality is ludicrous, as demonstrated by philosophical hermeneutics. Because prejudices are inherent to our human condition, and because we all have our own values and make our own axiological choices, each person's morality will bleed onto their vision of the world, Law included. Let us admit, however, that what she meant was that, in accordance with natural sciences, the purpose of legal positivism is to search the truth, continuing the main epistemological failure of the movement. She mentions soft positivism as unworthy of strict positivism's ambitions, effectively enshrining laws as the only viable vector for the "true form" of legal positivism.

This assertion cuts her off from even conceiving that positivism could still evolve in the field of Law, meaning that she could not have even envisaged the possibility that laws could be replaced by another legal tool in the positivist theory[1527]. The proof is that she does not even consider contracts to be part of what she calls soft positivism. This could have, once again, been avoided had she understood the foundations of positivism, which is not confined to Law, but permeates a great number of academic disciplines like natural sciences, psychology and probably the one discipline suffering the most from positivism, economics[1528].

The failure of all the above-mentioned authors has hampered legal philosophers from understanding why positivism is still well and alive in both common and civil Law traditions. More centrally with regard to this dissertation, it prevents us from grasping the shift from legal positivism to contractual positivism. This might be a very small jump from an intellectual point of view, but it is a major source of

[1526] Sebok p. 2061.

[1527] Cf. *infra* part 3, III, 2.

[1528] Other examples on the long list of authors failing to understand the underlying and overarching principles of legal positivism include Marmor; Stone; Pojanowski; Himma, Positivism; Tamanaha; Kramer; Lyons; Goldsworthy; Greenawalt; Wright; Postema; Füßer; Soper; Coleman, and to a lesser extent, Schauer; MacCormick; Finnis, Truth; George, Preface.

confusion between arithmetical equality and equity, between synallagmaticity and geometric equality, in addition to emerging as a turning point regarding the compatibility between positivism and universals[1529].

The concept of contractual positivism is one we have failed to encounter, whether in the Anglo-Saxon or continental European literature. As such, we will lay out our own definition of contractual positivism hereafter. The basic idea of contractual positivism is quite simple once the fundamentals of legal positivism have been properly understood. Indeed, contractual positivism substitutes the law (i.e., a written legal text adopted and enacted in accordance with a specific procedure, very often a parliamentary one) with the contract (i.e., an agreement between two or more people defining certain rights and obligations between the signatories[1530]).

This entails that contracts are the main vector of Law, and that laws are merely here to complement what does not feature in the contract *("lois dispositives")*. The main consequence is that anybody capable of contracting now becomes a "legislating" entity, whose contractual will must be heeded unless limited by another one. As a result, people need to be considered equal in this paradigm, with eventual inequalities resulting from contracts passed between one another i.e., consented and voluntary inequalities. The reason is simple: if parties are not equal, this means that

[1529] Here understood in a sense opposite to Ockham's nominalist individual entities i.e., traits such as a cognitive capacity, a cultural element or even an affective need found in a significant number of groups or individuals (Widmer p. 107). According to Aristotle, universals are *pragmata* belonging to a plurality of people (e.g., men, women), by opposition to singulars, which are *pragmata* inherently incapable of belonging to more than a single person (e.g., Socrates, Plato's magister) (Aristotle, Interprétation 17a35-17b).

[1530] In order to define the concept of contract more precisely, we will use notions drawn directly from Swiss Law. The contract is defined by art. 1 of the Swiss CO as an exchange of at least two reciprocal wills consistent *("concordantes")* with one another. There are thus four essential elements to any contract, in Swiss Law at least. The first and second are the wills of the parties, which manifest themselves in the form of an offer to contract (first element) and an acceptation of this offer to contract (second element). The third element is the reciprocity of both wills, whereby the will to offer must indeed target the accepting party while the will to accept must target the offering party. Finally, the fourth element is the fact that the reciprocal wills must also be consistent with one another, meaning that said wills must coincide on a contract's essential points. There will obviously be variations between each country's legal definition of a contract, but the reason for which we chose Swiss Law to define the contract, other than the obvious *lex fori* proximity and influence, is that it gives us a definition that is pragmatic enough to be understood by non-Swiss jurists (cf. Morin, art. 1 *in* CR CO I; Zellweger-Gutknecht, art. 1 *in* BSK OR I; Kramer/Schmidlin, art. 1 *in* BK OR).

one can impose their contractual will on somebody else and thus the contract disappears.

There are many similitudes between both positivisms, namely the prevalence of objectivity which breeds a desire for exhaustivity, the deductive reasoning, the prevalence of willpower over Reason, the sacralisation of the text[1531], sanctions as the main recourse for people to obey the Law, a *jus potestas* and not a *jus auctoritas*, the predominance of form over substance[1532] and the belief in univocal interpretations.

However, there are some notable differences between contractual and legal positivism whose importance is all the more notable when understanding the weight of both the concept of authority and philosophical hermeneutics. Namely, contractual positivism has a decidedly individualist nature, contrary to legal positivism as seen *supra* in part 2. It is also egalitarian in nature, as parties must be equal in order to contract. Indeed, if parties are not equal, this means that one of

[1531] Both the sacralisation of the text and the prevalence of willpower have not been explored *supra*. The reason is that although these elements are important in the characterization of legal positivism, they are hardly ever found in positivist writings, including those criticizing positivism. Given that we wanted a "canonical" definition of legal positivism to pursue our criticism of it, we decided to set them apart, although we whole-heartedly agree with those who established these connections (Papaux, Introduction pp. 1-134; Frydman, *passim*). Furthermore, the sacralisation of the text, which was of religious nature before Modernity, has since become intricately linked to the supposed objectivity of the text: the objective God became the objective scientific methodology and then the objective content of a text of Law. Interestingly, willpower follows a similar pattern. From the will of God featured in the Bible's legal texts to the will of the legislator featured in the formal legal text to the will of the contractors featured in the contract, willpower has remained constant throughout the evolution of positivism. Both of these characteristics can be traced to Saint Augustine and his *illuminatio* doctrine according to which we must heed the evangelical texts and obey human laws, even if unjust, so long as they do not perturb our application of the evangelical texts (Papaux, Introduction pp. 70-78). Both of these characteristics have the merit to put positivism in front of its biggest contradiction: it pretends to belong to the realm of reason as dictated by science and the objective truth it pursues, all the while functioning with willpower as its main driving force.

[1532] Meaning that for both positivisms, the content, without being completely irrelevant, is secondary to the formal validity of the legal text. Unless we face a woefully unauthoritative text of law, people will have to apply the law/perform the contract for as long as they are formally valid, mindful of the formal prescription laid out beforehand. From the perspective of the three-dimension theory of Law, this means that, contrary to the concept of authority, the validity pole is first, determining what is Law, while the two others are relegated to determining the intensity of of what is deemed extra-legal by legal positivists (Ost/van de Kerchove pp. 372 ss).

them can impose their legal will on the other. If such an inequality results from a contract, then it is because the "weak" party wanted it to be so. That being said, if such an inequality results from a *de facto* situation prior to the signing of the contract, the entire contracting process becomes lopsided, and the purpose of contracts, which is to grant each individual maximum legal freedom, loses part of its substance. The only way to avoid this is to consider everyone equal or to install equalizing mechanisms to create a legal fiction of equality.

As such, if someone is theoretically entirely free to contract, said freedom can only be tempered by another's equal freedom to contract. This means that the general justice matrix of contractual positivism is commutative, not distributive, as we have shown *supra* in part 2.

Moreover, contractual positivism has a tendency to accentuate some of legal positivism's characteristics. For instance, willpower, which reflects the will of God or the legislator in legal positivism, becomes the will of the parties, all of which have the will and power to contract. This means that each individual has the power to create their own set of rules, which would thus only be limited by another individual's own set of rules.

Arbitration currently reflects much of the contractual positivist doctrine. Typically, parties contract with one another and insert an arbitral clause in the contract. This arbitral clause becomes the centre of the entire arbitral process, the foundation upon which rests the "authority" of arbitrators, as well as their margin of action. Given that arbitration suffers from a severe deficit of authority, arbitrators must therefore rely on something external to them to justify their course of action. Furthermore, considering that equity *ex aequo et bono* is not the legal-philosophical epicentre of arbitration, the arbitrator's reliance on the contractual text is at an all-time high as seen *supra* in parts 1 and 2.

As such, instead of building back their authority by interpreting norms and situations to be able to act in specific or even *ex aequo et bono* equity, arbitrators are guided in their interpretations by contractual positivism, meaning that their actions essentially consist in re-establishing the imbalance resulting from factual events with regard to the original balance laid out in the contract, barring certain situations with an exceptionally manifest unbalanced component (e.g., taking advantage of a person's distress to make them sign a contract). Whether the contract was truly egalitarian in its attribution of rights and obligations does not matter, for contractual positivism generally assumes equality between all parties,

implying that an unbalanced contract is merely the result of equal wills voluntarily deciding on an unbalanced contract. A self-inflicted wound in other words.

Contractual positivism did not appear out of thin air, and while it is intricately linked to legal positivism, it is also linked to the doctrine called "contractualism", albeit more distantly. Our reason for naming contractual positivism as such was to show its closeness to legal positivism, but also to avoid any semantical conundrum with contractualism. The main difference between them is that contractual positivism is based on actual contracts, while contractualism is based on a non-existent entity wrongly named "contract".

Marking the distinction between contractualism and contractual positivism has indeed not been helped in any way by the appropriation of the term "contractualism" to describe the doctrine of the social contract of Hobbes and Rousseau, despite the fact that no contract is ever signed in their respective doctrines. More recently, Rawls and Scanlon have followed in their footsteps[1533]. "Morality is contractualist, on Scanlon's account, in just the sense that it seeks an accommodation among our disparate and conflicting ends and interests to which it would be unreasonable for us not to subscribe as a framework for common life."[1534] Following this definition, there is no contract involved in the unaptly named doctrine of contractualism.

This is further confirmed by the fact that Scanlon's theory is viewed as a moral philosophy rather than a legal philosophy, whereby contracts are used to judge an action's morality[1535]. This is, from a legal standpoint, quite the bizarre definition of a contract, which does not feature any of its traditionally admitted components in Law. Should we even ignore these legal components, contracts are simply an instrument, void of morality. They are a mere legal vector, not of morality, but of the co-contractors' wills[1536].

Among the typical pre-conditions of the contract is the notion of reciprocity: both parties mutually accept each other's offer. However, Scanlon's vision of what is an informed mutual agreement is far removed from an actual contract. This is especially so because he relies mostly on human rationality, without seizing the importance of individual willpower, and without understanding that human beings

[1533] Without drawing any conclusion, it is interesting to note that the proponents of contractualism have usually not studied Law.

[1534] Watson p. 222.

[1535] Scanlon, Contractualism pp. 111-113; Watson p. 241.

[1536] Usually of the stronger will, but this is a Pandora's box that shan't be opened here.

are far from rational beings[1537]. This is but a reflection of the confusion surrounding geometric equality and synallagmaticity: the obligations of a contract may be allocated equally, but it does not mean that the parties are equal. Unquestionably, the best example of this is the employment contract, where the employer and the employee will rarely if ever be on a true equal footing[1538].

While trite in appearance and easily solvable from an intellectual standpoint, this sort of language abuse is typical of some of the problems we have encountered with authority throughout this dissertation, whereby power and authority are assimilated to one another. Additionally, should we further our counterpoints against Scanlon's brand of contractualism, we would find that morality is neither a contractual source nor contractualist, but an axiological choice that inserts itself in an entire system of values stemming from a tradition (a community, a family clan, a society, etc.). The existence of reciprocity in Scanlon's theory, a contractual foundation in that it ensures that both parties agree on the same things, is also peculiar: called "mutual recognition" or "mutual agreement", it is a postulate according to which "moral motivation is rooted in a recognition of others as rational, self-governing creatures."[1539] While this could be true, albeit to a very limited extent, about co-contractors, this is certainly not enough to induce, even abduct, any form of contractual reciprocity between parties. This is even more so in an international setting like arbitration wherein the degree of contingency is higher still than in internal affairs, where contractual reciprocity is even harder to determine.

This is further underscored in Scanlon's seminal article on contractualism, which lays out a typically univocal and objective description of a "unanimous agreement", one resolutely different from our legal definition of a contract (cf. *supra*): "To think of a principle for unanimous agreement I must think of it not merely as acceptable to *me* […] but as acceptable to others as well. To be relevant, my judgement that the principle is acceptable must be impartial. What does that mean? To judge impartially that a principle is acceptable is, one might say, to judge that it is one which you would have reason to accept no matter who you were."[1540]

[1537] Cf. *supra* regarding the weight of willpower in contracts; cf. Papaux, Contrat pp. 211-212 regarding the irrationality of human beings. Furthermore, Scanlon defines reciprocity as a contractual agreement (cf. *infra*), whereas reciprocity is but one element of a contractual agreement (cf. *supra*).

[1538] Cf. Supiot, Pourquoi pp. 485 ss; Witzig pp. 30-45.

[1539] Watson p. 222; Hill p. 488; Wallace pp. 452 ss. Cf. Papaux, Homo Faber to grasp how wrong this conception of humanity is.

[1540] Scanlon, Contractualism p. 120.

To these legal criticisms, we could add another one, more hard-hitting and taking aim at the foundation of this contemporary doctrine of the social "contract": *"L'idée même d'un contrat social entre des individus qui ne sont pas encore en société et décident des modalités de celle-ci est profondément fausse et à l'origine de toutes les autres erreurs: c'est d'elle que vient l'illusion que les individus continuent de poursuivre leurs fins et que la société n'est là que pour les y aider. C'est d'elle que naît l'idée d'individus pleinement libres qui sacrifient une partie de cette liberté lors de l'entrée en société, ou encore celle qu'ils pourraient peut-être arbitrer entre ce qu'ils donnent et ce qu'ils gagnent …"*[1541]

This is typically why constructing a proper genealogy is of prime importance when studying a concept: to grasp its most fundamental characteristics and anticipate its evolution. It very often reveals how insufficient our language is to describe all the philosophical variations faced during our studies, further accentuating the importance of historicity[1542]. Most importantly, we can understand when a concept is being diverted from its final cause. This is unquestionably the most cardinal advantage of establishing genealogies, for it allows us to seize the substance (or essence) of a concept, enabling us to forgo more or less minor details and see through cosmetic evolutions or grand-scale changes: what is the result of external axiological decisions or the result of a genuine internal revolution. This is how we know that contractual positivism is derived from legal positivism, as we will now see, rather than the protrusion of the *contrat social* doctrine which did not involve a contract (contractualism).

Legal positivism has been a long time coming, in particular with the Roman Catholic Church building on Plato's fundamental top-down intellectual matrix[1543]. Understanding this is how we know that legal positivism did not start with Hobbes, Austin, etc. It is also how we know that contractual positivism, far from being a novel doctrine, is a mere substrate of legal positivism. The reason is simple: their foundation is the same. The will of the legislator becomes the will of the parties. The sacralisation of the written legal provisions becomes the sacralisation of the written contractual provisions. Individual rights are considered absolute and should only be restrained in the most extreme of cases i.e., criminal charges in the crushing majority of cases. The various freedoms consecrated by legal texts become the

[1541] Méda pp. 297-298. Overall, Scanlon's general theory on contractualism is about as removed from contracts as it is from Law.

[1542] Gadamer, Philosophy pp. 127 ss.

[1543] Cf. Papaux, Introduction pp. 1-134.

freedom to contract. Epistemologically, truth to the detriment of justice remains a staple[1544].

More visibly and still on an epistemological level, the pretension to an exhaustive law has become a pretension to an exhaustive contract, a mentality deriving from a poor conception of natural sciences whereby said natural sciences can explain anything. From a more logical standpoint, both legal and contractual positivisms advocate for the deduction of rules from the general principles instead of abduction (cf. *supra*).

In this context, the contract is but an instrument which may or may not reflect a positivist mentality depending on the parties and overall judicial system adjudicating it. In the occidental world, positivism remains, in our view, the overwhelmingly dominant legal doctrine, which is why the instrument of the contract is heavily influenced by it[1545]. While it is easy to think that civil Law countries are more prone to "positivist contracts", due to their more extensive written Law traditions, this observation is only valid when focusing on the cosmetic aspects of legal positivism rather than the fundamental ones, which is very visible when looking at England's contract law jurisprudence[1546].

[1544] We have shown multiple times through the course of this dissertation how justice does not matter in the eye of legal positivism. Concerning contractual positivism, everyday life is literally littered with such examples. Uber's arbitration clause features indeed an international component but, despite respecting the overall formalities of international arbitration, how is it fair for a driver to travel hundreds of kilometres to get justice under the supervision of a unique arbitrator chosen by the opposing party (cf. for instance Uber Technologies Inc. v. Heller, 2020 SCC 16 decided on the 26th of June 2020 by the Canadian supreme court)? The internet is ripe with such examples of mass contracts concocted by Apple, Google, Microsoft, Amazon or Facebook, all of which have a knack for pushing many contractualist convolutions to their absurd limit (cf. Bory pp. 65-109).

[1545] Legal studies in civil Law countries are nearly always done in a positivistic way, which is a strength of this doctrine that we should all respect: it is very pedagogical. In common Law countries, the method is less positivistic, but the content just as much: the key figures are simply moved around, assuming new forms. There are some encouraging signs of currents fighting back, the most notable ones being the Brussels current and, to a lesser extent, the Quebecois current.

[1546] Cf. Bank of Nova Scotia v. Hellenic mutual war risks association ltd. (Bermuda) [1991] 2 Lloyd's Rep. 191, a decision also known as "The Good Luck". In this case, the Court of Appeal (England and Wales) decided that contractual and moral rules were separate from one another, fully enshrining positivism in English and Welsh Law (Phang p. 107). "It is submitted that a positivistic approach accompanied by pragmatic commercial considerations will continue to dominate English contract law (and, quite possibly, even commercial law generally). A slight tension will result from the infusion of certain doctrines premised upon fairness, but the outlook for a full development of these doctrines appears bleak in view of

Instead of using imprecise criteria to determine whether superficial, cosmetic aspects of an argument are sufficient to qualify said argument as positivist, using philosophically foundational characteristics tempered with historicity proves much more useful. Even more so, it proves much deeper hermeneutically, for it permits us to see where positivism lurks and how it evolves without trying to hoodwink readers through the use of a novelty's shininess. The filiation between legal positivism and contractual positivism requires the use of the aforementioned essential characteristics to be identified as simply an offshoot of legal positivism. Rather than proceeding to a full analysis of the similitudes and differences between legal and contractual positivisms, we will highlight the most essential ones, in the continuation of those mentioned *supra*.

The first of these characteristics (in no particular order) is the quest for truth drawn from natural sciences. A contract's purpose, just like a law's, has never been the truth, or even objectivity. Given that contracts generally only involve two parties, subjectivity is found in higher proportions than in laws, which are hopefully the product of more than the will of two individuals. This only exacerbates the problem: the will of the legislator replaced the will of God as the objective source of Law, but in contractual positivism, the will of the legislator is no longer mandatory, second to the will of the parties[1547]. In contractual positivism, the word of the parties is the most important and objective criterion of analysis.

This criterion becomes all the more ominous when paired with legal positivism's ever so strong affection for formalism. As a reminder, positivism views a proper law as one that respects the valid formal prescriptions, justice and fairness notwithstanding[1548]. Contractual positivism being an accelerated and accentuated version of legal positivism, we find the same primacy of form over content and in higher numbers. This implies that when contractual partners enter into a litigation process, what is written in the contract becomes the most important aspect of the entire trial, even (or especially) when the situation is resolutely unfair.

Furthermore, it is easier to contract than to legislate, meaning that contracts are more accessible to individuals than texts of law. Consequently, the number of legal creations is much higher in contractual positivism than in legal positivism as

the fact that positivistic considerations will result in *ad hoc* limits […]." (Phang p. 108; cf. also pp. 109-111).

[1547] Feinman p. 950.

[1548] Kelsen, International pp. 124 ss.

any person capable of contracting becomes a "legislator"[1549]. Despite the lower threshold in terms of formal requirements to become Law in contractual positivism, the formal aspects of Law (whose main source are contracts in contractual positivism) remain more important than its content, meaning that the availability of contracts does not temper the preponderance of form over content, but simply offers it more opportunities to materialize.

Adding to this already ominous mixture, individualism is not a characteristic of legal positivism per se, but is part of the political doctrines that have accompanied the rise of positivism, as we have seen at length with the concept of authority (cf. *supra*). Contrary to legal positivism, contractual positivism has a direct link to individualism as the overwhelming majority of contracts are of the one-on-one variety, one individual vs another. Even in the case of contracts involving many people, resulting collaborations are merely the fruit of an addition of individual interests. These collaborations cease the moment individual interests cease to align, even in the middle of a trial. This "fusion" between individualism and contractual positivism should not be surprising given the parallel trajectories of both positivism and individualism.

Finally entrenched in positivism, individualism now impedes authority, not just in the field of political philosophy, but of legal philosophy as well. This newly found versatility is yet another obstacle faced by the restoration of authority, an intrinsically collective concept whose success heavily depends on the capacity of the citizens of a society to act collectively: by inheriting common foundations and by augmenting them, always for the common good (cf. *supra*). There will always remain space for individual interests and self-preservation even in the most collective of society, but only secondarily. This is in substance the difference between a citizen and an individual: the latter's interests always precede that of their surroundings, the nature of the surroundings notwithstanding.

Having a predominant legal doctrine placing the individual at the heart of Law rather than a society of citizens poses more difficulties concerning the fulfilment of the common good, if only because the *Vorverständnisse* of the members of society are heavily slanted towards themselves rather than the collective. A supplemental effort is thus required to acknowledge the problem before even being able to proceed with finding a solution. Once this initial effort has been made, there remains the issue of the type of solution required to solve a problem. In a "me first"

[1549] Supiot, Contractualisation pp. 26-28, 39-41.

context, collective solutions to an individualistic society's challenges become perceived as an infringement to one's absolute freedoms[1550]. The general environmental crisis serves as a massive, constant reminder of the inability of individualistic societies to act for the common good, even when the looming threat is the extinction of humanity[1551].

Closer to the heart of this dissertation, this heavy penchant for individualism strongly hampers the capacity of arbitrators to be authoritative. As mentioned already, the effort to overcome one's own prejudices is never negligible, requiring the faculty to question one's own self at a fairly deep level, maintaining a level-headedness even when emotions are fiery and always keeping sight of the common good, even to both parties' dissatisfaction, is an enormous endeavour, difficult to achieve. Moreover, let us not forget that one of international arbitration's features is the extreme contingency and complexity of facts and their establishment, which includes cultural and linguistic incompatibilities of various degrees. This is the reason why, historically, arbitrators have been well-respected figures, capable of wisdom rather than wielding encyclopaedic knowledge: the mindset is more important than knowledge, especially when authoritative arbitral solutions would likely oppose the prevailing legal mindset.

More than that, wisdom is the necessary pre-condition to being able to overcome prejudices, especially when these are individual-oriented in a paradigm where individualistic solutions are not adequate. Consequently, all the knowledge in the world will not help an arbitrator overcome their prejudices if they do not have the wisdom to question themselves. Being an arbitrator implies being part of a certain elite, from a knowledge standpoint to be sure, but in particular from a mindset standpoint, a mindset recognizing the prevalence of wisdom over knowledge, the preponderance of an open mind over technical skills and the priority of the collective over the individual, especially in situations of relative adversity[1552].

[1550] Rawls' limits in this regard are acknowledged, even by very friendly critics, Degiovanni pp. 37 ss.

[1551] Cf. the latest IPCC special report on global warming, which focuses on a variety of topics from freshwater issues to food crisis to the increased risk of natural disasters (last consulted on the 2nd of March 2022): ‹https://www.ipcc.ch/report/ar6/wg2/›. There are obviously many other crises that would benefit from a collective response but have found none: ever-increasing income inequalities, wars for natural resources, the housing crisis on all levels, etc.

[1552] One of the more honest positivists we have read states it very directly: "To enter a Positivist Hall, much less to join a Positivist class, or to subscribe to a Positivist fund, requires in these days of prejudice and lampooning, a certain mental detachment and a real moral courage.

Enter the two aspects perhaps most characteristic of contractual positivism: equality and commutative justice. Both are not intrinsic attributes of legal positivism, which is not to say that legal positivists do not have a certain fascination for them. However, equality is inherent to the contractualist order, with the notable exception of money[1553]. The central idea is that two parties wishing to contract are equal, for if they were not, their freedom would be limited[1554]. This may not seem particularly problematic until we understand just what sort of equality is extracted. Indeed, equality in commutative justice (arithmetic) is not the same as in distributive justice (geometric).

As seen *supra* in part 2, commutative justice is arithmetical while distributive justice is proportional (or geometric). In the distributive paradigm, proportional equality is not an end but a means to reach justice: equal application of the law, equal treatment of citizens by authorities, equal access to healthcare, etc. In the commutative paradigm however, arithmetical equality is the purpose, because the fundamental postulate of commutative justice is that all individuals are equal, meaning that if one gets ahead to the detriment of another, they need to be put back on the same level, "re-equalized".

This can be seen in contracts, which are the main vectors of both contractual positivism and commutative justice. Indeed, contracts require equal free wills of all co-contractors in order to come into existence[1555]. Moreover, as we have seen *supra*, the fact that services are very often quantified through sums of money, meaning that contracting parties can often invoke this arithmetical reference to determine the value of both parties' contractual obligations.

The tendency stemming from an egalitarian mindset is the erasure of differences, which in turn, entails the use of discriminations. This might seem antithetical but in reality, in order to eliminate differences, discriminations are obligatory. If not, the gaps between the various categories of society would remain, maybe in a somewhat toned-down context. Measures can be positive or negative, but will always remain discriminatory: what is positive for one will nearly always be negative to someone

The direct object of our courses is to inculcate Positive convictions with a view to a Positivist life." (Harrison p. 463) This is quite clear: the mindset of positivism is more important than the knowledge of Law.

[1553] Supiot, Contractualisation p. 23.

[1554] Other than the obvious fiction that contractors are equal to one another, this idea continues yet another aspect of Modernity in the form of absolute freedoms.

[1555] Cf. for instance Craswell pp. 2 ss; Martenet p. 801.

else. To compensate inequalities, one must indeed install discriminatory measures in order to establish a (fictitious) equality, usually with the exclusion of the biggest factor of inequality in any capitalistic society: money, the one difference entirely tolerated in contractual positivism[1556].

To be clear, this is not a judgement on whether such measures are appropriate or not. We are merely observing the impact of commutative justice and the arithmetical equality it entails. What we do question, however, is whether a justice based on discriminations can truly be called authoritative, just, even. If equality in an arithmetical setting is the end, where is justice located? If both are contradictory, as seen in the few examples *supra*, it would seem logical that the end, the purpose, would prevail over an undetermined non-corollary.

Strict commutative justice very often culminates in absurd results when facts overcome the lowest threshold of complexity. When such is not the case however, commutative justice is a useful tool to quickly sort out the most basic situations, which make up for an extremely high contingent in everyday life: buying food, renting a car, using public transportation, borrowing a chair at the cafeteria, etc. These legal relations usually go unnoticed and seldom do they end in court. The moment a case becomes a shade more complex however, is usually when commutative justice becomes inapplicable, even in what could legitimately be called "easy cases" (a divorce with no animosity and money problems, a murder, a car crash, the refusal to install solar panels, etc.). The unfairness of this train of thought can be demonstrated with very simple examples. According to this doctrine, it is not unfair to conceive a general flat tax for all without factoring in income levels[1557].

The question then becomes: why bother explaining anything if it is constrained to the easiest daily cases? To which the answer is quite direct and in line with philosophical hermeneutics: because of the mindset and the interpretation prism deriving from it. Far from being as innocuous as the cases it is linked to, commutative justice and its arithmetical equality are likely to pose enormous problems, in particular in a society which favours individual interactions rather than societal ones. Exiting this mindset would require a non-negligible hermeneutical

[1556] Supiot, Contractualisation p. 23.

[1557] In Mongolia for instance, there is a flat income tax of 10% for all residents. In Europe and North America, the Value Added Tax (VAT) is very frequently seen as an unfair tax targeting people with more modest means: ‹https://www.francetvinfo.fr/economie/impots/la-tva-est-elle-un-impot-injuste_3240357.html› (last consulted on the 14th of September 2022).

effort involving the questioning of the contemporary positivist jurist's very foundations, which is what we will do now.

Although the exercise is very tempting, we will refrain from analysing how we could exit the downward spiral in which contractual positivism has precipitated us; this would be a topic for an entirely different book, requiring multiple genealogies. Less ambitiously, and as stated *supra*, our purpose here is to find a way to temper the effects of contractual positivism, both by continuing to expose its falsehoods and by showing the positive impact philosophical hermeneutics could have.

Coupled with contractual positivism, its penchant for individualism in particular, commutative justice makes for a very questionable way of doing justice: what is authoritative requires the prioritization of the common good, but neither this legal doctrine nor this justice theory's final cause include it. Quite the opposite, contractual positivism and commutative justice are both angled towards individualistic conflict resolution. Even more so, the quasi-veneration of the text (Bible-law-contract) renders jurists very skittish regarding – potential – departures from the contract and the will of the parties. This is why, as we have seen, arbitrators overload their awards with various legal, jurisprudential and doctrinal references: to avoid having to take an intellectual stance on the matter, preferring instead to use other legal references rather than being caught acting *ex aequo et bono*, the apex of unreasonableness according to positivism (cf. *supra*). To be clear, the reproach does not concern the tendency of legal interpreters to ground a decision in a legal argument, but the propensity to do so to the detriment of their authority and to a degree unbefitting of a field whose legal foundation is equity *ex aequo et bono*, precisely because laws historically proved too stifling in the pursuit of Law's final cause, justice (cf. *supra* parts 1-2).

Fundamentally close yet conceptually opposite to commutative justice, distributive justice merely uses arithmetical equality as a criterion among others to gauge whether a solution is fair, balanced and hopefully authoritative. In other words, arithmetical equality is a means to an end, not the end itself, which makes distributive justice much more flexible and adaptative in its application of arithmetical equality. By stating that equality is a means, this implies that distributive justice uses it at certain precise moments during the trial because it is a matter of giving each party their due. Typically, a judge must grant all parties the same opportunities to express their respective viewpoints or risk being unjust. These viewpoints will very certainly have different values, which will just as certainly lead to an arithmetically unequal solution, but equal chances to express them should be granted nonetheless.

This vision of arithmetical equality as being an occasional instrument for distributive justice can be demonstrated quite simply once we replace commutative justice in what we think is its rightful place: as a substrate of distributive justice. The arithmetical equality defended by commutative justice is indeed just another proportion: the same way 75-25 or 51-49 are proportions, so are 50-50 or 33-33-33. Equality is an unusual proportion for sure, one where winners and losers mathematically do not exist, but a proportion nonetheless. This is a small recalibration with big ramifications, both theoretical and practical, not unlike how the wrong use of certain words can lead to immense changes, showing once more how important language is in any academic field, humanities and natural sciences.

In the case of commutative justice, the aforementioned changes appear in the form of the invalidation of the entire mindset it lays out: equality was never an end, always a means to dispense justice. Indeed, as seen *supra* in part 2, distributive justice highlights proportions as the basis of its justice, so arithmetical equality is simply one of many possible combinations of proportions.

With this in mind, centring an entire theory of justice or moulding a complete mindset around one of many options does not seem quite logical anymore, unless said society has enshrined egalitarianism as the core of its common good. This would make for quite an unfair society given that the heart of distributive justice, "to each their due", would become unattainable and the Talion generalized, blinding a few people in the process. This explains why a rigid mindset is so dangerous for legal interpreters: it deprives them of a number of justice variations, reduces the scale they operate on and ultimately, diminishes their vision and capacity to take events into consideration. The consequences of this are potentially dramatic as we have seen with the numerous arbitral decisions unable to take into consideration the parameters of decolonized countries, trying to find middle-of-the-road equal issues in the face of unadulterated larceny, leading in turn to a legion of geopolitical crises whose effects are still felt today (cf. *supra* part 2).

Furthermore, it ensures that justice does not become a casualty of arithmetical equality, that the legal interpreter does not become a victim of contractual positivism, and that equity does not suffer from the rigid mindset permeating the field. The answer to inequalities is not more arithmetical equality but justice. By introducing proportions, distributive justice lays out the groundwork for the logical foundation of all legal reasonings, the analogical reasoning. In yet another ironic twist, it would also restore some of equality's lost credibility by replacing it in its rightful place in the justice system. It would hopefully cease to be seen as a

constant potential landmine to the advance of a fair meritocracy, by definition inegalitarian and a branch of justice ("to decide on the merits").

Univocity has already been revealed to be quite the scary utopia *supra*, and although it would be adventurous of us to brand it as a consequence of commutative justice, the vision-narrowing effects of the latter certainly do not help us extract ourselves from the grip of the former. Indeed, we now know that commutative justice is synonymous with fewer options to do justice, smaller margins of interpretation. By reducing the number of options, in particular if viable options exist in this "discarded zone", the probability of finding multiple viable interpretations decreases.

Whether this decrease is small or not is irrelevant. Its mere existence is already a huge detriment to legal interpretation, for it convinces legal interpreters that unique interpretations are not only possible but common currency, to the point where jurists can accept univocity as a suitable solution. This causes jurists to become more skittish, less prone to craft and conceive new legal arguments as they consistently avoid straying too far from the one interpretation. This partly explains why there has been an inflation of legal sources in international arbitration awards over the past decades: international arbitrators, without falling into pure egalitarianism, a practical impossibility in their complex world, still fall prey to the hermeneutical mindset stemming from it.

One could argue that by doing so, they are simply making use of authoritative interpretations preceding them, using what previous generations of arbitrators have transmitted to them. One could also argue that decisions commonly referred to become so because of their perceived authority as augmenting the field of international arbitration. Such an argumentation line would, however, ignore the purpose of justice, the very final cause of any legal domain, raising a very problematic question at the same time: if an unjust decision is considered authoritative, what does this say about the current state of international arbitration? Why are legal technicities considered the authoritative aspect of an award rather than the justice it brings to the case at hand? More bluntly still, why are technicities viewed as the common good and why viewing them as such augments anything in the field?

This is why the rehabilitation of the analogical reasoning through distributive justice is so important, because it would put some distance between the interpreter and the rigid, dogmatic mindset of positivism, no matter what shapes it takes. The reason why is that contractual positivism, like legalism and Christianism before it,

intrinsically favours univocity. Be it the will of the parties, the will of the legislator or the will of God, all emphasize the dominance of a single will, of a single voice. Furthering distributive justice and lowering the influence of commutative justice by (re)integrating the latter into the former would be a step in the right direction of philosophical hermeneutics, mainly by broadening the scope of potential interpretations to establish balanced proportions. Let us never forget that etymologically, *analogia* was translated to *pro portio* in Latin, that distributive justice fully revolves around proportions, a justice described by Cicero as the greatest form of justice (cf. *supra*).

One would think that the many contemporary calls for pluralism would draw enough attention to the practical impossibility of univocity, yet those making and heeding said calls very often pair them with univocal concepts such as universal rights or a single international arbitral order, highlighting their incomprehension of the fundamental aspects of positivism and hermeneutics[1558]. As mentioned *supra*, one of the main benefiters of the rehabilitation of the analogical reasoning would be equality, not as a purpose but as a means, one which would not be scorned and frowned upon for being synonymous with inelegant paralogical legal reasonings. In procedural rules, equality has seen one of the most important developments in occidental laws over the past centuries: for all people to be tried and judged according to their actions and choices, not status, money, race, etc. Although practice is still far from perfect, this concept was powerful enough to be one of the driving ideas of the French Revolution[1559]. As a means, equality is a powerful notion capable of levelling unfair playing fields, but as an end, it becomes capable of the exact contrary, often rendering a fair situation unfair.

The aforementioned re-integration of commutative justice in distributive justice would also serve the authority of arbitrators even more than it would other legal interpreters, for arbitrators are supposed to be the masters of specific and *ex aequo et bono* equity, bound by justice and not by laws. We are of the opinion that arbitrators were the ones who suffered the most from the emergence of contractual positivism as the child of legalism.

[1558] Cf. Messer pp. 312-313 for a shining example of incomprehension. Cf. also Zechenter pp. 340-342; Nagengast p. 363; Donnelly pp. 281 ss; Chomsky, Danger pp. 49 ss who understands the hypocrisy but fails to dig any deeper into the matter. For logically sounder explanations, cf. Bessis pp. 33 ss.

[1559] Fortunet pp. 105-106.

Re-establishing distributive justice is the general idea arbitrators should always keep in mind when interpreting. In other words, distributive justice serves as a lighthouse while philosophical hermeneutics serves as the boat, the vector bringing us to shore. We have seen with Eco *supra* that full creative license to interpret is not a good idea. With this in mind, using distributive justice rather than commutative justice would greatly enhance the flexibility of the legal interpreter, all the while serving as a frame for interpretations. A broad frame for sure, but a frame nonetheless, which would prevent interpreters from being completely off-target. As we know, commutative justice presents the interpreter only with proportions of equal value, setting aside all the other ones, drastically diminishing the options of the hermeneut. Distributive justice broadens those possibilities, and although it does not necessarily mean that new solutions will emerge everywhere and at any time, it renders the hermeneut's frame of action more flexible, presenting them with more options to overcome their prejudices. Doing so may not change laws and rules, but would certainly change their application, an act of ruse typical of jurists[1560]. This is even more true when the interpreter acts *ex aequo et bono* as arbitrators (should) do, with more margin than other interpreters.

Under legal positivism, arbitration suffered from the diminishing of its main legal vector, equity *ex aequo et bono*, and the rise of technicities, which started taking so much space in the legal spheres that it choked out equity's breathing room (cf. *supra* part 2). In spite of those events, arbitration still retained more creative freedom than other legal domains. That is until positivism's main legal incarnation became contractual positivism, engulfing small everyday informal transactions and what was supposed to be an accessible and informal method to resolve conflicts, arbitration. By further dragging arbitration under the umbrella of positivism, contractual positivism laid out the philosophical foundations which would render arbitration much more susceptible to the mentality of North American litigators with a newly found passion for international arbitration[1561].

Finally, there is one last aspect of contractual positivism worthy of mention: individualism. Without reaching too much into the field of political sciences, contracts have actively participated in the further fragmentation of society, which had already been traveling the individualist path for quite some time[1562]. Like

[1560] Cf. Papaux, Autorité for an account on this matter.

[1561] Lalive, Forme p. 392

[1562] Cf. Méda pp. 288 ss; Papaux, Introduction pp. 1-134; Supiot, Homo Juridicus pp. 142-143 and *supra* part 2.

commutative justice, individualism grew in tandem with legal positivism without being a necessary consequence of it. Like commutative justice, legal individualism is closely related to the nature of the contract. This is very obvious in the eyes of anyone who has studied Law: 99.99% of contracts are of the individual-vs-individual nature, the crushing majority of them being performed without a hitch. In actuality, even the contract involving the state are of the individual type, with the state often being considered as a single entity.

This means that unlike legal positivism, contractual positivism is intrinsically geared in the opposite direction of the common good: how do we establish a common good in Law when the doctrine of reference atomizes a society's actors in individual, separate entities? The environmental crisis is a good example: facing a problem requiring a collective international action to be solved, one capable of questioning the individualistic orientation of the past centuries, we seem to be relying only on individual initiatives to do so. The very matter of Law's capacity to apprehend such a problem has been seriously questioned, and the current answer is none too optimistic[1563]. This is one of the reasons why as long as contractual positivism remains the dominant legal doctrine, chances of restoring international arbitration to authoritative levels remain low. This characteristic of contractual positivism and contemporary societies as a whole is, in our view, by far the most difficult to solve, even for conscientious hermeneuts.

Any will to return to "the good old days" of ancient Rome is doomed, although, as seen throughout this dissertation, this does not mean that we cannot draw wisdom and knowledge from her experience. Without encroaching on other fields and losing ourselves in an interdisciplinary study for which we lack knowledge and time, we simply wished to expose some of the fundamental problems facing us if we are to attempt restoring international arbitration.

The point we should heed concerning contractual positivism is the following: contracts are a tool. A useful one to be sure, which explains their high usage. They are not, however, a way to conceive a society, whether it is from the contractual positivist side or from the contractualist doctrine trying to revive Rousseau's *contrat social*. Without even mentioning the impediment it represents to a society, the notion of self-legislating individuals does not make sense[1564] for a basic reason: how can a multitude of individuals with the – supposed – full freedom to contract

[1563] Frigerio pp. 403 ss.

[1564] The term "self-regulating" is often used to describe the behaviour that actors of contractualist systems should adopt, yet often fail to do so. This term is already misleading as it waters

interact when the rights they create for themselves are contradictory? If everything and everyone is arithmetically equal, there is no hierarchy and the sole option left to establish whose rights should prevail is *potestas*, whether direct (strength of arms) or indirect (money). This is yet another example as to why having equality as a purpose rather than a means often translates into a very problematic state of affairs.

Over the course of this section, we have seen in circular fashion the issues with the dominant legal mindset of our era, its latest offspring more specifically. Developing a few thoughts regarding this doctrine has allowed us to understand the weightiest prejudices legal interpreters can face. Contractual positivism, much more than a label attached to such or such person, is the crystallization of what is certainly a high number of the prejudices against which occidental jurists should resist. In order to do so, the tools offered by philosophical hermeneutics are highly adequate: the discovery of our prejudices, their apprehension and their insertion in the interpretative process. This is where the importance of a flexible mindset is most visible, to allow the interpreter to take a certain distance with themselves.

Once the phase involving our prejudices has been conducted, we can focus on the interpretation *stricto sensu*, without ever forgetting to channel or restrain our prejudices depending on what we identify as required for an authoritative interpretation. This identification, without going into too much detail, requires wisdom at least as much as it requires knowledge. This implies a sensitivity to context and the capacity to know when one's prejudices impede one's sensitivity and overall judgement[1565], which is what has been lacking in international arbitration since World War II at least, although supplemental knowledge could not hurt either given the writings of some of the arbitrators of the past 30 years (cf. *supra* part 2).

down the true nature of the contract in the contractualist doctrine, which is to replace the law as the legal apex of a system.

[1565] In a way, shedding prejudices is much harder than shedding biases because the latter are much more blatant than prejudices. Additionally, prejudices are not an inherent negative, meaning that some of them are actually used by arbitrators to do their job in what would be generally considered a good way. For instance, how does an excellent legal technician, who thrived for years as an arbitrator due to their technical skills, even begin to question the fact that, in some cases, their technical skills could prove detrimental to an authoritative award? In this instance, we would have a typical case of wisdom being more relevant to arbitration's authority than knowledge.

3. Arbitration's paradoxical lack of flexibility, both legal and philosophical, and a potential way forward

The requirement of flexibility is found at another stage of the legal process: the elaboration, the creation of the text of law. The more flexible a text of law is, the more easily it will be applicable and the better its capacity to apprehend unforeseen cases. The less flexible a text is, the more the legislator will be prone to legislate in order to remedy new occurrences which might be too estranged from the starting point, risking legislative inflation, which is what happened to international arbitration in the course of the past decades (cf. *supra*).

In order to avoid that, and the unending ensuing technocratic problems, it is important for the basic texts to be adaptative, to confer them the capacity to evolve and do justice in as many cases as possible. If a text of law needs hundreds of amendments, it is either very old or very inadequate, crafted by a legislator with little to no prudence, a hallmark of both excessive rigidity and poor legislating[1566]. As stated repeatedly, adaptability and flexibility are of high importance to the legal interpreter. Not only are they better armed for a good practice of Law and justice, but also prevented from being stuck in a rigid framework whereby not only their legal mindset becomes stale, but their entire societal view, suffers as a result[1567].

In the universe of international arbitration, a good mindset is all the more important given the quantity and financial weight of the cases transiting in front of arbitral courts every day worldwide, as well as the increased degree of contingency due to what are perhaps the most complex and convoluted factual situations in Law. Addedly, arbitration has historically been the most flexible way of obtaining justice, and in a few aspects, it still is, which is more of a testament to how heavy the court systems are than a display of flexibility on the part of the arbitral tribunals, which have lost much of their lustre. Regardless of the recent evolutions in the field, an arbitrator must still be able to adapt his court and trial according to the origins of the attorneys, parties and applicable rules.

This emphasis on the mindset shines most in the domain of equity, where the creativity of a jurist is tested most harshly with regard to their capacity to craft full legal reasonings. Unfortunately, the concept has been somewhat shunned since arbitration started its unauthoritative descent. For centuries indeed, arbitration was

[1566] Papaux, Introduction pp. 58-59, 171 ss; Aristotle, Nicomachean Ethics 1140a24-1140b30.

[1567] Cf. Ost/van de Kerchove, Savoir-faire pp. 32 ss; Henry pp. 714 ss; Dezalay/Garth, Market; Bredin, Remarques; Jestaz; Habermas pp. 97 ss; Supiot, Nombres pp. 284 ss.

conducted extremely flexibly as seen *supra* in parts 1 and 2. A staple since the Roman era, and somewhat still used in some common Law countries such as the U. K., specific and *ex aequo et bono* equity started to frighten off jurists with the advent of heavy technocratization in arbitration. Before that, the judgement *ex aequo et bono* was already shunned, probably because the "old guard" essentially hailed from civil Law countries, where the influence of legal positivism was more prevalent than ever, and where judges were considered *"bouches de la loi"* and were thus required to apply the law, not interpret it[1568].

Technocratization is in no small part responsible for the current state of arbitral equity. Yet, it needs to be combined with the historically recent notion of arbitral jurisprudence, developed under the guise of legal certainty, for us to comprehend how specific and *ex aequo et bono* equity has seen such a decrease in usage[1569]. Arbitral jurisprudence just might be the latest aspect of arbitration to veer in the direction of the state courts system, to feed into the arbitral lack of authority. This trend started during the decolonization movement and underwent a drastic acceleration once the United States opened its doors to international arbitration in the 1980s[1570].

[1568] For a panoramic view of 20th century positivism, cf. Brenner; Viala; Sueur; van de Kerchove. Cf. also Supiot, Nombres pp. 142 ss who goes a step further than this by showing how many falsely consider the legal judgement to be biased and requiring a complete mathematization to become credible.

[1569] The concept of legal certainty is in itself worthy of an entire PhD, in particular given the epistemological parallels one could establish with hard sciences and the inherent uncertainty of Law. The intrinsic degree of contingency in legal cases should make us very wary of this idea that Law can be certain, contrary to the aspects surrounding a legal decision, which can perfectly enjoy and accrued degree of certainty: the application of an award by local authorities, the enforcement of the award, can the money of the award be transferred without a problem, etc. "[T]he myth of legal certainty, the illusion that the law is, or can be made, a comprehensive, eternised, set of rules which embrace all possible legal disputes and settle them in advance." (Brady p. 18) Said otherwise: "[F]ixer *pour l'avenir, arrêter* aujourd'hui *dans le* futur. *La sécurité juridique formelle veut y procéder en instaurant des cadres, des formes, sachant pourtant que la vie du droit maintes et maintes fois leur échappera* […]. *L'expression 'l'application de ce* texte *à ce cas' omet la complexité de cette opération nodale de qualification en la recevant comme simple subsomption, réduction cognitive à laquelle était contraint le positivisme juridique en tant qu'il ne dispose pas des moyens logiques ni épistémologiques pour entreprendre le saut qualitatif (eu égard à l'hétérogénéité) qu'elle présuppose. Les notions, courantes en droit international, de 'sens ordinaire' des mots, et plus irréaliste encore de 'sens naturel', sont exemplaires de ce paralogisme de la subsomption."* (Papaux, Sécurité pp. 37-38)

[1570] Lalive, Forme pp. 391 ss.

On a very basic, logical level, the use of jurisprudence reduces the margin of equity *ex aequo et bono*. By using past decisions to fill many of the blanks left behind by the text of law, the arbitrator reduces their margin of appreciation. The longer a jurisprudential history, the more apparent this statement becomes. In the case of state courts and judges, there is nothing shocking about this, as they are the herald of their country's judicial tradition. Moreover, many concepts retain their usage after decades (contracts, wills, bankruptcy, etc.), which means that ignoring past decisions is to cut one's self from the wisdom and knowledge of past judges, to risk jeopardizing an authoritative inheritance.

In arbitration, the matter is entirely different, because arbitrators are supposed to complement state jurisdictions, not reflect them as loyally as possible. Arbitration is tailored to suit the needs of the concrete cases, and each of them requires a different solution. The idea of legal certainty is, in international arbitration even more than other fields of Law, quite antithetical to the enormous contingency surrounding arbitral cases, those of international nature in particular. Moreover, the secrecy of arbitral proceedings and awards has historically meant that arbitrators simply could not draw inspiration from previous cases[1571].

Finally, we know that the apparition of legal precedent is very recent in arbitration, even by taking into account the sole post-World War II period[1572], meaning that the institution, even in its current form, has only just been recently acquainted with this idea of arbitral precedent. And as we have seen in parts 1-2 *supra*, being a good and efficient arbitrator was more dependent on wisdom or concrete knowledge than legal technique until recently.

We have also seen that the legal creativity of arbitrators was heavily stifled by the current technocratic climate, inciting them to safer, commutative-oriented, unauthoritative decisions (cf. part 2 *supra* and part 3). Although the use of jurisprudence to reason analogically is inherent to Law and constitutes a very important source of inspiration for the entire abductive process, including building up our experience as jurists, we are not entirely certain that in arbitration, its use is always pertinent.

Indeed, having practical experience is an important asset for any arbitrator. Having seen and participated in cases unquestionably helps those deciding to develop a higher sensitivity to context and better understand how to carry themselves and

[1571] Kaufmann-Kohler, Precedent pp. 361 ss.
[1572] Cf. Kaufmann-Kohler, Precedent.

structure a trial. In arbitration, however, unlike the typical jurisprudence published by state courts, there is no binding precedent, to any degree. Historically, there are two main reasons: arbitral decisions are much more shrouded in secrecy than court decisions and arbitrators have very broadly decided cases *ex aequo et bono*. This has recently changed on both fronts, which is something we have seen *supra* regarding equity. Although awards are not usually published, the inflation of arbitral cases and the use of electronic media has favoured their publication.

More importantly, and from a more legal-philosophical perspective, we are not convinced that an arbitral jurisprudence truly helps arbitrators construct authoritative analogical reasonings. The first reason stems from what has been exposed *supra* in part 2 i.e., the fact that we are currently sitting on more than 50 years of a mainly unauthoritative body of arbitral precedents. Although analogical reasonings could most certainly be effectuated from unauthoritative precedents to craft authoritative decisions, recent arbitral awards have decidedly not taken this path. Instead, said recent awards have drawn inspiration from older decisions for quasi-purely legal technical support. The reason is that in a paradigm where technical skills are viewed as "authoritative", what is drawn from previous decisions are technical considerations.

Consequently, instead of augmenting their awards by drawing inspiration from authoritative precedents to decide *ex aequo et bono*, contemporary arbitrators have used generally unauthoritative precedents to shape their own decisions. As such, arbitral jurisprudence does not provide the material present-day arbitrators could use to craft authoritative decisions and follow the general authoritative "movement" of constantly augmenting what has been passed down to us. As a result, the use of arbitral jurisprudence resembles much more yet another shackle arbitrators inflict upon themselves, restraining once again their capacity to act *ex aequo et bono*.

This paves the way for the second reason why we are not wholly convinced by the idea of arbitral jurisprudence. Indeed, instead of providing authoritative precedents usable to conduct further abductive and analogical reasonings, arbitral jurisprudence thus "harmonizes", or more precisely "univocizes" legal and arbitral concepts. We have seen *supra* the extent to which contemporary arbitrators feel the need to use legal rules and jurisprudence in their own reasonings and how their positivist mindset transpires through those actions.

These further restraints to an arbitrator's capacity to interpret and act in equity *ex aequo et bono* are the reason why we consider arbitral jurisprudence in its current unauthoritative state to be a detriment to authoritative improvements we

could bring to international arbitration[1573]. This is, in our view, quite regrettable considering that an authoritative arbitral jurisprudence, combined with a thorough understanding of philosophical hermeneutics and the abductive process, represent the most optimal way towards an authoritative version of international arbitration.

Adding a jurisprudential frame in addition to the legal frame is not likely to help them free themselves of those self-imposed shackles. Arbitral jurisprudence could thus be considered as yet another obstacle of technical nature in the mission of the arbitrator[1574].

Still, arbitral jurisprudence does not bind arbitrators as tightly as the most visible of these shackles, which have entered the arbitral world at the same time as mega-law firms. As seen *supra* in part 2, attorneys belonging to such firms imported the same aggressive methods they used in litigation. These methods were predominantly of a procedural nature, and while specific equity could compensate the overuse of formal rules, the passivity of many arbitrators to close the floodgates meant that a new normal was instilled without much resistance from those who should have acted, to a certain extent, as guardians of the institution[1575]. This means that despite common Law's stronger ties to specific equity, it remained shunned while, in parallel, procedural rules were suddenly becoming more invasive, labyrinth-like and inflated. Accordingly, international arbitration had been stripped of two of its fundamental characteristics: legal flexibility and procedural flexibility.

[1573] Schultz, Consistency p. 298: "Put bluntly, it is not more important for a rule to be settled than it be settled right, since the former is morally neutral and the latter is meant to be a moral positive."

[1574] To be clear, we are not downright condemning arbitral jurisprudence, merely stating that it is historically bizarre and with certain potential consequences that may be antithetical to some of arbitration's purposes. In this regard, we are not advocating for anything different than Schultz: "My argument, then, is that when it is likely, or even clear, that the investment arbitration regime or a given rule does more harm than good, it is no excuse to maintain it in the name of consistency. My argument further is that it is wrong to say, without qualifications, that investment arbitrators should seek consistency. They should seek consistency only when doing so furthers a benign, desirable regime." (Schultz, Consistency p. 316).
Cf. Kaufmann-Kohler, Precedent regarding an insight in the arbitral practitioner's mind addressing the importance of consistency and predictability, quickly making the case for an arbitral jurisprudence, quite the irony given that arbitration was crafted by ancient Romans to elude what national laws and courts could already do (p. 375 specifically).

[1575] Lalive, Courage; Oppetit pp. 10-11; Hanotiau pp. 367, 370; Maniruzzaman p. 439; Lazareff pp. 477-483.

Additionally, arbitration has gradually become more gated, to the benefit of a certain financial elite which could afford the ever-increasing costs of an arbitral procedure, which had obviously ballooned the moment it reached unheard levels of complicatedness[1576]. Trials which were supposed to be quick and efficient could now take years to reach their conclusion, resulting in massive bills for the client, both for the payment of the arbitral panel and their attorneys, attorneys which only started massively intervening in arbitral trials a few decades ago, as they were generally excluded from proceedings for centuries[1577].

There is probably one last major reason why arbitration has lost much of its flexibility, but this one does not stem from an authority-related analysis. Rather, it has to do with the magnitude international arbitration has reached from a "number perspective" i.e., the sheer quantity of cases, their immense financial scale and the number of countries and people involved[1578]. Without even setting foot in the political dimension of international arbitration, the evolution of arbitration to a full-blown globalist institution has been downright spectacular. This magnitude, this complexification of the field, could typically be brandished by defenders of the current arbitral system to justify the increase of rules, procedures and usage of jurisprudence: "we need a structure or risk legal anarchy".

Without sinking to this degree of alarmism however, it is our opinion that not only are these all arguments in favour of the developments made in this hermeneutical part, but also that there is no risk of "legal anarchy" or, to put it in less controversial terms, the legal certainty of arbitration would not be jeopardized. This can be demonstrated without even resorting to the history of arbitration, which has been taken into consideration quite scrupulously in this dissertation.

Firstly, the financial scale of arbitration disputes should never impact the way arbitration is constructed or conceived as a concept. Obviously, certain procedural safeguards are required the vaster the sums of money in play, but the institution of

[1576] Grisel, Elites pp. 269 ss. This is quite visible when looking at the percentage of the international arbitral elite who capture a disproportionate amount of arbitration mandates, and how commercial and investment arbitrators are the same people. Cf. also Dezalay/ Garth, Market pp. 777-781, who show how arbitral procedures became more complicated, more frequent and increasingly reserved to a financial elite. Abi-Saab p. 383 further confirms this complexification and multiplication of arbitral instances.

[1577] Cf. *supra* parts 1-2, Benson pp. 489 ss in particular.

[1578] Cf. for instance the widely discussed case involving Yukos and Rosneft, which has resulted in USD 50 billions in damages and USD 60 millions in attorney/arbitrator fees in a triple award decided on the 18th of July 2014.

arbitration should not be conceived differently, as this would imply a two-tiered arbitral justice system subject to the parties' wealth, a rather unjust way to dispense justice.

Similarly, the ever-increasing quantity of cases should never be correlated to a rigid intellectual framework. The idea that laws and an accrued usage of jurisprudence would help lighten caseloads for the practitioner bypasses quality in favour of quantity, whereby an arbitrator would simply need to find enough precedents and legal bases to shore up their arguments and justification concerning the award. The construction of legal reasoning would, ideally in such a set-up and according to its proponents, reduce the intellectual workload in favour of data-mining operations. Already enjoying a rather poor reputation, that of merchants rather than jurists, this conception of arbitration is typically why many people think that a computer could replace a judge or an arbitrator, which is extremely far from the truth and exceedingly dangerous for jurists of all walks of life[1579].

In international arbitration, much more than in national litigation, those deciding the case have a wide margin of appreciation i.e., more space for specific equity. This margin of appreciation is still restrained by some rules such as avoiding absurdities, the arbitrator's very own credibility towards peers and clients, etc (cf. *supra* Eco). More concretely, the complexity of arbitral problems, their financial weight and the responsibility they imply means that it would take a deeply unserious arbitrator to work on such cases without preparation, without consulting the immense body of doctrine available for all types of cases. The latter element is the most important and is sadly often forgotten among positivists: doctrine is just as much a source of Law as texts of law and jurisprudence. In the arbitral paradigm, doctrine has the advantage of setting limits to the "imagination" of the arbitrator without shackling them[1580].

The last argument opposable to both the legislative inflation and the overuse of arbitral jurisprudence is linked to the fact that international arbitration now spans the entire globe. As a corollary, cultures are inevitably confronted with one another, hopefully in a positive and constructive fashion. Cross-culture, to put it mildly, is the

[1579] Supiot, Nombres pp. 214 ss.

[1580] Or, to put differently, doctrine serves as a non-binding source of inspiration for legal interpreters, which shows how important the doctrine is as a source of Law, serving as both a catalyst and a limiter to legal reasonings: "[D]octrine is neither auxiliary nor ancillary, but principal, at its very foundation, even today, and in spite of its own self-image." (Papaux/ Wyler, Doctrine p. 534)

direct and prime reason why international arbitration stands at the apex of contingency in legal fields, both factually and legally. What follows is complexity on many levels: conciliation of cultures, understanding them, language barriers, national legal barriers, acceptability of the award, etc. From a legal philosophy perspective, this means that the gap between facts and Law is more difficult to bridge than ever, heavily relying on the interpretative and legal skills of the arbitrators *in concreto*, and their capacity for equity[1581]. This has been stated multiple times but here, we can see that the frequent use of equity is not contingent, but necessary in international arbitration, today more so than ever from this perspective.

Equity in arbitration is the main reason for its flexibility, both from a legal and legal philosophy standpoint. This flexibility is what sets it apart from state litigation on a fundamental level, not the secrecy of the proceedings, the choice of applicable Law or the choice of the arbitrators. The obvious question would be to ask, "why remove this feature?", but if we take this interrogation a step further logically speaking, the question becomes: how do you remove something inherent from a concept and have this concept retain its essence? The answer is, you do not, or really, you cannot. More moderately, what about reducing, tempering the "influence" of this feature? Without the capacity to act on facts, this necessarily orientates us towards the Law. Only by enacting more laws and rules, by instilling the rule of arbitral precedent could arbitral equity be kept under control to the point of possibly making it disappear, a self-imposed restriction by arbitrators[1582]. The balance of interests facing us would be as follows: are measures impacting the essence of arbitration worth using for the sake of legal certainty, when such an increase is itself uncertain? Obviously not, but this is the latest path on which the field travels.

Concerning international arbitration's cultural aspects and the impact these have on the flexibility or rigidity of both rules and mindset, we have shown, even without needing to resort to the lengthy historical demonstration of parts 1-2 *supra*, that

[1581] Jayme pp. 167 ss.

[1582] Briefly, we have seen *supra* that the reason for wanting to "control" international arbitration is linked to legal certainty, which we are now showing that it would be to the detriment of arbitration's essence. We are not convinced that sacrificing even a part of arbitration's essence on the altar of legal certainty would be a good idea, as it increasingly looks like a spectre of positivism. Even more so, we are not convinced that granting control over a Law would further its certainty. Definitely not its authority. Cf. Papaux, Sécurité pp. 38 ss, who convincingly demonstrates that legal certainty is not only a bad idea, but an altogether impossible one due to the nature of cases: they are individual, unique, and thus cannot be reflected for certain in legal texts.

extreme contingency was inherent to international arbitration, that worldwide cultures are part of this extreme contingency, and that legal certainty is a heavy price to pay in exchange for denting the essence of arbitration. Cultural differences find themselves in a similar situation: their uneven and very divergent natures cannot be unified under the guise of legal or procedural certainty. Understanding how cultures and personalities gel together cannot be done abstractly, the appreciation needs to be done *in concreto*. As such, equity and flexibility of the mind are required, not further abstract legislating. More generally, cultural meetings and shocks are littered with prejudices, and what better way to apprehend such delicate problems than philosophical hermeneutics, the very school of thought centred around prejudices and mitigating them?

The observations concerning international arbitration's intrinsic contingency bring us to the last point we would like to make before underlining the "way forward" to quote the terms of this section's title. Arbitration was always very well suited for complex international disputes, long before legislators from all continents decided to legislate on the matter. Its flexibility and adaptability, which already worked very well on a small and local scale, were perfectly suited to bigger, far more complex cases. Contingency was not a problem, so long as the adaptative mindset that has long been the hallmark of arbitration was maintained. This mindset is, from a legal lexicon perspective, equity *ex aequo et bono* (cf. *infra* for further developments).

As it now stands, international arbitration is not very different from its state counterparts, with the procedure now serving as the main, if sometimes only, legal frontier between both. For centuries, arbitration was different formally and materially. Its very purpose, other than doing the "obvious" justice, was to serve as a complement to public courts, compensating the lack of secrecy, of flexibility (formal and material) and proximity. Of these non-exhaustive criteria, only secrecy remains, and it has been argued multiple times that this may not be such a net positive for arbitration and Law in general[1583].

All of the problems mentioned here fully participate in the authority crisis of international arbitration. This has reached a point where one could legitimately question whether the term "arbitration" is still applicable to the contemporary field: if the crisis of authority is such that it affects its essence, is it still

[1583] Cf. Bachmann pp. 217-224 and the quoted references. Furthermore, this secrecy is itself suffering from the recent propensity to publish awards and use them as jurisprudential precedents.

arbitration? Whatever the answer, mapping a way forward and out of the authority crisis[1584] is becoming a painfully evident necessity for arbitration.

While it should never be viewed as a panacea, philosophical hermeneutics would help international arbitration solve some of the above-mentioned problems. By using open textures as the axis around which it revolves, philosophical hermeneutics is set, from the outset, for a maximal degree of adaptability and flexibility. What is important is to remember the fact that open textures are "fillable" according to what the legal interpreter deems most suitable to justice *in concreto*. They are usable in various situations, adaptable to many cases, mentalities and cultures. Moreover, philosophical hermeneutics is centred around history and apprehending the prejudices reflective of it. It pushes its users to understand the different cultures they face, in addition to having a better grasp of the overarching context, a key trait of an authoritative arbitration.

Even then, it is important to remember that the mindset supersedes the method, even if said method consists in the use of flexible tools such as open textures. The 20th century linguistic turn placed language at the centre of human thought, a placement further emphasized in Law by a long use of open textures. Despite a certain affinity for this train of thought, the warning emitted by Ricoeur rings ever harder the more the proponents of the linguistic turn focus on the method rather than the mindset: "[P]*aradoxalement, le* linguistic turn, *en dépit de la tournure référentielle de la sémantique philosophique, a bien souvent signifié un refus de 'sortir' du langage et une méfiance égale à celle du structuralisme français à l'égard de tout l'ordre extralinguistique. Il est même important de souligner que l'axiome implicite selon lequel 'tout est langage' a conduit bien souvent à un sémantisme clos, incapable de rendre compte de l'agir humain comme* arrivant *effectivement dans le monde, comme si l'analyse linguistique condamnait à sauter d'un jeu de langage dans l'autre, sans que la pensée puisse jamais rejoindre un fait* effectif."[1585]

Philosophical hermeneutics invites the interpreter to continually challenge their prejudices, forcing them never to relinquish the dynamicity of their interpretations.

[1584] At this point, we could even talk about a crisis of essence of arbitration, but further elaborating on this problematic would be too lengthy and too off-topic with regard to this dissertation. We think, however, that having this in mind and keeping an eye open on the causes and the potential ramifications of this problem is important to avoid more bad surprises.

[1585] Ricoeur, Soi-même pp. 349-350.

This form of hermeneutics favours interpretative fluidity over rigidity, the critical and dynamic adaptation of the text over the intention of the author and the narrowness it entails. As such, an arbitrator trained in philosophical hermeneutics and understanding of the purpose, the history and the nature of arbitration, would hopefully be more open to building their own legal reasonings than those viewing themselves as simple enforcers of the original will of the parties, with no intention of looking at what lies beyond the arbitral trial and its overall historical insertion.

Although this is more related to the mindset of arbitrators than their interpretative capacities *stricto sensu*, we have seen that philosophical hermeneutics is precisely less about the use of interpretative methods than it is about adopting a certain mindset. This is why both equity and open textures are so important for the interpreter in the accomplishment of their mission, they are the media through which philosophical hermeneutics can operate in Law, keeping in mind that the most overarching compass of all remains an authoritative arbitral justice.

4. Philosophical hermeneutics to understand the common good, equity to reach it

Although the idea of "not applying the law" will seem anathema to some, it is important to remember that the application of an unjust law is not the mission of the arbitrator, as the Nuremberg trial and the absurdity of Nazi regime laws convincingly showed to the world[1586]. As such, taking some distance from an unjust law is not something that should be feared, simply apprehended as yet another facet of the work of an arbitrator. If, on the contrary, a law is just *in casu*, using it is generally the correct answer.

This distinction, however, is reductive of the role of Law, as we have seen *supra* that the purpose of general equity is to bridge the gap between the Law and the case, no matter how wide or narrow the gap. Consequently, using the margin of discretion afforded by general equity does not mean "not applying the Law", but ensuring that case and Law in adequation, to the point where legal interpreters can offer plausible and coherent legal solutions to concrete legal problems i.e., legal cases. We are thus not advocating for "not applying the Law", but in favour of offering more opportunities to the legal interpreter to adapt the Law to the case and more flexibility in their apprehension of cases.

[1586] Ledford pp. 170-174.

Arbitration, much more than state court proceedings, is the quintessential place where equity has materialized historically, and not simply in the shape of general equity. The idea inherited from the Romans, which lasted well into the Middle Ages and until monarchs intoxicated by their *potestas* decided otherwise, that they did not want legal institutions challenging their rule. The use of philosophical hermeneutics therefore has a clear goal here: to reinforce the opportunities and widen the margin of application of specific and *ex aequo et bono* equity. In this context, open textures in a written text not only grant more flexibility, and thus more durability, but also a wider berth for the interpreter to act authoritatively[1587]. Whether or not the interpretation ends up being authoritative is up to the interpreter and their good use of philosophical hermeneutics, but the first step, the one circumventing legal positivism, is best guaranteed by open textures "fillable" by specific equity[1588].

The reason why philosophical hermeneutics is so interesting in the materialization of international arbitration, is because it forces arbitrators to have a true sense of history, one that does not start with the British liberalism and end with North American neoliberalism. The ontological aspect of philosophical hermeneutics brings them back to their prejudices, their weaknesses and ultimately and hopefully, a certain modesty vis-à-vis their position as legal interpreters. Modesty may seem trite, abstract or even a little useless to interpreters, but it is, in fact, the most important characteristic they can have, for it forces interpreters to never overestimate themselves, never think that they have a perfect answer for any case and never embark on a race to the biggest arbitral award possible, which is, sadly, often used as a business card by contemporary arbitrators in their line of work[1589].

[1587] Cf. *infra* part 3, III, 6 regarding the argument from authority.

[1588] Combacau/Sur pp. 178 ss, 180-181 in particular, where they explain that the bigger the interpretative latitude left to the legal interpreter, the better legal texts will evolve and thus resist the test of time.

[1589] Cf. for instance the profiles of some well-known names in the field: Yas Banifatemi, Mohamed Shelbaya, Nigel Blackaby, Danielle Morris, etc. In addition to this, philosophical hermeneutics and modesty are a combination which inculcates very well why re-establishing the foundations of a branch every other week is not a good idea, usually by trying to produce the arbitral jurisprudence of reference for the future. This should never be an objective for an arbitrator, as competition becomes more of a drive than justice, the good of an individual superseding that of a society, a community.

Interestingly, the pertinence and importance of specific equity and open textures does not decrease in case of legislative inflation, which we are currently witnessing in many fields, international arbitration in particular (cf. *supra*). Open textures can roughly be understood as words with various potential interpretations[1590]. Logically, the more a text of law is specific and precise, the less space for open interpretations should jurists have. Consequently, this would mean that legislative inflation should be synonymous with less creative space for the legal interpreter: the more laws, the lesser the margin of interpretation[1591].

This is, ironically, not how events transpire. Indeed, by turning to legal mass production, legislators create blind spots, contradictions, and most often, a compilation of texts so convoluted, unclear and complicated, that they become unusable[1592]. Even more so, the higher the quantity of texts, the higher the number of open textures. As a result, judges and arbitrators would be wholly legitimized to interpret creatively, to pursue justice instead of trying to make logical sense of an accumulation of laws that lost its purpose long ago[1593]. In other words, technocratization has created a perfect storm to reverse what it has itself partially caused: the decline of specific and *ex aequo et bono* equity and the importance of the legal interpreter.

Unfortunately, this opportunity has yet to be seized on by the actors of international arbitration. The main reason has already been stated *supra* and is not unique to arbitration: a lack of esprit critique stemming from many sources, including those discussed at length in this dissertation such as the technocratic overspecialization, positivism's form over substance, the non-usage of equity *ex aequo et bono* and even a certain lack of courage[1594]. This translates into one of the current predicaments plaguing the field: the overwhelming number of ultra-technical experts and the lack of wisdom, of people unconcerned by the idea of a distributive arbitral justice, and overall, the authority problems we now know so well (cf. *supra*).

[1590] The paternity of this concept is often, falsely, attributed to Hart, but it can easily be traced back to Aristotle, who probably was not the first to highlight them (Nichomachean Ethics, 1137a31-1138a3).

[1591] Kaufmann-Kohler, Precedent p. 375; Badescu pp. 367-368.

[1592] Bredin, Remarques p. 119.

[1593] Gardies p. 173.

[1594] Jestaz pp. 90 ss; Bredin, Remarques pp. 111-112, 117-118; Ost/van de Kerchove, Savoir-faire pp. 32-43; Supiot pp. 1-6; Lalive, Courage; Henry p. 721.

Ideally, arbitrators would display a certain abnegation, a certain ruse even[1595], and seize the opportunity to declare that the applicable laws to an arbitration case are too complicated, convoluted, contradictory even, and act *ex aequo et bono*, or they could reinterpret the multiple texts of law through specific equity in a way most prone to do justice *in concreto*, all the while taking into account the common good through distributive justice, more far-reaching than to simply think about the parties to the contract. They would try to loosen the restrictions on their capacity for specific or *ex aequo et bono* equity, often self-inflicted.

More pragmatically however, we are very conscious that doing so would require a level of courage that most contemporary arbitrators would not show, for fear of biting the hand that feeds them, of being ostracized by their peers or of having to create a full authoritative legal reasoning. While this assessment may seem harsh, it is by no means unreasonable or cowardly for arbitrators to feel that way, especially after many decades of the institution being astray from its path. Furthermore, operating with a courage seemingly bordering on brashness is usually not a good idea in Law, in particular in arbitration, where the discretion and overall calm of the proceedings is what little remains of more than 2'500 years of European-style arbitration.

This state of affairs is why the use of open textures seems like a more sensible approach, more mindful of appearances and entrenched mentalities, more capable of fundamental changes without giving the impression (founded or not) of a *tabula rasa*. Moreover, open textures do not rely on duping anyone, and in the end, still initiate the opening towards specific equity.

As hinted *supra*, specific equity is indeed what is used to "fill in" the "openness" of open textures. In parallel, let us remember that specific equity necessarily functions in parallel to general equity, which could be fundamentally defined as the bridge between Law (general and abstract) and case (particular and concrete). More precisely, these are the two concepts that render Law so versatile, shifting between paradigms thousands, millions perhaps, of times every day worldwide. In other words, they incarnate Law, making it a reality in concrete cases (cf. *supra* in the Roman arbitration already), compensating the intrinsic characteristic of Law that is its inability to apprehend cases directly[1596].

[1595] One they have shown many times over the course of history, to the point where it could be argued that it is an epistemological component of Law (Papaux, Autorité pp. 209 ss).

[1596] Aristotle, Politics 1287b16-1287b36.

This operation can be exceedingly quick and simple in basic cases where the abstract law is already very close to the concrete case. Using the convenient yet useful example of speeding again, the gap between the law (120 km/h is the limit) and the case (car flashed at 130 km/h) is mentally very easy to bridge, although the many opposition procedures for such clear cases show us that it is never that simple.

In international arbitration however, cases are littered with complexities surrounding both the establishment of Law and facts, very often spanning multiple countries and cultures, quite frequently impacting other people and environments other than that of those directly implicated in the procedure. Somewhat reductively, general and specific equity are already an immense part of international arbitration as arbitrators almost always need a high level of technical skills to navigate the haziness of international arbitration law and some of the most complex legal facts imaginable.

Despite regularly confronting such elaborate and convoluted situations, this kind of arbitral equity is not authoritative, nor is it hermeneutically astute most of the time. Technicians would indeed not fear general equity if it simply served as an intellectually and axiologically neutral bridge between Law and cases, the type of equity only conceivable by legal positivists. *"En droit, les questions de compétence sont préalables au débat sur le fond. La tradition scientifique et philosophique occidentale les ignore, considérant que tout être humain incarne la raison et est interchangeable avec tout autre, et que les faits et les vérités parlent d'eux-mêmes à tout être de raison. Peu importent la qualité et la compétence du critique, si ces objections s'imposent à tout esprit attentif, et si les critères au nom desquels on les juge sont admis universellement."*[1597]

Herein lies the true complexity of general equity: the bridge is not neutral, and neither are the zones it connects[1598]; in other words, even the most neutral type of equity is not neutral. Much like an architect imprinting their personality, vision and skill on their constructions, an arbitrator imprints their personality, culture and values on their awards. In both cases, artisans do not have a full creative license to do as they please, they are constrained by needs, obligations and to various extents, reasonableness[1599]. While not unbridled, they still retain creative license, and just like the creative architectural works we remember and enjoy in contrast to the stale unoriginal ones, we remember creative, fair and just arbitral decisions much more

[1597] Perelman p. 203.
[1598] Perelman pp. 199 ss.
[1599] Cf. *supra* concerning this matter, in particular under the guidance of Eco.

than the technically solid ones that lack in authority and which are currently proliferating.

The extent of this creative license will heavily depend on the intellectual makeup of the legal interpreter, which includes their creativity and talent to craft legal reasonings[1600]. Legal culture is obviously central in so doing, but discarding general knowledge in favour of the sole legal culture is what leads to overspecialized technicians. To quote the words of Bredin: "*Le Droit s'essouffle vite à ne pas rencontrer la philosophie, la sociologie, l'histoire, l'économie. Les grands juristes de ce siècle et du siècle passé, oppressés dans le domaine apparemment clos du Droit, s'en sont vite évadés. Que dire des pollutions de la spécialité! Quand il faut, à la réflexion juridique, les larges horizons, l'effacement des limites favorable à toute synthèse, la distance d'où se prend un regard qui ne soit pas borgne, et ces longues perspectives qui portent l'imagination, que dire des spécialisations qui, si dignes d'intérêt qu'elles soient, bornent, rapetissent* […]."[1601]

This is when the impact of philosophical hermeneutics should be the heaviest, by putting the dynamic mindset to use the moment equity is involved. Through said mindset, the arbitrator understands the weight of their own prejudices, the modesty required in the face of these prejudices to be able to distance one's self from them

[1600] Although this could probably be an interesting debate, we are of the opinion that subserviently following articles of law and lining them does not constitute an intelligent legal reasoning. A good legal interpreter should indeed first be concerned with justice, not coherence, when crafting a legal reasoning. Articulating articles can undoubtedly lead to justice, but as we have seen many times and as stated by Ricoeur: *"L'application d'une règle juridique est en fait une opération très complexe où l'interprétation des faits et celle de la norme se conditionnent mutuellement. Du côté des faits de la cause en procès, le même enchaînement factuel peut être interprété de plusieurs manières."* (Ricoeur, Liberté p. 180) The probability that articulating provisions, the complexity of this operation notwithstanding, can hope to match the complexity of reality's contingency borders on zero. As such, and rather than operating in such a crude way, it would be much more interesting, much more fruitful, to conceive the best solution possible, use legal provisions when useful and specific equity when lacking, usually resulting in a mix of both. This entire process would be "supervised" by both a system's general principles, consisting in a legal order's cardinal values and fundamental legal rules and principles, and philosophical hermeneutics, which seem to us like one of the better solutions in terms of having a flexible mindset, capable of apprehending as many parameters and as much information as possible to do justice authoritatively. This would allow the dialogue between the Law, the facts and the legal interpreter to be more efficient, aiming towards an objective set beforehand. This is where rhetoric plays an immense role (cf. *infra* part 3, III, 6).

[1601] Bredin, Remarques pp. 115-116.

and, more overarchingly, the historical context in which the case and those affected find themselves.

The latter element is probably the most ethereal, but also the most important: by understanding the historicity of the process, whether their own or that of the entire affair, the arbitrator inserts themselves into something bigger than the case. They can question the purpose of their mission and try to anticipate the ramifications of their decision, integrating it in the aforementioned historical context, helping them understand that an award is always inserted in a more general frame, itself centred around the common good, that which is sacred for a society, that which each generation inherits from the past ones.

In many senses, equity, under which all three types of equity are subsumed, is the legal vector of authority. The first reason is that equity is where the legal interpreter has the biggest "freedom of expression", where they are fully expected to give, argue and counterbalance an opinion, with equity *ex aequo et bono* being the "purest" manifestation of this freedom. The second reason is that when a law is inadequate, unauthoritative or both, specific equity is how the legal interpreter can serve as a "watchdog" to avoid injustice. The third reason is that general equity is the key moment where Law and facts finally connect, the most delicate moment of the legal interpretative process, where the legal interpreter brings the most to the realization of justice, to the common good: it is the moment where justice is done.

This is where rhetoric intervenes: if philosophical hermeneutics is the foundation of a good mindset to craft fair and just awards, rhetoric gives us the tools to build equity. To be sure, there is a clear distinction between methods of legal interpretation and philosophical hermeneutics. The latter, unlike the former, has a clear understanding of authority that allows it to make a more complete use of legal instruments such as equity to reach authoritative interpretations. Correlatively, the fact that methods of interpretation lack the inclusion of authority in their process reveals that they are simply a means and never set axiological criteria in the interpretative process. As such, the determination of a just or an unjust decision requires more than simply "ticking the boxes" of all methods of legal interpretation. Additionally, philosophical hermeneutics provides us with a more complete comprehension of the interpretative process through prejudices and the way we can apprehend them. This implies that a thorough use of equity should not be limited to the simple application of interpretation methods. It needs to include philosophical hermeneutics in order to be able to work towards an authoritative "horizon",

granting us the possibility to orient our decision towards what is advocated by authority, even if legal texts are poorly conceived or unfair.

Gadamer, although he placed a great deal of importance on legal interpretation, was not a legal philosopher and thus never took more than a passing interest in notions like justice or equity. Subsequently, the "how?" of equity remains unanswered, which is when rhetoric intervenes to construct equity, to build a legal reasoning. *"Rien de tel, pour arriver à un résultat satisfaisant, qu'une analyse préalable du contexte dans lequel se produit la justification à des méthodes utilisées à cet effet."*[1602]

Rhetoric is here understood in its most complete meaning, not as an element of spectacle, not as the clunky oral theatrics sometimes displayed by flashy attorneys, but as the art of persuasion, of debate. Both rhetoric and equity deal with contingent material, not with necessity as they simply cannot influence it[1603]. Equity helps the arbitrator to find the best solution possible, while rhetoric intervenes in combination with it (mostly after) to construct the legal argument. We have seen that this "best solution possible" should make maximum use of philosophical hermeneutics, but philosophical hermeneutics does not help us more in the construction of the legal reasoning, the definitive one, the one that parties and attorneys will read.

Contingency is roughly defined as what could be otherwise, where the notion of choice intervenes. It is the opposite of necessity, which is what needs to be and thus cannot, inherently, be otherwise. Law is defined and guided by the justice it provides. In order to do so, decisions are a necessity in Law. These decisions depend on human contingency, for any legal decision will strongly, if not entirely, hinge on the choices made by those concerned by said decision, be they the parties or the interpreter of the Law[1604]. This is perhaps the greatest epistemological flaw of legal positivism: Law deals in contingency, not in necessity, contrary to natural sciences which primarily study necessary phenomena, not natural contingencies (should they even exist) or choices. This is why, epistemologically, Law is placed under the sign of rhetoric, whose targeted object is contingency. Its purpose is thus to discuss, not demonstrate[1605].

[1602] Perelman p. 199.
[1603] Perelman/Olbrechts-Tyteca pp. 1-3.
[1604] Perelman/Olbrechts-Tyteca pp. 1 ss; Perelman pp. 197 ss; Frydman pp. 45-46.
[1605] Frydman pp. 45-46.

As we are currently sketching the limits of philosophical hermeneutics, going further than what it was intended for, the selected model for building equity makes good use of rhetoric, drawing inspiration from many of the methods and mindsets strewing the genealogy of legal interpretation. Without detailing it too much, the pragmatic model is widely based on ancient dialectic and hermeneutics, with a touch of modern esprit critique, refusing to accept the authority of a text as quickly as the Ancients. In other words, the pragmatic model postulates the use of tradition to interpret current legal texts, but in light of the current fundamental principles of the concerned legal order, breaking the separation owed to the Lumières between authority and Reason[1606]. In other words, it takes philosophical hermeneutics a step further down the path of decision-making in the legal context, all the while conserving the fundamentals of authority[1607], tradition, history and dynamicity of philosophical hermeneutics.

This is not very different from the linear application of authority as crafted in the course of this dissertation: what is authoritative evolves with society, it is never fixed unless immutable like the Gods[1608]. This evolution can be of any sort, but the general compass, the overall orientation does not waver i.e., the common good. Tradition is very present in the construction of authority, for authority is made of the sedimentation of past actions that either founded or augmented the common good. This is also precisely the context in which philosophical hermeneutics and the Brussels pragmatic model insert themselves in the discussion, by giving the interpreter the best chance to know what was, is and should be authoritative.

In the end, both philosophical hermeneutics and authority are articulated around the present reception of the past, or, in other words, the present reception of traditions. Philosophical hermeneutics is obviously more centred around subjectivity than authority, for the good reason that interpretations, as collective as they may become, are always done on an individual level first, even if it is just through reading or the reception of someone else's reading. The interpreter then places their interpretation in the global picture, according to both their prejudices and the general historical context. Authority, on the other hand, is always about the collective first. It can then manifest itself in a variety of ways depending on each individual and each situation: the authority of Caesar the senator and general differed from that of

[1606] Frydman pp. 679-680.
[1607] The complete version, not the modern one.
[1608] Papaux, Introduction pp. 64 ss.

Cicero the senator, attorney and philosopher. This do not change the fact that both concepts are eminently collective.

According to the waning dominant doctrine of the last 300 years, this would mean that both authority and philosophical hermeneutics are divorced from Reason, from reality some would even say, for embracing tradition as their main axis of rotation. This was falsely assimilated to a dereliction of esprit critique, the acceptance without questioning of false tales and stories. We already know that such was not necessarily the case, in particular in the academic world and among scholars[1609].

In accordance with the Brussels pragmatic model[1610] of interpretation however, it is important to remain critical of authoritative sources, all the while acknowledging their weight in the discussion, as well as their importance. The idea is to always keep an open mind and not blindly accept authority as "a given." This certainly does not mean that we should revert to an automatic criticism of anything authoritative, to the point where the use of the argument from authority is disqualifying in any debate. Doing so is akin to accepting Descartes' *tabula rasa* all the while failing to discuss the merits of the argument made by the authority. This is, again, ironic, given that Descartes' objective was to avoid exactly what those claiming to be his successors did for centuries, by shutting off critical thinking in the face of tradition and authority. The way they did so, through a complete lack of ponderation, balance and argumentation was eerily reminiscent of those they scorned. Those they still scorn.

5. Gathering thoughts on the relevance of philosophical hermeneutics

In the course of the third part of this dissertation, we have seen why a more careful, modest and open-minded interpretation could untie the knots of positivism. This doctrine is still dominant in the field of Law, whether it is in civil or common Law systems. Similarly to philosophical hermeneutics, the mindset is much more important than the method. A jurist calling legal positivism "stale" and "estranged from facts and the daily practice of the Law" yet barely daring to separate themselves from the letter of the Law, is just as much a vector of the positivist mindset than the one stating, "everything is in the law." Similarly, those criticizing positivists for "sticking too close to the laws" yet only use jurisprudential

[1609] Cf. *supra* part 2, III, 1 and V, 3, B, *a* concerning the quodlibetic sources; Perelman/ Olbrechts-Tyteca pp. 1 ss.

[1610] And philosophical hermeneutics to a different extent.

precedents or the terms of a contract to interpret Law are just as positivistic as the targets of their criticism. The most famous example in recent memory of this attempt to liberate one's self from the chains of legal positivism can be attributed to Dworkin and his famous judge Hercules[1611].

Through philosophical hermeneutics, we are forced, before anything else, to face our own shortcomings. The more frequently someone does so, the more this person realizes the many flaws they have. This probably sounds very abstract in the face of international arbitration awards worth millions or billions, but the realization that one is imperfect, usually with more flaws than qualities, is very efficient to understand that one is not perfect, and neither are their decisions. This first step does not seem very scientific, and yet is an integral part as to why philosophical hermeneutics is, in our view, the best accessible option to break away from positivism. This idea of perfection stems directly from natural sciences, where the idea of a perfect rule with no exception is possible (e.g., Einstein's relativity, Newton's gravity or Lavoisier's conservation of mass), which is far from ever being the case in Law. A legal rule with exceptions will indeed never be automatically flawed because of those exceptions, or because someone broke such a rule.

Once this inherent imperfection has been acknowledged, the interpreter will have an easier time tempering their prejudices, which become all the more detectable when their first mental reflex is to be on the lookout for their own defects. More broadly, acknowledging the existence of our prejudices implies understanding that other

[1611] Dworkin pp. 239 ss. Without going into too much detail, Dworkin summons an imaginary judge called Hercules, who notably does not falter in his actions, always coming up with the right solution, without any form of dialectic or otherness. This imaginary figure is quite revealing of Dworkin's general mindset: the prevalence of the jurist's individuality and a perfection which prolongs the positivist unending quest for scientific truth, untainted by human contingency. Cf. Frydman pp. 670-671; Michelman pp. 76-77. Despite Dworkin's acknowledgement of both the importance of history and historical context, as well as hermeneutics, his general theory contradicts such an acknowledgement. By asserting the scientific and objective nature of the judiciary decision and that there was always a "right answer" (Frydman, Dworkin pp. 295-296), Dworkin firmly anchors himself in opposition of both historical prejudices and philosophical hermeneutics: "For over a quarter of a century, Ronald Dworkin has steadfastly held to the proposition that there is a single right answer for every hard case. […] Dworkin's conclusion seems all the more counterintuitive given that he does not regard legal interpretation as merely mechanical or syllogistic, but rather as hermeneutical and akin to literary interpretation." (Rosenfeld p. 363). Furthermore, and unsurprisingly given what we said *supra* regarding each person's prejudices, Dworkin anchors these "right answers" in his own political vision of society, which neighboured Rawls' egalitarianism (cf. Rosenfeld p. 365 and *supra* part 3, III, 2).

people have other prejudices, the former being impacted by the latter in various ways. Considering this level of contingency, even if the interpreter only perceives a fraction of such a wide variety of thoughts, they should grasp quite easily why univocity, the child prodigy of positivism, will ever remain a chimera or a utopia, depending on one's sensitivity.

As a reminder, positivism is primarily interested in the application of the methodology of natural sciences to all scholarly fields[1612]. In Law, this movement became known as legal positivism or, sometimes, legalism. The purpose of natural sciences is to uncover the truth and the rules of the functioning of our surroundings. One of the main lessons this uncovering teaches us is that there is, supposedly, one truth: the existence of two truths is impossible, one must be fake[1613]. We can clearly see how, in Law, this would translate to unmitigated judicial and scholarly disasters. Any seasoned jurist should know that there are usually as many versions of the truth as there are people involved. Moreover, Law has never been concerned with "discovering the truth", rather focusing on doing justice. As much as possible, Law will obviously try to be based on proven facts, but if the truth is unjust or illegal, measures must be taken by the judicial authority. Furthermore, who is to say what is true or not in cases where two witnesses make conflicting statements? This is typically why Law is not centred around truth, but around likelihood, probabilities and verisimilitude[1614]. This is not to say that Law ignores the truth[1615], simply that it does not pursue it: what is true is not necessarily just, what is true may or may not have legal consequences and, quite pragmatically, discovering the truth is very often terribly difficult, especially given that Law frequently affects people's personal interests, sometimes intimately, which makes them all the more irrational, or exceedingly rational in the defence of their interests.

The advantage of philosophical hermeneutics is mainly two-fold: it allows the legal interpreter to break out of the univocity mentality and to get a better grasp of the general context through historicity. On account of this, arbitrators would become better equipped to fulfil their mission, especially authoritatively. Let us remember

[1612] Popper pp. 130 ss and his "unity of method."

[1613] Cf. Soler pp. 43 ss, who shows that the very definition of "truth" is far from univocal and most certainly never will be. Even in what is often seen as the "hardest" of sciences, physics, scholars do not necessarily understand the difference between a model and a theory, as well as the way they interact with and represent the notion of truth, including the fact that measuring instruments are themselves "materialized theories" (Soler pp. 45 ss).

[1614] Papaux, Introduction pp. 137-146, 187-206.

[1615] Cf. Bouvier; Papaux, Introduction pp. 137 ss.

indeed that the common good goes beyond an arbitration clause, hereby rendering commutative justice nearly useless. In order for distributive justice to function "cleanly", understanding the context of both facts and Law is critical, which is probably the main strength of philosophical hermeneutics.

The other major problem that needs to be addressed is the technocratization of international arbitration and everything it entails, the intellectual and legal rigidity in particular. Equity was discussed at length[1616] to show how it could help with this general problem, with philosophical hermeneutics as the cornerstone for both legal inflation and rigidity.

All in all, philosophical hermeneutics fits very well in the general crisis of authority in which international arbitration finds itself. Be it from a legal standpoint or a philosophical standpoint, it stands as the best alternative to begin solving the conundrums encountered throughout the course of this dissertation. There are obviously many other problems plaguing international arbitration, the most prominent being the financial retribution of arbitrators and, to a lesser extent, attorneys. The political ramifications of international arbitration should be taken into account if philosophical hermeneutics is properly used, as their exclusion is a major reason for international arbitration's current predicament.

The knowledge required, however, definitely goes beyond what philosophical arbitration brings to the table, as the general culture of arbitrators is, in politically impactful cases, an arbitrator's greatest weapon. This includes languages and knowledge of Law, local politics, the energy market, international trade and commerce, de-escalation of conflicts, societal changes and projections, etc. In other words, philosophical hermeneutics seems like the most adequate solution at our disposal … for the first steps in the direction of solving the crisis of authority in international arbitration.

6. The argument from authority, where do we stand on hermeneutics and authority's crossroads?

Before drawing up the concluding remarks on this dissertation's final part, we would like to evoke and quickly analyse the argument from authority. Located somewhat at the crossroads between hermeneutics and authority, we would be

[1616] Cf. *supra* part 3, III, 2.

remiss not to explain why it has not featured more prominently in a PhD centred around authority and hermeneutics.

Unsurprisingly, the argument from authority has suffered the same fate as authority in general[1617]. This was, in fact, perhaps more pronounced in the case of the argument from authority given its position as an end to all discussions in a way that stood firmly against Reason by the time Modernity was in full flight during the 17th and 18th centuries. Any discussion about the argument from authority would therefore feature what has already been stated *supra* but on a smaller scale.

Simplistically, it consists in using the authority of a person or institution to add some weight to an argument, often with the idea of sealing the debate through this nominal invocation. The main idea is to use the actions of other people as proof of support for a thesis. The argument from authority is usually construed as a dead end to all reasonable reasonings for modern intellectuals and their descendants, understandably so given how it was used and abused to the point of creating a fictitious infallibility of certain doctrines[1618]. Accusing someone of using an argument from authority is usually the equivalent of rejecting the entire reasoning, the general point notwithstanding, for it would be void of Reason[1619].

The genealogy of the argument from authority yields a different definition of which we have already seen traces in the quodlibetic sources[1620]. Given this gap, it is a pity that the more precise "argument from prestige" was not retained to describe the modern version of the argument from authority[1621]. The argument from authority is a derivative of the general concept of authority, meaning that it is posterior to authority itself. In occidental civilizations, the first traces of this argument can be traced to early Christian discourses and writings such as Augustine's, who referred to the authority of the Church in matters of interpretation of the holy scriptures *("ecclesiae auctoritate")*[1622]. This implies that the paradigms of authority and the argument from authority are not the same: from a collective to an personal one (me and the scriptures, me and God). A distinction can thus be drawn between an authoritative argument and an argument from

[1617] Frydman pp. 23-24, 111-115, 154-155, 257-260, 295.
[1618] Perelman/Olbrechts-Tyteca p. 411.
[1619] Bouvier; Frydman pp. 23-24.
[1620] Cf. *supra* part 2, III, 1 and V, 3, B, *a*.
[1621] Perelman/Olbrechts-Tyteca p. 411.
[1622] Frydman pp. 154-155.

authority, although both can very well coexist and have done so very often (e.g., Aristotle's basic definitions in legal philosophy, Musashi Miyamoto's explanations on the warrior mindset in the 五輪書の空の巻, etc.).

The argument from authority has a narrower scope than an intrinsically authoritative argument. The latter is directly tied to authority while the former is already somewhat estranged from the conception crafted in this dissertation through the collective dimension of authority. This, however, does not mean that the argument from authority is divorced from authority itself. Quite the contrary, many rapprochements could be made between the two, in particular within the framework of hermeneutics.

This is something we have already seen with the notion of epistemological authority[1623]. Harnessing the academic context, arguments from authority are deployed on a regular basis in all fields of academia as was the case with Fermat's theorem[1624], whose resolution by Wiles would not have been possible had he not used multiple arguments from authority stemming from previous mathematicians' work, discoveries and errors to travel the last miles and exhume a solution to the theorem. In other words, Wiles used multiple arguments from authority in order to finish the job started by his predecessors. By using arguments from authority, Wiles was thus able to become an authority himself. Even more so, by using arguments from authority, he was able to confirm the authoritative status of his predecessors: their research had indeed augmented the field of mathematics, although a clear demonstration of their "definitive" authoritative status could not be entirely established until Wiles' finishing touches.

As frustrating as these back and forth between past and present may be in establishing authority, they are the key to determining what is authoritative or not. The test of time is indeed of prime importance to determine whether a theory or an action is authoritative or not. What could seem authoritative at some point for some people may seem unauthoritative for the same people 10 years later. What grandparents considered authoritative can be viewed quite differently by their grandchildren, not necessarily because their values are entirely different, but because the passage of time and its historical events confirm or infirm the authority of certain events, choices, values, people or arguments.

[1623] Cf. *supra* part 2, III, 4, C.
[1624] Cf. *supra* part 3, II, 2, B, *b.*

There is a litany of examples demonstrating this; for instance, the king of France was viewed by his countrymen as a symbol of authority for centuries, while nowadays, the idea of re-instating a French king would probably make them wince. Likewise, the medical procedure known as bloodletting was frequently used from the time of Hippocrates until the late 19th century, even experiencing a revival in the first half of the 20th century, where many medical epistemological authorities of the time such as Lafleur, Pepper or Pye-Smith advocated for it, to the point where they thought that those who refused to bleed a patient were timid and lacking in moral courage[1625]. Nowadays, bloodletting is merely used to "treat blood disorders such as iron overload or polycythaemia"[1626], having been widely abandoned by medical doctors despite centuries of authoritative status. In Law, we have seen that legal positivism has been the authoritative doctrine of reference for many decades now, but also that the test of time was being quite harsh with it.

This shows us how prejudices, history, the argument from authority and the general concept of authority are all intertwined. *Vorverständnisse* are inherent to human beings; they evolve and devolve according to each person's life experiences. In other words, *Vorverständnisse* correspond to each's personal history, a history during which each single person is influenced to various degrees by others, and those making the most important and positive impact on us are frequently deemed to be the authoritative figures we emulate.

Some of our most "imprinted" prejudices are thus imparted by what we view as authoritative, whether people or ideas, whether positively or negatively. However, questioning prejudices is of prime importance for a good hermeneut, a good interpreter of the Law[1627]. This means that we should be able to question what we view as authoritative, on a regular-enough basis, in order to maintain our interpretative faculties to an authoritative level. This is obviously much harder to do than simply write about it, for arguments from authority i.e., arguments so strong that they enter the authoritative paradigm and acquire a certain stature reflecting their coherence and the difficulty to attack them, are by essence much harder to question than other arguments. Otherwise, they would not have been deserving of the "authoritative" moniker, which indicates that, in accordance to the collective nature of authority, they are viewed as such by a wide number of

[1625] Anders pp. 792 ss.

[1626] Anders p. 801.

[1627] Cf. *supra* part 3, II, 2, B, *b* and more generally, cf. part 2 and part 3, III, 6 regarding our questioning of widely accepted concepts such as authority or the argument from authority.

people, meaning that they are accepted to the point of being taken for granted by a great number of people.

In occidental philosophy for instance, no new intellectual matrix has been discovered since the time of Plato and Aristotle. As such, despite an extremely difficult test of time, they are still very regularly mentioned and used by current scholars. Many aspects of their respective theories have been dismissed over time, those related to science in particular, but the fact that their matrixes are still used to this day by the "scholarly society", more than two millennia after their death, not only shows that said matrixes are arguments from authority on which we base ourselves without needing to demonstrate what they are, but also that they have augmented the field of philosophy[1628] and resisted the test the time, meaning that they can rightfully be considered authoritative and that arguments based on their reasonings are indeed drawn from their authority.

Borne from and abused by the Church, the argument from authority was definitely one of the clearest reasons why authority was vilified by Modernity. Ironically, the more abused it was, the more it reflected a lack of authority from the Church, which sought to hide its own failings behind a veil of prestige rather than authority. By that point in time, the actions of the Church were void of authority. Whether it was from an inheritance perspective (the teachings of Christ) or from a collective standpoint (with the higher-ups spending lavishly, often stripping monuments of their valuables such as the pantheon in Rome under Urban VIII), the Church had become corrupt to the extent of a *fait notoire*[1629]. This is also what precipitated the rupture between Reason and tradition, which included authority.

This link between authority and Reason is precisely what a better understanding of the argument from authority can help restore. We are hesitant to openly call Reason a characteristic of authority given how broad a notion it is. What is certain, however, is that divorcing authority from Reason has been one of the most lasting consequences of the modern mistake, if not the most lasting one. Calling out someone for making use of the argument from authority is still, to this very day, a consequence of this divorce and considered as a one-size-fit-all dismissal of any rhetorical argument. As the most salient part of the separation between authority and Reason, the argument from authority is the ideal playground to demonstrate just how close to Reason authority is. This analysis will underscore once more the

[1628] Any intellectual field for that matter.
[1629] Cf. Julia pp. 279 ss; Dompnier p. 223.

irony stemming from the modern-positivist current i.e., how the rejection of the argument from authority gave birth to the biggest argument from authority we may have ever seen in Law besides God, the biggest at least over the course of the last three centuries[1630].

We are thoroughly acquainted with this irony by now: the replacement of the will of God by the will of the legislator, the latter donning the uniform of Reason to justify its prevalence in the legal interpretative process[1631]. Further adding to the irony is a relatively new substitution that took place during the 20th century as neoliberalism progressed: the replacement of the will of the legislator by the will of the parties; the word of God has become the word of the contracting parties. The will of the parties, crystallized in the freedom to contract, has become an almighty "authoritative" figure, one jurists and legislators need to accommodate at all costs[1632]. From a legal production standpoint, and in line with the positivist legal inflation, the opportunity is too good to reject: each individual can create Law and their own absolute sphere of influence, theoretically only limited by other absolute spheres of influence. This reasoning is nonsensical: Law is never absolute, always relative to someone else.

The present gap between the argument from authority and Reason stems from an easy-to-remember construction, one deriving from the confusion surrounding the concept of authority[1633]: "your logical argument, your reasoning is not good enough, hence you use the name of a famous person or a hierarchical superior to justify an unreasonable argument."[1634] The argument from authority can then effortlessly be used to call out others as simply relying on the prestige of famous authors to justify an unreasonable reasoning.

This is obviously a simplistic sketch[1635], yet it illustrates quite well how easy it is to abuse the argument from authority, to hide behind the authority of the argument

[1630] Frydman pp. 401-404.
[1631] Papaux, Introduction pp. 1-134.
[1632] Cf. *supra* part 3, III, 2 with the contractualization of society.
[1633] Cf. *supra* part 2, III, 1-3.
[1634] Perelman/Olbrechts-Tyteca p. 412. The quotation marks do not refer to these authors, merely mentioning their own argument under the form of what a modern-influenced thinker might say.
[1635] Typically, medieval authors such as Thomas of Aquinas were not the fondest of the argument from authority, which they considered poor, but facing an aporia in a logical reasoning of their own, they would use the argument from authority, not by conviction, but for conscious lack of a better argument, knowing full well that their reasoning was somewhat weak on this

from authority to dismiss what could not be so other than through this argument: because the argument from authority is seen as binding, accusing someone of using it is akin to accusing someone of stifling the debate[1636]. What is truly simplistic and lazy, however, is the false equivalency made between someone unable to defend their intellectual positions, forced to resort to proxies, and someone referring to well-established authors to draw inspiration or underscore their own argument[1637]. This reflects a binary approach to Law and legal rhetoric, based on an erroneous appreciation of natural sciences: true or false[1638]. This erroneous appreciation stems from the fact that both legal and scientific scholars never spend much time defining what features under the banner of the word "truth"[1639].

The argument from authority has a much more individualistic tone than the general concept of authority. This is why, in order to underline the strengths and reasonableness of the argument from authority, one needs to take a more specific approach, to avoid repeating what has already been said in part 2 *supra*. Evidently, what is applicable to the general concept of authority is applicable to the more precise notion of argument from authority.

The first of these specific points is linked to the prejudices of philosophical hermeneutics: information gathering and accessibility. Becoming a student of any field and entering gigantic hermeneutical circles implies drowning in a mass of information, which is why the guidance of professors is indispensable: they know where, when, why, how and what to look for. More importantly in the context of the argument from authority, they know who to look for.

Building on this knowledge as the student advances further in their academic career, those with good critical skills are able to establish their own chart of good and bad writers, the latter constituting the bulk of academia. The "problem" is that doing so

particular point (cf. Chenu pp. 106 ss, 117; Thomas of Aquinas, tome 1, question 1, article 8).

[1636] Perelman/Olbrechts-Tyteca p. 411.

[1637] Perelman/Olbrechts-Tyteca p. 413 who very astutely remark that quite often, it is not the argument from authority that is attacked, but the authority of the person invoked.

[1638] Perelman/Olbrechts-Tyteca p. 412.

[1639] Soler pp. 43 ss. According to her, the truth is traditionally viewed by occidental scholars as a faithful description of what is. The problem with such a conception of the truth, she adds, is that there are no criteria to determine what is true or false, especially in the face of a phenomenon that cannot be seen with the naked eye (e.g., atoms and electrons). The very idea that a thought and a concrete object correspond with one another is thus very enigmatic, to the point where we think we intuitively understand what the truth is, when instead, we do not really comprehend it.

is extremely time-consuming, to the point where creativity can be stifled by the lack of energy due to it being invested in researching/confirming what past authors have already done. In order to solve this problem inherent to academia, the student needs shortcuts (i.e., prejudices) and names on which they can firmly rely or that they can easily discard. Even the most seasoned researchers have their preferred authors, that they read or listen to with a favourable disposition, which is exactly when they must remind themselves not to shut down their esprit critique.

This is how schools of thought have lived for eons. For example, we do not recall Habermas ever saying Gadamer was using an argument from authority simply for quoting Heidegger or Plato. Using the added weight of famous authors is not a problem when inserted in a general logical reasoning. Furthermore, when one is conscious of History's importance in humanity's intellectual process, the use of past authorities makes even more sense, for they insert new scholarly creations in an overarching context, establishing footboards for future reasonings.

This first argument in favour of the argument from authority is therefore intrinsic to human beings and a clear reflection of their finitude and incapacity to process data like machines. At this point, the use of the argument from authority seems quite rational, a necessity even, in light of its links to one of humanity's inescapable characteristics. The only way to counter this argument would be to believe in the Cartesian *tabula rasa*, which has already proven to be a convenient way to elude addressing previously made arguments, but a chimeric way to construct reasonings.

We now understand that the argument from authority necessarily inserts itself in a tradition, that something must have come before, on which it heavily relies[1640]. The link between prejudices and argument from authority is also quite apparent. Both are indeed cognitive shortcuts, always helping the interpreter, sometimes allowing them to consciously formulate interpretation while receiving information from another source. Typically, when two attorneys square off, the capacity to think quickly can oftentimes prove quite useful. What is frequently referred to as "quick-witted", "quick-thinking" or "having good reflexes" is but the sedimentation of prior knowledge, *Vorverständnisse*, which are helped in their application by arguments from authority.

Broaching on the historical dimension of arguments from authority brings us to the second argument in defence of the argument of authority: the insertion in a school of

[1640] Perelman/Olbrechts-Tyteca pp. 413 ss. Cf. *supra* regarding this more overarching aspect, especially with the ancient Romans (part 2, II, 2-4).

thought, in a tradition, as well as a show of intellectual honesty[1641]. As indicated *supra*, being part of a school of thought has been part of humanity's intellectual tradition for millennia and referring to magisters was a central part of it. Obviously, the advent of printing allowed scholars to access more diversified sources, which diluted the reliance on one's magister and allowed for broader horizons; this does not mean that overnight, any scholar could single-handedly apprehend immense fields of knowledge, guidance was and remains obviously needed.

Moreover, acknowledging the authors that influence our scholarly makeup is part of being intellectually honest. Using well-known authors to expose a tradition, the genealogy of a concept and eventually the definition of a concept is not an argument from authority, but a display of modesty in the face of authoritative sources, which withstood the test of time or were ahead of their time.

Whether the modern misconception was intentional or not is hard to know given the distance between us and modern authors. What is certain are the brutal ramifications of their musings on authority on the core of a notion which, had they understood it better, would have further supported some of their theses and provided a healthy dialectic focus point against the backdrop of their enterprise centred around individualism and absolutism. The concept of authority in the argument from authority suffered heavily from those misgivings.

This is why it is at best viewed as an epistemological authority[1642], or at worst a *potestas*-like authority[1643]. The collective conception of authority is never mentioned, which is why using the terms "authoritative interpretation/argument" would make more sense to describe what is imbued with authority, epistemologically or fundamentally. On the other end, the commonly accepted argument from authority, emptied of its substance and logically barren, would be much more aptly described by the terms "argument from prestige."[1644]

According to the Cambridge dictionary, prestige can be described as the "respect and admiration given to someone or something, usually because of a reputation for high quality, success or social influence." In accordance with this definition, prestige could be seen as a possible consequence of authority, albeit not a necessary one. More importantly, however, the notion of prestige does not involve

[1641] Perelman/Olbrechts-Tyteca p. 412.
[1642] Frydman pp. 45-46.
[1643] Cf. *supra* part 2, III, 1 and 2.
[1644] Cf. *supra* and Perelman/Olbrechts-Tyteca p. 412.

an augmentation, and although it implies a relation with others, it can either be individual or collective.

Furthermore, it is founded upon the admiration of others based on one's reputation. As such, prestige is much more ethereal than authority in the sense that it does not matter whether one's reputation is deserved or not, it simply matters that the reputation indeed exists. There are many instances where scholars were deemed prestigious before their reputation eventually crumbled under scrutiny. A good relatively recent example is that of Karl-Theodor zu Guttenberg, a former German federal minister of defence whose prestige as the then golden boy of German politics[1645] came to a brutal halt after it was discovered that his PhD contained multiple plagiarisms.

In order to further this definition of prestige, we would like to call upon etymology to show how important the choice of words is. The term "prestige" is directly derived from the medieval Latin word *praestigium*, which stands for illusion or magic trick. *Praestigium* is itself borne from the ancient Latin *praestinguo* (to obscure) or *praestringo* (to confuse someone)[1646]. Without digging as deep as we did *supra*[1647] for *auctoritas*, the etymology of prestige is quite revealing and underscores two ideas.

The first one is that the term "argument from prestige" is very well founded given how its users typically use a prestigious name to blind the opposing side, to confuse them. The second thing is that Perelman and Olbrechts-Tyteca's decision to differentiate prestige from authority was probably more accurate than even they knew: prestige under its Latin terminology is quite antithetical to authority, the reflection of a selfish, unauthoritative act, at best a ruse, at worst a deception. In all instances, it reflects a selfish action for dishonest gains, which would not have been achieved without duping someone.

While never apprehended under the direct light of prestige by Perelman and Olbrechts-Tyteca, their wording to describe it is unquestionably the best-suited. Although both prestige and authority can coincide as cause/consequence, their respective existences are distinct from one another. Obviously, authoritative persons

[1645] He was the youngest post-World War II minister of defence and the inheritor to multiple titles of the now-defunct German nobility.

[1646] Retrieved from the *Centre national de ressources textuelles et lexicales* on the 9th of March 2022, entry *"prestige"*: ‹https://www.cnrtl.fr/definition/prestige›.

[1647] Part 2, I, 2.

have often benefitted from a certain prestige, but not necessarily: a small-town schoolteacher with a knack for drawing the best out of their students might be an authoritative figure in this setting but will lack prestige. In the same vein, prestigious people may or may not be authoritative: being the president of the U.S. is prestigious, but we doubt Joe Biden and Donald Trump could ever be considered authoritative given their penchant for rugged individualism, among a litany of other flaws.

We do not contest that the modern criticism of the argument from authority is well-intentioned, which is why we consider the Brussels pragmatic model to be a helpful legal complement to Gadamer's philosophical hermeneutics, although the latter also advocates for the constant vigilance of the interpreter's esprit critique. However, using the word "authority" and what it entails creates a paralogism and is doubly problematic: it diminishes authority and unduly reinforces the argument from prestige. When manipulating a heavy, historically laden concept like authority, it would thus be more accurate and clearer to use the terms "argument from prestige."

Once the line between the argument from prestige and the authoritative interpretation has been properly drawn, we can see that there is not much left to analyse, explain or comment on the argument from authority. The argument from prestige, although a very interesting topic in and of itself, is not sufficiently related to this dissertation to deserve more than a quick overview. On one hand, the notion of prestige is the fruit of a genealogy removed from that of authority, which means that despite historical, semantical and conception confusions that have brought authority and prestige together, both topics are separate and should thus be treated as such. On the other hand, the idea of authoritative interpretation is precisely what this part 3 has explained through philosophical hermeneutics and equity. In light of this, the pertinent developments on authority in interpretation have been made in concentric circles, while the prestige aspects of the argument from authority are left aside for lack of purpose in this dissertation.

As stated *supra*, an argument, an interpretation which could be considered authoritative answer to the same criteria as any authoritative action: what is founded upon the common good is inherited then augmented. The purpose is simple, to leave things in a better state than when we "found" them. By this logic, an authoritative interpretation definitely does not need to be prestigious. It does, however, need to augment our understanding of a text, a dialogue or a discourse, be it by establishing authoritative prejudices used by subsequent interpreters in their interpretation of the same text, or be it by reducing or increasing the *plurivocité* or

polysemy of a text's words, filling in open textures. Unlike that of other domains, legal interpretations are then applied, meaning that the authoritative component must also extend to the concretization of the interpretation. By doing so, other interpreters can employ this authoritative interpretation, which can then be used to construct what could truly be called an argument from authority i.e., an argument derived from an authoritative interpretation[1648].

In other words, an argument from authority, should it be defined in the light of a more complete version of authority and in contrast with the argument from prestige, would mean as follows: an argument derived from an authoritative interpretation inserted in a logical reasoning. The "borrowed authority" would be first and foremost used in adequation with the reasoning invoking it, for instance because we wish to further elaborate on the discoveries made by an authority, not unlike what we saw with Fermat's last theorem, or because we wish to contrast our reasoning with that of an authority in our field, etc. In other words, we would judge the pertinence of the use of an authoritative name through its use in the overall reasoning. If said name is simply used to put an end or to avoid a discussion, without explaining why or how, or without improving upon the reasoning it is integrated in, then we are in the presence of an argument of prestige. This would underline the difference between an authoritative interpretation, which serves as a standard for future subsequent interpretations, and the argument from authority, which borrows from an authority to elaborate on a point of reasoning.

Yet again, we find ourselves in front of another instance of why the choice of words is so important and another explanation as to why the concept of authority has been eviscerated over the past centuries. Whether for authority or contractualism, the confusion surrounding them has had lasting consequences. It has also produced splendid examples as to why, to solve issues in Law, we must always keep a close eye on general semiotics and hermeneutics.

[1648] Cf. for instance the rule of precedent in Law, although precedents must first be authoritative themselves, which is currently the very problem with the idea of an arbitral jurisprudence.

III. Hermeneutical conclusion

This third and final part regarding the use of hermeneutics has shone a light on other facets of the same problems discussed in parts 1 and 2. Doing so demonstrated that notions and concepts which might seem clear to many are far from being so: contractualism, legalism or even prestige are part of an increasingly long list of poorly constructed or misconstrued terms that also includes authority, equity and even arbitration.

The misconceptions are not simply linguistic, and some concepts have been completely turned upside-down as we have seen with authority, and to a lesser extent with positivism. The necessity of establishing genealogies has been highlighted many times, and it is not an act of random fate that this entire problem was encapsulated by philosophical hermeneutics, one of the main advocates of the establishment of genealogies.

Adopting a position at the extreme opposite of analytical philosophy, philosophical hermeneutics places history at the centre of its reflexions. Whether it is the history of the interpreter as an individual, or the history of a concept, or the history of the general context, an intelligent interpretation cannot happen without understanding why we are in the current situation and what will influence an interpretation.

This does not mean that we should automatically side with what history seems to indicate. The contextualization of history, apprehending it to solve the case at hand, implies an actualization of history. Drawing lessons from it is much more important than perpetuating it at all costs, as Augustus perfectly knew. History cannot be reduced to what happened in the past; it is constantly in motion, varying from one individual to the other, from one society to the next. Conceiving history as a

collection of anecdotes deprived of any relevance for the present is laughable, but seeing it as a sacrosanct relic is just as laughable. This is why originalist and textualist theories are just as nonsensical as positivism, which is not a stretch given that the former two are an imitation of the latter under a different name.

Our genealogies could not have been conducted without a sound understanding of the notion of essence, or substance in Aristotelian terms. *Sub stance*, what stands under, what underlies and supports a concept. Failure to properly address a substance when effectuating a genealogy will usually result in a very partial genealogy, for if one is to trace a concept assuming many forms and disguises, one must discern the overarching patterns guiding the concept through its various phases, without stopping at the first superficial distinction.

At this stage of the dissertation, we know that many of international arbitration's problems would greatly benefit from a tad of philosophical hermeneutics. Arbitrators would understand just how disastrous the arbitral institution has been for many of the so-called third-world countries, how favouring the financial health of a company to the detriment of entire ecosystems is not particularly wise and, more generally, why international arbitration suffers, not from a crisis of clients and money, but from a crisis of authority. Without being a devout hermeneut, the simple analysis of the history of arbitration shows how unauthoritative arbitration has become. That is, unless we substitute justice for mercantilism as the final cause of international arbitration, in which case international arbitration needs indeed not worry at all.

Given the prerequisite of philosophical hermeneutics, understanding the context in which Law is currently conceptualized has been an important factor throughout this dissertation. Considering that legal and contractual positivisms are the most influential legal-philosophical doctrines of the past centuries in the Occident is why both are so central to grasping a wide variety of legal situations in the western hemisphere. Because they represent the dominant mindset of the past decades, centuries even if we view positivism as a whole, they probably are the most important component of a western jurist's mindset, unquestionably the heaviest prejudice they must deal with.

The consequence of having a positivist mindset can be summarized as an extreme rigidity. By forcing themselves into the tightest of dead ends, and because this extreme rigidity compels them to stick to the text (law or contract) as closely as possible, western jurists have effectively handcuffed themselves to the text of law.

This self-inflicted punishment is even more confusing in the case of international arbitrators, who should instead be overjoyed about the possibility of spreading their wings after years of constraints in front of national courts. Although there is no definite proof of this, our hope is that the keys of the shackles are still within reach. This shackling, however, was to be expected: by using one of the most basic tools in Law, the contract, as the centre of an entire legal philosophy, the interpretative options deriving from it were bound to represent a small contingent, as we have seen with commutative justice and the very small number of interpretative possibilities if offers.

Most importantly however, is how the technocratization and the love of the text have derailed jurists from their purpose of justice. Because the contract or the law are so central to Law, because the aforementioned love of the text blinds us to its possible shortcomings, because a text needs to be exhaustive or else it cannot be perfect, because so much effort is put into developing technicities in the hope of rendering the text perfect, we now find ourselves in a situation where we openly do not care about wisdom, even if said wisdom would help us do justice in many cases, especially in arbitration, where it was a staple for centuries.

This might be based on an intuition more than on concrete evidence, but we are convinced that this lack of wisdom is the pivotal cause of our increasing incapacity to act in equity, to construct legal reasonings without overcentralizing the laws or the will of the parties, or even more unimaginable, to construct a legal reasoning from naught when the application of the law/contract is unfair, without it needing to be shockingly so. This is what results in the many absurd legal vortexes of our system[1649].

The notion of prejudice, of *Vorverständniss*, is yet another addition philosophical hermeneutics brings to counter those problems. Much broader than the notion of bias, prejudices reflect one's personal history. The ability to put some distance between them and us is highly difficult, for it implies the capacity to fundamentally question one's self, which takes time, a minimal amount of wisdom and modesty, as well as a mind open enough to accept and act upon self-criticism. This step is

[1649] Cf. Chappuis pp. 17-18, who illustrates this vortex by giving an example of EU Law concerning the commission regulation (EU) no. 97/2010 of the 4th of February 2010 regarding the pizza napoletana, which includes a vivid description of the smell ("deliciously fragrant") and consistency ("tender, elastic and easily foldable") of a typical Neapolitan pizza. To further quote Chappuis, *"Réveillons-nous et sortons de ce cauchemar."*

necessary for anything to improve in legal hermeneutics, to allow us to go past our mistakes and improve ourselves. Without being a fully authoritative action, taking our foundations and ameliorating them would be a step in the right direction. The best example of this need for introspection is one we are now well acquainted with.

We often think ourselves, Occidentals, as being a developed people, that we have shed whatever primitiveness was still attached to us by extracting ourselves from the Middle Ages, also derisively called Dark Ages. We supposedly overcame religious superstitions and, legally speaking, we have elaborate and complex legal systems, with written laws, far from the obscurantism of oral customs and arbitrary rules. More importantly, our Law is scientific, apparently, which makes it a reflection of truth, far removed from the superstitious Laws of the countries we have colonized over the centuries, and who need our help to extract themselves from this dire situation, or so we thought, and to an unfortunate extent, still think[1650].

To reach such a conclusion while still under the heavy influence of millennia of Christianism is ironic beyond belief. Unable to fully fundamentally question our prejudices, we have convinced ourselves that our laws are the result of a scientific process *(Rechtswissenschaft)*, when in actuality, we have simply substituted our veneration of the Bible with our veneration of legal texts, our veneration of God with our veneration of the legislator (its shape notwithstanding). We remain wholly oblivious to this irony, maybe more than ever because of how unable to question ourselves we are. The consequences of which are, quite logically, not very different than when we used to venerate "superstitious traditions": we apply without questioning, still convinced of the existence of univocal interpretations. Even the Lumières, with all their faults, had the merit of trying to extract themselves from a situation they deemed untenable, without success unfortunately, in spite of their belief to the contrary.

In the end, there are multiple lessons we can draw from this hermeneutical episode: the importance of self-reflexion which often entails a dialog with "otherness"[1651], the modesty to tell ourselves we might be wrong about something we consider ourselves talented at, accepting the idea that we live with more uncertainties than certainties, that we are definitely not as evolved as we think, whatever that

[1650] Supiot, Contractualisation p. 19.

[1651] This means engaging with people with different worldviews, not simply someone from a different ethnicity with the same viewpoint. This also means applying the lessons learned when they are deemed constructive, which is another step up in the degree of difficulty.

means[1652]. Without reducing philosophical hermeneutics to this sole notion, the idea of alterity is always floating around it, serving as a reminder of the importance of dialectic to escape our prejudices more easily, to lessen the degree of our subjectivity in which we dwell, to the point of an overmarinated stew sometimes, another ramification of an individual society.

[1652] For an interesting account on the matter, cf. Papaux, Homo Faber. Cf. also Bergson p. 140, who was the first to oppose the idea that there is anything *sapiens* about us, preferring the term *faber* as a tribute to our gift for inventing tools and random objects.

Conclusion

Synthesis

This dissertation began against an extremely nebulous backdrop, which required the establishment of a genealogy, a historical context, to understand the very notion of arbitration. This allowed us to exhume a few trends in arbitration, often the consequences of positivism, but also, sometimes, the consequences of political choices, especially in recent history. The most important trends are the progressive vanishing act of equity, *ex aequo et bono* especially, the overhauling technocratization of the field and the disappearance of a common good. These trends could have been analysed separately but doing so would have obscured, occulted even, the more overarching problem of this evolution. Operating in silos would not have been a fruitful reading prism indeed, if only because the concepts studied would have lacked in transversality and connexity. Effectively, the three highlighted trends have all impacted arbitration on the same level: its authority, a concept whose interdisciplinarity is very broad.

In this context, the best way to proceed was thus to understand enough about authority to further the hermeneutical circle entered under the umbrella of a double genealogy. The idea was to grasp enough of the concept of authority to allow us to manipulate it sufficiently freely to properly define and refine the details of international arbitration's problems, as well as proposing a solution to said problems.

The issue with hermeneutical circles is always the entry door, which can remain elusive for extended periods of time. Once the entrance has been found, however, the issue is "simply" to remain within the circle, usually through circular motions. In our case, the entry was the genealogy of arbitration. What we were looking for

was partially or entirely unknown at the very beginning, but centuries of arbitration have led us to see how drastic the changes of the institution had been over the course of the last 120 years.

Changes are not inherently good or bad, but more than the axiological changes, it is the brutality of the recent changes that puzzled us. From a legal philosophy standpoint, this was very apparent: why was equity *aequo et bono*, the bedrock of arbitration for millennia, dropped in favour of what is now much closer to litigation than historical arbitration? In other words, why is arbitration evolving into something which already exists and with what consequences?

This is probably where sociology could continue helping legal philosophers pursue their musings on the topic, but also where it has more problems operating than in other domains, for arbitration remains a well-kept secret, even among jurists who do not specialize in it. There are multiple reasons for this state of affairs, the longest-lasting being the secrecy of the proceedings and of the award. This means that with the exception of those directly involved in a case, no one else will, generally, know that it even happened. Moreover, those able to recount what happens in arbitration are its actors, the very ones responsible for the current crisis of authority in international arbitration, not really the most impartial of witnesses.

A full study on the impact of international arbitration on the politics and commerce of fossil fuels, furthering and deepening the work of Garth and Dezalay, would help immensely to scale the importance of arbitration vis-à-vis extra-legal fields, especially environmental studies. The same could be said concerning the impact of international arbitration on free trade and the extent to which it helps companies, states and people alike to avoid national jurisdictions and laws. Doing so in parallel of a socio-economic study quantifying the net financial results of such a legal system would be even more helpful in our understanding of the phenomenon.

Despite the many enquiries that remain to be undertaken in this field, we were able to establish the existence of a crisis of authority, in particular as far as legal philosophy is concerned: bypass of justice in favour of legal technique, commutative justice as the defining paradigm, a lack of concern for the common good, the fear of building full legal reasonings partially due to the belief in univocity, the rapprochement with normal litigation, the sanctification of the will of the parties.

The lack of concern for the common good is what has wrecked the authority of arbitration the most and is precisely the point which would chiefly require expertise

outside of our field of knowledge. This is why talks of interdisciplinarity do not ring hollow with international arbitration: they are mandatory to answer its biggest problem. Other "lesser" problems will also always benefit from another perspective, for the multiplication of viewpoints is the only way for us to build a solid hermeneutical circle in which solutions can be found and arbitral foundations improved, even if it means criticizing the current overwhelmingly dominant *doxa*.

The use of authority as the main tool for analysis proved a fruitful decision thanks to its flexibility, which allowed us not to be limited by a particular field, direction or axiological choice. More importantly, it granted us a criterion through which we could eye more closely the long tradition of occidental arbitration. Through the restoration of the concept, which has been left hollow after centuries of mischaracterization, we were able to map a way forward, using said concept to "measure" the hurts suffered by arbitration.

A bridge between past and present inherently ensuring that brighter days always lie ahead, authority goes beyond the insertion within a tradition or intellectual current, because it sets an axiological minimal standard we need to reach to accomplish this insertion. In other words, we cannot begin to view purely individualistic actions as authoritative, no matter how strong the tradition said actions are based on. This is not the limit of the standard however, as there needs to be an augmentation of the common good for an action to be authoritative. A collective action with no regard for the common good would, consequently, be just as unauthoritative as a strictly individualistic action.

Human beings are *zoon politikon*, no matter how hard we deny it, no matter how big the hubris to think we can do everything on our own. The general quarantine decided as the result of Covid-19 in 2020-2021 has served as grim proof of this assertion: regardless of how developed communication tools are, being physically isolated from one another is already more than we can stomach, as both suicide and depression rates have soared.

Our status as *zoon politikon* does not reduce the importance of our personality, as we well know through our application of philosophical hermeneutics. It simply puts it in a different perspective, one where we do not act either as persons, or collectively, but where the *ergon* of the first requires the second to materialize. Herein lies the simple idea upon which authority is built: when departing from their society, persons must leave it in a better state than when we first entered it. Simple to conceptualize, it becomes much more complex at the point of realization, especially

in societies whose individual components are fragmented to the extent where they believe that their personal freedom is superior to the welfare of society, often refusing minor concessions.

An unauthoritative society does not build on the past in the hope of a better future. With regard to both conditions of authority, this means that there is a segmentation. Whether it is a severance from the past or a severance from other people, authority requires overcoming frontiers, especially the illusory ones. This severance is probably why we harbour a certain level of annoyance with some aspects of the analytical current of legal philosophy: much like arbitrators practicing positivism, analytical philosophers sever themselves from a key component of authority, the past, rendering any work of theirs incapable of becoming authoritative.

This remark is even more striking once we have internalized the hermeneutical mindset drawn up by Hans-Georg Gadamer. Hard to access and apply continuously because it confronts our world's contingency quite frontally and forces us to be intellectually flexible, this mindset is unrelenting in the questioning of our own prejudices. In yet another addition to the seemingly endless list of ironic twists provided to us by Modernity, said mindset is probably the closest one to Descartes' *tabula rasa*, in terms of critical thinking at least. It is however neither as easily conceived, nor is it as impossible to apply. The main difference is that the Gadamerian mindset requires accepting the finitude inherent to our human condition, implying that whatever we do, we should always acknowledge that our conclusions will remain imperfect, subject to further augmentations.

This modesty is also what allows us to question ourselves, which is admittedly easier when one is not convinced of being flawless. More broadly, remaining modest also serves the purpose of not letting the interpreter think that they are creating something new, that they are the very first in history to reach a certain conclusion. They indeed know that they are but the latest addition in an otherwise long line of scholars, merely bringing their own small contribution to an edifice whose construction started long before them and will continue to grow long after their death.

It is more flattering to view ourselves as "the only one who ever saw this" or consider our research as "groundbreakingly new", but in reality, everything researchers do is based on the work of others, predecessors and peers alike, which allows us to form an opinion before having even started our own research. These others help us confirm, deny, advance, question, argue and counter-argue on our

path to writing books, articles and PhDs. This “insertion in something bigger” is not simply tradition, but a reflection of authority, for deep down, scholars all wish to improve their field, *faire avancer la science*.

This modesty does not stem from knowledge but from wisdom. Deconstructing and understanding the concept of univocity typically requires knowledge, but the impulse to distance ourselves from it stems from a certain modesty, and the honesty to admit that our interpretation of a matter is not the only one, that others may be better. This very wisdom is the source of equity, which admittedly also requires sufficient legal knowledge to be properly carried out. Both wisdom and the modesty it brings about are too often lacking in Law, in practice and in theory, and the will to found new currents, to be the first to supposedly do this or that, etc. are typically the reflection of people unknowingly enamoured with the strongest dimension of authority: creation, foundation. At this point in human history, however, there are not many fields left untouched to the point where one could genuinely claim they founded something rather than building on the pre-existent. We personally could not think of a single one.

This modesty is undeniably required when facing an immense field like international arbitration, of which having a full view appears to border on the impossible, especially considering the secrecy that has surrounded it for millennia. For us, this secrecy ranks arbitration as the most esoteric field of Law, in front of other hard-to-penetrate legal fields such as banking law or legal philosophy. While there has recently been a shift on this front, and not necessarily for the better as we have seen, the history of arbitration will ever remain difficult to grasp. This renders any serious hermeneutical understanding of the topic both complex and complicated, hinging on small fragments of an already fragmented past.

At this point in time, arbitration has probably never been so widespread yet so misunderstood. People outside of the profession or who have not conclusively studied it barely know of its existence. Practitioners on the other hand, hardly ever criticize it, either for fear of being an outcast, or because they genuinely believe in it. The last wave of arbitrators daring to criticize non-technical elements of arbitration were part of the old European guard such as Lalive and Lazareff, most of whom are dead and were, at the time of their criticism, already at the tail end of their careers. More than that, their criticism often lacked self-awareness in the sense that they squarely focused on the latest arrivals in the international arbitration ecosystem, the aggressive North American law firms, without ever questioning the role they played

in the political turmoil surrounding oil-exporting countries, before U.S. law firms truly entered the world of international arbitration.

This old guard, to its somewhat limited credit, did not entirely upend arbitration and was somewhat respectful of what it was from a legal philosophy standpoint. Awards were not as accessible as they are now, meaning that the idea of an arbitral jurisprudence was not yet conceivable. And although they laid out the ground work for the current technocratic predicament, they were able to craft legal reasonings without the need to constantly base themselves on dozens of laws and arbitral precedents. In other words, they could construct their own legal reasonings, as they did with the *lex mercatoria*, which is still applied nowadays, albeit under different names. More widely, albeit to a comparatively limited extent, arbitration still functioned under the guidance of a wide brand of specific equity, even equity *ex aequo et bono* sometimes. Lalive was known for being able to discard any text of law he viewed as unequitable or useless for his case. Sadly, they were lacking in terms of doing justice, and their inability to grasp the most important aspects of the many landmark cases they were involved in has shaken their status as figures of authority.

Over the course of this dissertation, one may have wondered whether or not we really needed international arbitration for the main topics to be discussed. The many other domains of Law could have been used instead: real estate law, divorce law, contracts law, international economic law, European law, etc. are all littered with injustices, imbalances, and serious defects authority-wise and in the department of hermeneutics.

The first problem with choosing a more “canon” legal domain would have been the smallness of their scope, in particular the traditional domains of national law such as contracts law, real estate law, etc. Whatever meta-theory drawn from these laws could have been easily dismissed by stating “but here, such is not the case, our laws are too different, etc.”. A sizable portion of the dissertation would have thus needed to be devolved to comparative law, which in turn would have led us astray from our deeper intent, legal philosophy.

What about broader fields such as European law or other forms of international law such as international public law, international labour law, international public law, etc.? Regarding European law, the European Union is only a few decades old, and whatever lessons we could draw from it would pale in comparison to older, more incremental institutions such as that of arbitration. Concerning the various

declinations of international public law, the problem is quite typical of it i.e., the states as actors of the field. The authority of a person is quite easy to conceptualize, but the authority of a state is an entirely different matter. The very question whether a state can be considered authoritative is highly doubtful in our opinion, as the authority we would base ourselves on would be that of its leaders and politicians.

Most importantly, the main reason why we chose arbitration is that it is one of the most philosophical fields in all of Law, where the concept of equity *ex aequo et bono* has historically been most fully accomplished, making arbitrators the "true" figures of justice, even more so than judges. This means that if positivism could permeate arbitration, we could demonstrably show that the crisis of authority in international arbitration is not simply political, but philosophical, aiming for the very foundations of an institution inching ever closer to being absorbed by litigation *lato sensu*.

There are multiple reasons to think that arbitrators are located the closest to the heart of justice, should they prove capable of re-conquering their authority. The first is the interpretative freedom arbitrators enjoy in their line of work. From a hermeneutical perspective, they are indeed less bound than judges to legal texts or to an overall legal structure, which chiefly includes the possibility to appeal to a higher court. This means that arbitrators have more room than judges to construct their legal reasonings which, if crafted in equity *ex aequo et bono*, imply a quasi-full freedom to build said legal reasonings. Without any legal text to use as "trampoline" to accelerate or facilitate their jump towards a decision of justice, arbitrators have historically had the possibility to develop their legal and logical arguments as independently as conceivable in occidental legal culture.

Obviously, such a margin of appreciation and operation should never be given to anyone, which is precisely when and where a person's authority takes centre stage. It is because an arbitrator has displayed proofs of authority during their life and professional career that they can be trusted with this extraordinary amount of freedom of legal interpretation and creation. Authority is central in this entire process because it constitutes the guarantee that the "unshackled" jurist knows very well how to act for the sake of the common good.

For an arbitrator, doing so is materialized by pronouncing fair and just awards augmenting the common good of a society by contributing to one of its most vital aspects: justice outside the reach of judges. Given their understanding of authority, equity *ex aequo et bono* and the purpose of arbitration with regard to state courts, it

is unsurprising that both ancient Greeks and Romans set minimal requirements for citizens to become arbitrators (age, trust from their society, etc.): it was required of them to have shown that they were authoritative, that they could be trusted with this immense interpretative freedom. This need for authority is even more pronounced once we remember that arbitral decisions have always been rendered under a thick shroud of secrecy through which we have only ever been able to glance at nothing more than a very small percentage of all awards rendered.

The second reason why arbitrators embody the quintessence of Law is that they are unburdened by procedure, although this has ceased to be the case recently. Historically, so long as arbitrators treated parties relatively equally, notably by giving each of them the same opportunity to defend their case, they were quite free to conduct "their" trial how they saw fit. Although judiciary and legal procedures are frequently a reflection of societal values whose importance is underappreciated, legal positivism has overemphasized formalities to the point where they often become the centre of attention instead of simply serving as supporting cast for the substantive aspects of the process. Unimpeded by excessive procedural weight, arbitrators could concentrate their energy on these substantive aspects, which, as we now know all too well, were not addressed by legal texts but by the arbitrator's equity *ex aequo et bono*.

This entire "machinery" is logically quite sound. The purpose of arbitration is to dispense a flexible brand of justice, meant to be informal (without formalities but not without forms), wherein the arbitrator is put in the best imaginable conditions to focus on the substance of the case, hermeneutically very free of their choices, with little to no hierarchical checks and with one objective in mind: authoritative justice. As such, arbitral justice is much more dependent on the quality of those deciding than in classic state justice, which means that it is only normal that the path towards becoming an arbitrator would be more strenuous, more demanding than that of becoming a judge.

Typically, high hermeneutical freedom also implies a high risk of falling prey to one's own prejudices, meaning that an arbitrator, for all the interpretative freedom they enjoy, should know what their prejudices are and how best to put them to use, all the while keeping in mind that their decision must augment the common good of the society wherein their decision will apply, which is something that can only be known through a thorough understanding of the context of said society: historical, political, social, economic, etc. Most certainly not a trivial task, but one befitting of the most authoritative and experienced jurists.

The lack of authority in today's arbitral paradigm resulting in a lack of trust in arbitrators is a great tragedy in our eyes, one hampering a pluri-millennial institution of great importance for doing justice in any society.

These above-mentioned reasons alone explain not only why arbitration is very suitable a field of Law to develop legal philosophy, but also why legal philosophy is *sine qua non* to apprehend the present state of the arbitral paradigm. To legal philosophers, arbitration provides an ideal location to test the contours of legal-philosophical concepts due to its proximity with the heart of Law. Authority and philosophical hermeneutics are those we have deemed most important, but we also saw how efficient arbitration is in exposing the limits of positivism, in addition to providing the ideal context to grasp the contours of contractual positivism.

Other concepts include commutative and distributive justices, which have accompanied the thoughts of legal scholars for millennia. However, we have seen that arbitration was essentially focused on distributive justice, and arbitrators are historically the ones who can most freely reach it through the use of equity *ex aequo et bono*. By definition, equity *ex aequo et bono* cannot be delimited through the sole use of Law, as it was precisely established to grant its users maximal flexibility, unhampered by laws[1653].

In parallel, legal philosophy is a wonderful tool, the most appropriate one when used correctly and adequately, to apprehend all sorts of legal phenomena, especially the complex ones such as arbitration, which is easily one of the most esoteric legal fields due to the secrecy surrounding it as well as the counter-clockwise movement it follows in comparison to what we spend most of our time learning in Law faculties.

In the end however, what struck us the most was the degree to which arbitration has been historically dependant on the authority of its arbitrators to be both effective and legitimate. It is our deep conviction that the foundation of this authority, even more than knowledge, is wisdom[1654]. And from it stems the capacity to decipher and understand human behaviours as well as comprehending particular and general societal interactions. Most importantly, with wisdom and a fair bit of knowledge

[1653] Papaux/Wyler pp. 248 ss.

[1654] Although wisdom is very seldom seen without knowledge, knowledge without wisdom is a very frequent occurrence. Typically, jurists or scientists who purposefully remain ignorant to politics because "it has nothing to do with our job" often-enough end up justifying atrocious acts (theirs or those of others) through clever yet unwise lines of reasoning.

comes a deeper appreciation for the most basic foundations of a society, its common good, including how to augment it, how to prevent it from stagnating.

In practice, this could translate into the capacity for international arbitrators to distance themselves from unfair applications of a law or a contract, and in the process, convince parties that their choice is the right one for the sake of all involved. Over the past 50-60 years, the most obvious instances concern the interactions between western multinational corporations and societies of the southern hemisphere, especially concerning the extraction of natural resources, be they fossil, mineral, etc.

Clauses instating an arbitral tribunal may very well have been featured in contracts between a government and a corporation, but if the corporation exploits this government's population to extract resources and if said government openly does not care about the well-being of its citizens, how are arbitrators doing any sort of justice if they do not address this issue[1655]?

Finally, we would like to mention one last reason why arbitration is one of the more philosophical fields in Law: the notion of arbitrariness, which is one we have deliberately opted to avoid, the reason being that even after all of our research, we are still very unsure as to where we find ourselves with regard to this concept, which is why we have preferred to err on the side of caution in this instance.

Indeed, arbitrariness is not something we have often come across during our research on arbitration, authority or interpretation. As such, what we are about to mention here is more of a passing impression, a question whose very status as a question we are unsure of: what is arbitrariness really? Somewhat provocatively, is arbitrariness really a bad thing?

[1655] Justifications for these sorts of behaviours often follow the lines of "if I don't do it, somebody else will, and although the result will be the same, I won't be the one getting richer." This sole line of reasoning suffices to exemplify the practical importance of an authoritative arbitrator, whose capacity to grasp the common good would allow them to hold the parties accountable, at least to a minimal degree (this is typically where a smart arbitral governance could help us a great deal, by laying out criteria, aggregating good and bad decisions to establish different lines of conduct depending on the region in which arbitrators operate for instance). We are not suggesting an open confrontation with the parties, rather nudging them in a better direction. While this may seem a little light and not drastic enough an action, if a good majority of arbitrators acted this way, the ripple effect could become very interesting to witness, particularly concerning the aforementioned argument of "the result will be the same", which loses much of its credibility and hold on the *Vorverständnisse* of arbitrators, on their mindset.

In our personal experience of 16 years as a student of Law and a jurist, we have only ever heard once the idea that arbitrariness was not the complete antithesis of justice, synonymous with lawlessness, and even then, the person uttering this idea was not exactly praising it. Still, it got us thinking, especially after studying the confusion surrounding authority: what if arbitrariness had been a victim of a similar misconception?

Etymologically, *arbiter* is a Latin word which can mean both an arbitrator and a witness. Unlike the term *testis, arbiter* is a witness who sees but is not seen. How then are arbitrators and witnesses connected? The answer lies in the fact that arbitrators were entirely free to decide cases, like someone who witnessed an entire situation without being seen, meaning that the parties' behaviour was not altered by this undetected presence[1656]. We could not find a single source stating that "arbitrariness" and "arbitrator" do not have the same Latin root. As such, the etymological meaning of arbitrariness would simply be the capacity to decide freely, without being hamstrung by outside factors, including the parties themselves[1657].

Nowadays however, the Merriam-Webster dictionary defines arbitrariness as "depending on individual discretion and not fixed by law" or "not restrained or limited in the exercise of power: ruling by absolute authority", while the Larousse defines it as an *"autorité qui s'exerce sans autre règle que le bon plaisir"*, with words such as "justice", "legality", "objectivity" or "real" as antonyms. From a legal-philosophical standpoint, and simply using notions we have mentioned in this dissertation, these definitions are sorely lacking in nuance.

For instance, the very first definition features two characteristics of equity but calls them arbitrary, while the second and third ones mistake power and authority (authority is by essence collective), marking them both as insufficient. Furthermore, justice dispensed by a single person makes up the vast majority of arbitral awards historically speaking and to this day, but if their awards had predominantly been arbitrary, arbitration would never have flourished. We can also discard the lack of legal base or legality as *sine qua non* to arbitrariness or else, this would mean that decisions *ex aequo et bono* would be inexistent.

In Swiss Law, an arbitrary decision is one so shockingly unfair that it is manifest to any reasonable person, or, to quote a federal judge: "shocking enough that we fall

[1656] Benveniste pp. 119-122.
[1657] De Loynes de Fumichon/Humbert p. 309.

from our chair." Setting aside this judge's flair for drama, we can see how "floating" the notion is, how open a texture it is. This adds another layer of mystery to arbitrariness: how can a notion so widely viewed as a repellent symbol by jurists of all walks of life be so loosely defined? This is not a surprise to those familiar with legal hermeneutics as a texture as open as this allows for an application in a vast number of potential cases, serving as a guard rail preventing us from falling off a cliff after falling from our chair. But even with this being said, one would think that a notion as repellent as arbitrariness would be more fleshed out than this.

Once we understand that objectivity is neither possible nor desirable in Law, we are left with decisions that are necessarily subjective. What then remains to be discussed is the matter of the degree of this subjectivity. Consequently, a subjective decision cannot be arbitrary or else all legal decisions would qualify as such as indeed, legal decisions are at best inter-subjective when there are multiple judges/arbitrators deciding a case.

Correlating arbitrariness to a lack of legal text or judicial precedent is also somewhat illogical because then, centuries of arbitration *ex aequo et bono* would simply never have come to pass. What is then left of arbitrariness besides unfairness? Is there a difference between them? Is so, what is it and if not, why the semantical difference? More overarchingly, if the term "arbitrariness" indeed derives from "arbitrator" or *"arbiter"*, why is the former so negative and the latter two merely descriptive? If the lack of legal text is the criterion used to define arbitrariness, would this not mean that non-positivist sources of Law are all arbitrary to various degrees? Could arbitrariness be perfectly acceptable depending on its degree?

Providing an answer to these questions would yet be another splendid opportunity to establish a complete genealogy, this time of the concept of arbitrariness. This, however, would go far beyond the boundaries we set for ourselves over the course of this dissertation, if only because upending yet another commonly-used-but-widely-misunderstood legal concept is not our purpose. Although we are neither confirming nor denying this, demonstrating that arbitrariness is widely misconstrued would be a very strong argument in favour of establishing arbitration as the place of choice, maybe even birth, for the concretization of equity. Equity *ex aequo et bono* could then be established as the foundation of arbitration, especially considering how often accepted definitions of arbitrariness seem to share commonalities with it.

Paradigm shift: the impact of atomization and the collective human *ergon*. What way forward?

When we first set out to discover what "felt wrong" in today's international arbitration, we had no clue as to what would be the destination. In such circumstances, the most important thing to do, after discovering the main problem, is to find a compass to help us extract ourselves from said problem. In international arbitration, the problems were manyfold, requiring the comprehension of a lost philosophical concept, authority, which became our compass for the duration of this work.

Authority is itself guided by something fully or partially lost to us since the days of ancient Rome, the common good. As we have seen throughout this dissertation, the common good incarnates itself in traditions, which are constantly and consistently augmented in order to better fit the needs of the society to which they belong. In Switzerland, the society within which we happen to have the deepest roots, this common good could be depicted as the capacity for the Swiss people to directly amend our Federal Constitution, to maintain a peaceful cohabitation between people speaking different languages or to always favour the possibility of a compromise between opposite parties.

Generally speaking, the more broadly a "society" is defined, the harder it becomes to determine what is common to all, a common good in particular. This is even more the case in contemporary occidental societies where the citizen has been replaced by the individual. As such, the world of international arbitration is one where crafting a common good seems particularly difficult, especially when we consider the intellectual weight of contractual positivism and its intrinsic individualism.

As unfortunate as this may be, the environmental crisis may have provided us with the best opportunity yet to draw out some societal collectiveness, especially considering the sanction awaiting us should we fail (and we are): the annihilation of big segments of the human race. One could argue that this inheritance is so bad, so nefarious that the collective authority of a society needs to be re-founded, like Augustus did some 2000 years ago. This may be so, especially in light of our climate problems, but would imply overhauling what seems to be the centre of our daily lives in the Occident, material comfort, as well as renouncing our capacity and penchant for destruction[1658].

[1658] Cf. Papaux, Homo Faber; Frigerio pp. 485-486.

Positively defining the common good in international arbitration is also very complex, and the only criterion we can use in this regard is an open texture par excellence, the final cause of any legal process: to do justice, through equity as much as possible. However, just as two cases are never identical, two iterations of justice are never identical, even more so when contingency reaches its apex in Law i.e., in the field of international arbitration, which makes the contours of this notion of an arbitral common good even more difficult than in other fields.

Somewhat bluntly, and based on what we have seen throughout this dissertation, we have become convinced that the idea of a common good in international arbitration is simply too complicated and complex to establish. There are many reasons to that, such as the fact that nearly all countries practice it; the fact that the strongest link between members of the arbitral community are either financial, or procedural, but seldom do they insert their awards into the community to which said awards will apply, the reason being that because arbitrators tend to toe the contractual positivist line, those concerned by their awards are merely the parties to the arbitral clause; the affiliation to contractual positivism means that people are contracting individuals before being citizens belonging to something bigger than their sum and that their common good is dependent on the contractual clauses they sign.

As such, if the *lex mercatoria* or the formal rules of procedures found in all arbitral institutions are the only elements linking arbitrators, this would mean that a common good in international arbitration would necessarily be based on either one. The problem is that having both of these at the centre of international arbitration is exactly what got international arbitration in the crisis of authority in which it currently finds itself.

Moreover, we have clearly outlined that any common good in international arbitration would face severe impediments due to hermeneutical constraints pertaining to the prevalence of contractual positivism and commutative justice, as well as the absence of any coherent or even basic use of philosophical hermeneutics. This means that before we even start focusing on an arbitral common good, we need to address these issues inherent to the contemporary arbitral paradigm. As such, taking a step in the direction of equity *ex aequo et bono* seems to us like a good first step to take.

Although we find ourselves in a bit of a chicken and egg situation (equity *ex aequo et bono* is based on authority, but we need equity *ex aequo et bono* to restore some authority to the arbitral paradigm), starting with equity is necessary for the following

reason. Crafting an arbitral common good, not *ex nihilo* but close enough, is useless if arbitrators function on a legal-philosophical level such that any conception of the common good will be reduced to contracts and individualities as soon as it is put into practice. Consequently, our proposition is to first operate a restoration, not of the arbitral common good, but the arbitral mindset, that which allowed arbitration to do justice where state justice could not. Doing so would already be an act of authority, through which the arbitral paradigm would be augmented by virtue of its participants' virtue.

Subsequently, we could also hope that this change in the mindset of arbitrators would also allow them to pull back from contractual positivism and the fixation they have with regard to the contract signed by the parties, especially if such a contract inserts itself in an unauthoritative perspective with regard to the society wherein it will apply.

Obviously, a machinery as big as international arbitration cannot change overnight, and it will take years, decades probably, to reverse its course of action since the end of World War II. But, that being said, if we do not at least try to define what could be fundamentally ameliorated within arbitration, we sincerely doubt that external rules attempting to curtail its reach would ever work. Furthermore, the history of arbitration has taught us a valuable lesson in that despite very serious attempts at setting it aside (e.g., Louis XIV of France), it always manages to re-establish itself as the most important complement to state courts.

The reason, as we have seen multiple times, is that arbitration is by nature extremely flexible, capable of espousing the contours of cases that state justice cannot handle, capable of doing justice where state courts cannot. It is in the very perspective of this flexibility that we think that the way forward for arbitration needs to start with an *assainissement* of its foundations and the restoration of the arbitrator as the most quintessential legal interpreter, capable of doing an authoritative justice and entrusted to do so because of their own personal authority and what they brought to their society before becoming arbitrators.

More prosaically, this would also mean that the notion of practitioners "specialized" in international arbitration would lose much of its substance. Indeed, if the substance of arbitration is to do justice *ex aequo et bono*, the need to be specialized in arbitral procedures is drastically reduced, although given the state of the profession, it would be far-fetched to think that pure arbitration specialists could cease to exist in the near future. Furthermore, this would not stop the "elitism" of

arbitration, but it would certainly make it change. The cursor would move from a financial and procedural elite towards an intellectual and legally wise elite. The restoration of arbitral authority would therefore start with the restoration of arbitrators' epistemic authority. This, however, would only be the first of many further steps, especially if the end game is to restore (or establish at this point) full authority to arbitration.

The reason why we view the way forward as one restoring a certain lustre to arbitration rather than taking it down entirely is for purely pragmatic reasons. The first one is that *la nature a horreur du vide*, meaning that if arbitration disappears, it is only a matter of time before it is replaced by something else, maybe with a few cosmetic changes here and there. The second reason is that arbitration is not intrinsically bad, quite the opposite in our view, particularly because we are convinced that an important criterion to do justice authoritatively is to do so as closely as possible to the contingency of each case. This remark does not include courts of appeal given that it is in their nature to be overarching, but regarding the "lowest" tribunals, the ones tasked with establishing facts, the arbitral ones are in a privileged position to be both the closest to the facts, especially if arbitrators have the margin to require any information they could need from the parties, and also closest to the quintessence of Law, as we have already stated *supra*. Furthermore, once we consider that international arbitration attracts some of the most, if not the most brilliant legal minds, it becomes even cardinal to protect this institution.

Overlooking arbitration, the studies conducted between interpretation and authority have led us to an interesting juncture point between Gadamer's philosophical hermeneutics and authority. A great defender of a dynamic tradition in the face of both a stale tradition and repeated *tabula rasa*, Gadamer did not live to see the latest archaeological developments of ancient Rome and the most recent theories concerning the collective and inherited aspects of *auctoritas*. A student of Antiquity, like Heidegger and Arendt, we do not doubt that Gadamer would have seized this opportunity to further his point: our *Vorverständnisse* are not only the result of personal experience and mindset, but of a collective inheritance.

The augmentation aspect of *auctoritas* then means that, unlike what Habermas argued, philosophical hermeneutics was never stuck in the past to begin with, but is a bridge between past and present, constantly actualized by societal evolutions. Authoritative interpretations, the very target of philosophical hermeneutics, therefore require a solid understanding of what was, what is and what might be in the face of a society's traditions. Traditions which should undoubtedly be protected,

but not by maintaining what they were in the past, but by constantly improving upon them.

This is precisely what international arbitration as a whole has lost sight of in the West. Overstepping many commonly accepted prejudices to resort more strongly to historicism, the genealogy of arbitration has shown how far we have travelled in quite a short period of time. Far from being the result of a slow and steady evolution as positivism has been, international arbitration has for a long time remained quite resistant to the dominant legal doctrine of the past 200+ years before being precipitated into the positivist current.

We can speculate as to why this was the case, and the answer is likely to be multiple. The most obvious one is the nature of the institution, which was always geared towards finding a solution to a conflict rather than imposing a judgement. Less obvious, yet just as important, is the legal nature of said institution: arbitration was not, until very recently, based on laws but on equity. Only the most recent chapters of arbitration have been geared towards legal texts, the prime vessel of legal positivism. We have also seen how it progressively geared towards an alter litigation the moment big law firms decided to send their own litigators to solve arbitral matters, effectively shredding the two points of resistance arbitration had against positivism (equity and substance over formalities). Even worse, by then, legal positivism had started to "mutate" into what has now become its most salient variant, contractual positivism.

Intrinsically individualist, contractual positivism is a legal doctrine from which we should resolutely run away if we wish for Law to retain a modicum of authority. More than authority, we suspect that Law would struggle to retain its basic credibility if its centre of gravity were to fully shift to the contract. This mentality is already quite common on the internet with non-stop barrages of general agreements regarding our personal data, our renouncement to our own rights should a website abuse said data, of 20-page contracts for dental care or an internship at a grocery store when one or two pages would suffice. Incidentally, many such contracts include an arbitration clause, whose purpose is, sadly, to deter people from accessing justice, effectively putting arbitration in a position opposite its final cause: to not do justice.

This mentality is often based on the postulate that parties to a contract have equal rights and that they are free to dispose of them how they see fit without restriction, absolute rights whose only limits are the absolute rights of others. While there may

be a certain simplistic logic behind this line of reasoning, it certainly does not mean that parties stand on equal ground as lease contracts, employment contracts, rent agreements, general banking conditions, etc. remind us so often. The contractual positivist doctrine can barely fulfil the needs of two parties, so how would it manage to do so with the interests of a society made of millions? How could the common good ever be quantified by a doctrine promoting individual subjective rights as absolute? Regarding international arbitration, how could contractual positivism quantify the most contingent and complex of all the fields of Law? How does one qualify an arbitrator's mission to do justice through a contract that very often postulates a commutative justice instead of a distributive one?

At this stage, any arbitral process wishing to re-acquire a substantive form of authority requires a few consecutive steps. The first one will always be the same: for arbitrators to become aware of their *Vorverständnisse*. Without doing so, all subsequent steps have a very low chance of happening, even less to truly last if arbitrators have never questioned themselves, never doubted themselves, never shown sincere modesty in the face of their task of pulling international arbitration out of its authority crisis, doing justice in the most difficult of cases. In other words, we could assimilate this first step to arbitrators facing and overcoming their own hubris (excesses).

Secondly, commutative justice needs to be reconsidered as what it truly is (a mere substrate of distributive justice) and positivism needs to be tempered down to the point where it becomes, at most, a tool for the arbitrator to use, not the premise and the result of their reasonings. Fulfilling these two requirements could enable equity *ex aequo et bono* to become the heart of arbitration once more, a legal discipline whose practitioners represent an intellectual legal elite, capable of doing justice in the face of great complexity and crafting intricate yet sound legal reasonings in order to fulfil their mission of doing justice.

Thirdly, it is only once arbitrators have re-acquired the mindset and legal tools necessary to craft authoritative arbitral awards that they might have a chance to do so indeed. For without being even given the possibility to act authoritatively, chances are, arbitrators will be unable, even if willing, to craft awards on the level of what we should expect from them i.e., authoritative awards representing the quintessence of justice, of Law.

The final step is one that goes beyond the scope of this dissertation: determining whether there is a common good in international arbitration, and if so, how do we

reach it? One thing is certain: international arbitration is not an independent paradigm separated from the rest of the legal orders, unlike what Gaillard thought. That is, unless we consider that international arbitration revolves around its procedural aspects, the very ones which, in our view, are the shallowest, the least authoritative ones.

Frankly, we are not convinced that international arbitration will ever revolve around a single common good, for international arbitration is now applied everywhere despite not having been conceived to this end. As such, the common good around which arbitrators coalesce would actually be one last twist of irony, one worthy of the contingency and complexity of their field: common goods.

If arbitrators are indeed the best we can offer as jurists, it would stand to reason that their mission would befit their skills and intellectual capacities. As such, the plurality of common goods implies the capacity to shift gears from one case to the next, depending on the societies involved in each case at hand. Arbitrators would therefore be required to understand multiple common goods in order to bring about the most authoritative form of justice to all involved, not just those whose names feature in the contract. This is obviously an extremely difficult task because we sincerely doubt that any human being could understand more than a few societies' common good.

Typically demanding of a coherent Aristotelian pragmatism, conceiving the common good in a way such that arbitrators would be required to develop a citizen's sensibility to various common goods, as well as the hermeneutical mindset required for such a task is by no means a small undertaking. Quite the opposite.

Doing so would indeed replace arbitrators as the most authoritative figures in Law, an elite group of jurists capable of shifting between common goods without watering them down, of conceiving international arbitration as much more than what it currently stands for i.e., a tool for the interests of merchants, preferably the economically successful ones[1659].

This could also bring about a shift as to what is the heart of knowledge in international arbitration. Namely, arbitrators would cease to focus primarily on laws such as the transportation of natural gas or the performance of contracts regarding mining concessions. Instead, they would be specialists of certain general and legal cultures (Russian, Venezuelan, Mediterranean, etc.), which would be their main

[1659] Schultz/Dupont p. 1165 ss.

tools to decide *ex aequo et bono*. This re-organization of the priorities in arbitral knowledge would contribute to the reinstatement of equity *ex aequo et bono* as the legal-philosophical core of this paradigm. Indeed, this would be the most important type of knowledge to solve complex arbitral cases authoritatively and *ex aequo et bono*, at least for the most substantial part of their cases.

All in all, this dissertation has never advocated for a return to the "good old days", which have probably never existed as each era comes with its own horrors of all kinds. What we do advocate for, is for arbitrators to stop shackling themselves in a mindless pursuit of technical perfection and instead, start embracing their role as those doing justice in the most difficult and complex circumstances. This includes the idea that arbitrators are not legal technicians but fully-fledged jurists with the most intricate understanding of context, doing justice for more than just the parties to a contract, which would fundamentally differentiate them from the "grand old men" of the 1960s, 1970s and 1980s.

This is what ultimately attracts us to international arbitration: it is intended to be the legal field where interpreters have the most freedom to interpret, those with the biggest toolbox among jurists, those with the capacity to do justice in the most complex and delicate societal, political and legal situations. It is a sad state of affairs indeed that we have reached this stage of auto-mutilation, where arbitrators are reduced to being faithful agents of the parties' so-called absolute contractual rights in an undoubtedly very lucrative, but intellectually unchallenging game, and most importantly, void of wisdom.

Very hard to define in the abstract, authoritative arbitral awards are the perfect place to start fleshing out the notion of common good, not only in international arbitration, but in Law altogether. Let us never forget that historically, the wisest were called upon as arbitrators. And in our era, one where self-destruction seems to be the sad drumbeat to which occidental societies are constantly marching, imparting wisdom and justice is probably the best contribution we jurists can make to this world.

L'arbitrage international est sans doute l'objet le plus méconnu du droit depuis la Deuxième Guerre mondiale, quand bien même de nombreux ouvrages s'attelant à le décrire auront été publiés au XXIe siècle. Cependant, les auteurs se contentent très souvent de commenter les articles de tel et tel règlement, sans jamais se poser la moindre question sur les ressorts de l'institution. La chose n'a pourtant rien d'anodin, car l'écrasante majorité des échanges commerciaux et des transactions liées aux ressources naturelles passe par des arbitrages privés, non par des tribunaux étatiques. C'est ce que vise ainsi cet ouvrage : comprendre le phénomène de l'arbitrage pour ensuite tenter d'en découvrir les véritables fondements, le tout en restaurant l'idée même d'autorité, dévoyée depuis maintenant plusieurs siècles.

International arbitration has been the most misunderstood area of Law since World War II, despite the many 21st century writings attempting to describe it. However, authors usually merely comment on the various articles of a precise arbitration regulation, without really taking the time to question the inner workings of the arbitral paradigm as a whole. And yet, said paradigm is far from anecdotal given how the crushing majority of commercial exchanges and energy-related transactions is ruled by arbitration. This is precisely what this book is aimed at: to understand the arbitral phenomenon in order to then question it and attempt to discover its foundations, mostly through a restored conception of authority, which has been seriously misconstrued for the past centuries and counting.

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