

Law of The future Vision 2011

Signposting the legal space of the future



How will law evolve in the next 20 years?

Technological developments, population growth, intercommunal violence, climate change, resource scarcity, economic volatility; these are just some examples of uncertainties related to globalisation that impact life on the globe today. These challenges will fundamentally test our traditional ideas of law and governance in the 21st century. That is why HiiL has ventured a unique and ambitious mission to think ahead of the curve about the changing nature of law in the next 20 years.

HiiL initiated a long-term Law of the Future Action Programme in 2010. A process in which creative thinkers from academia and practice join to reflect on alternative futures for law and legal systems. The programme is based on the premise that prospective thinking about law is not only desirable but also required in order to ensure that law and legal systems do not become obsolete, ineffective or unjust. The aim is to set a world standard in thinking ahead to guide decision makers today. Read more at www.lawofthefuture.org.

With this publication HiiL presents the Law of the Future Vision based on the outcome of the first Law of the Future Forum held on 23 and 24 June 2011, in the Peace Palace, The Hague.

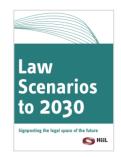
Law of the Future Vision 2011

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Law of the Future Forum 2011

- 23 and 24 June 2011, Peace Palace, The Hague, The Netherlands
- Constituted of 200 thoughts and practice leaders from different backgrounds, including young talents.
- Debated on the HiiL Law Scenarios to 2030



- Addressed three principal groups, at both the national and the international level: Government Civil society Business
- Focused on recommendations in three areas:
 - What policies are required to keep legal systems effective? What research agendas are needed in connection with future challenges for law? How should the lawyer of the future be trained?
- Offered plenary sessions as well as nine interactive working groups:
 - Government and the law of the future
 - Civil society and the law of the future
 - Business and the law of the future
 - The rule of law and the law of the future
 - Private actors and the law of the future
 - Highest national courts and the law of the future
 - Informal international law making and the law of the future
 - Online dispute resolution and access to justice
 - The youth, the law and the future





- The names of the speakers and panelists, as well as the other members of the Forum, can be found at www.lawofthefuture.org. Participation in the Forum is done in each participant's personal capacity and does not entail any formal representation of the respective organisations for which participants are employed. The Chatham House Rule applied to all debates, so statements made from the audience during the discussion parts are not attributed below or elsewhere.
- The working groups and panel debates were rich and diverse. They encompassed a large number of different questions, problems and dilemmas. This Law of the Future Vision publication reflects the common themes that emerged. The richness of the debate cannot be covered in one single document. The Law of the Future Vision, moreover, remains an ongoing process.
- A more detailed report of the proceedings in each of the Law of the Future Forum sessions will be available in the near future for those interested.

www.lawofthefuture.org

Law of the Future Statements



'Law has been characterised by stability and formality, which makes it difficult to keep pace with our constantly and rapidly changing 21st century world' **Hassane Cisse** | Deputy General Counsel, Knowledge and Research of the World Bank Group



'The world of the future needs to be protected and the principal weapon is international law; it must be strengthened with all the resources we have.' 'International law can be greatly strengthened if we examine all the worlds' religions'

Judge Weeramantry | Former Vice-President of the International Court of Justice and former Justice of the Supreme Court of Sri Lanka.



'Working with scenarios – the core of the Law of the Future Programme and a first for the legal world – perhaps offers us some interesting possibilities'. 'The Law of the Future Programme has encouraged HiiL to once again look to the future. A unique and ambitious mission, entirely in the tradition of Hugo Grotius, Tobias Asser and Van Vollenhoven.' **Mayor van Aartsen** | Mayor of The Hague



'One of the main challenges facing the human race in a situation of increasing interdependence is how to construct institutions and processes that promote co-existence and co-operation between peoples with very different cosmologies and values.' **William Twining** | University of Miami, School of Law



'Whatever scenario unfolds in the future, the fact is that interdependence is going to play out in a much more embedded way' **Faustina Pereira** | Director Human Rights and Legal Aid Services, BRAC Centre; Member of the Supreme Court of Bangladesh



'True to the motto "think global, act local", we will try to spread LOTF ideas and cutting-edge scenarios among students in our courses' Klaas Hendrik Eller | student of Law and Philosophy, University of Cologne



'The nice thing about teaching students about the law of the future is that it is something that they don't normally think about that much' **Jan M. Smits** | UM-HiiL Chair on the Internationalisation of Law and Chair of European Private Law at Maastricht University



 ${\rm `I}$ am very impressed by the quality of the scenarios that HiiL was able to develop over a very short period of time'

Pierre-Alain Schieb | Counselor in the Advisory Unit to the Secretary General of the OECD and Head of OECD Futures Projects



`It is a very good idea to force lawyers outside of their comfort zone and ask them to think ahead 20 - 30 years about what might happen and what the implications are for their particular area'

Randy Peerenboom | Law Professor at La Trobe University and an Associate Fellow of the Oxford University Center for Socio-Legal Studies



'I found the exercise of thinking about the scenarios incredibly helpful. We don't do enough thinking

about how law is going to change in the future'

Tom Ginsburg | Professor of Law at University of Chicago Law School



'A lot of people are really invited to participate in the thinking process that is very much needed to work on the questions that were put forward by HiiL' **Bibi van Ginkel** | Senior Research Fellow, Clingendael Security and Conflict Programme



The relevance of law is key. This does not mean relevance for its own sake. No *l'art pour l'art*. Rather, rule of law as a means to an end. We know that good rule systems have been good for societies; small and large. We also know that the absence of such systems or the presence of dysfunctional systems has been bad. Hence, we have an interest to have good systems.

Sam Muller | Director of HiiL

Law of the Future Vision 2011

Law of the Future Vision on Tools, Method and Process

Future thinking about law is uncommon, but badly needed if law is not to lose its relevance in the fastpaced world of today. Based on the survey conducted among the participants of the Forum, prior to this gathering about 80% of them had little or no experience working with future thinking and in particular with scenarios. Many of the members nevertheless held a positive view about future thinking in the field of law prior to the Forum. Importantly, however, about 60% of the participants reported that as a result of the Forum they are now more convinced that future thinking on law, legal systems and the challenges of the future is useful. This shows the need to organise similar meetings in the future, to further spread this conviction.

The main method used to think about the future, during the Forum, was that of contemplating alternative scenarios. The Law Scenarios to 2030 are an innovative, inspiring and well-grounded analytical tool with which to do so. It is a useful tool, both for the purpose of encouraging innovative out-of-the box research, and for practical purposes such as designing legal strategies for a state or an organisation. Hence, the tool should be further developed.

The *Law Scenarios to 2030* show *policy makers* that we are not locked into a determined future but that various possibilities are open; each of which has its own advantages and challenges. They also show that it is possible to conduct strategies to further certain desired developments and to counter undesired ones.

They show researchers that a number of assumptions which underpin the national state-based view of legal systems no longer hold true. Further research is needed into how many of the key guarantees captured by the notion of rule of law can still be assured under current and future circumstances. Further research is also needed as to how law and legal systems develop.

They show *students* of law that the law of the future, in which they will work, is not likely to be the same as the law of the present, which they are generally taught.

More generally, the *Law Scenarios to 2030* make it possible to bring together developments in different legal fields in one setting and to synergise solutions.

The participants of the Forum committed themselves to the Joint Action Programme that was proposed:

- Further developing the *Law Scenarios to 2030* and their uses (for example, by developing monitoring mechanisms under the scenarios)
- Continuing and expanding the process of regular interaction and exchange in the Forum, including various smaller-scale meetings and workshops in different places and, possibly, the setting-up of regional chapters. The process of collecting 'law of the future think-pieces', as well as to develop curriculums for making legal education more future-oriented will also be continued by HiiL.

Law of the Future Vision on Global Challenges

The current environment is unpredictable and uncertain. The world is working to cope with an economic crisis, shifts in geopolitical power relations, and serious global challenges such as concerns about the environment, transnational crime, state fragility and violence, health and migration. Law remains a hugely important tool to deal with these stresses and to enhance global stability.

At the same time, legal orders are also more likely to become more fragmented, more multi-layered, and more multi-sourced. Rule makers and rule enforcers are no longer automatically the same. Fundamental rights remain critical but any claim to universality will face objections and difficulties. In many areas 'government' has become 'governance' and 'rule the world' has become 'run the world'. Dealing with these challenges for law requires hard work and deliberate and effective strategies.

All actors involved in governance – national and international government, civil society, and business – have their role to play in coming up with such strategies; one cannot do without the other.

An approach to governance aimed less towards the production of very specific rules – which can divide – and more oriented towards convergence around principles – around which agreement can more easily be reached – may deserve more attention as possibly a better way to reconcile conflicting interests and views.

Internationalisation pressures on societies and, thus, legal systems are not expected to decrease. International law, even if not always perfect, is an important part of the solution on how to deal with global challenges. However, international law also faces challenges to its acceptance and implementation in view of different value systems in different parts of the world and perceived unevenness in its application and enforcement.

The nature of the rule of law has changed in the sense that it has now, to varying degrees, become an internationalised concept fed by rules both at the national and the international level. National legal systems are the foundation of international rules because that is where implementation and enforcement takes place. The claim of an hierarchy of international law over national law remains contested. Diversity and plurality are facts which require new thinking.

While government, civil society, and business each have their own specific roles and interests, many global, regional, and national challenges will always require combined action by these actors. Hence, more thinking is needed to develop intelligent multi-stakeholder fora and processes which can deliver the results needed.



Law of the Future Vision on Government

Government should be able to accommodate change, because change will continue to be the name of the game. The ability of government to shape developments is not unlimited; it will almost always have to do with other actors – other governments, civil society and business.

Government needs to fully take rule making and enforcement outside the public realm and in an international setting into consideration. At the same time, a fully developed 'Legal Internet' scenario has the risk of undermining the public good which government must guarantee.

In the interaction between national, regional and international government, rule of law may be gradually and slowly emerging as a unifying concept that transcends borders, levels and realms of governance (including the public-private divide). This, however, is not without problems, controversy, and contestation, as it involves rethinking the concept of rule of law from its historically national, liberal and state-oriented context to a broader one which poses new challenges.

Methods will have to be found to organise and shape a number of key elements of governance that have hitherto been almost exclusively shaped within the context of the nation-state. These elements include legitimacy (accountability and representation with a view to rule making and enforcement), the balance of power, the notion of legal unity and coherence, the notion of hierarchy, and the idea of a constitution. This concerns all branches of government: the legislative, executive, and judiciary.

State fragility is a serious challenge. It might very well be that the fragile state of today (which fragility might mostly affect, at present, that state's citizens) becomes tomorrow's great source of danger to international stability and security. In our inter-connected world, absence of rule of law in one area almost always affects other areas. Hence, rule of law should be mainstreamed as a key component of all policy-making. In doing so a state-centred approach is no longer sufficient. Putting the functional requirements of rule of law (what societal purposes is it there to serve?) more centre-stage can contribute to a better environment within which policies for building the rule of law of the future can be developed. Dealing with fragility of states is a process that goes far beyond the general timelines that have been used to date. The problems of fragile states should be addressed urgently, before the potential threats fully manifest themselves.

Sustained, international research into the concepts of accountability and representation, the balance of power (especially vertical), the notion of legal unity and coherence, the notion of hierarchy, and the idea of a constitution in an internationalised environment is needed. Empirical research into the perception of international institutions and the acceptance of international law and values at the local level (cities) is also required. Research on qualifying and quantifying justice needs, seen from the perspective of users is necessary as well. Connected with this, more research is required into state fragility and the contribution that rule systems can make in building stable and sustainable societies is urgently needed.

The legal professional of the future must be able to operate in a multi-value, multi-cultural, and multi-legal system environment. Current university curricula generally do not provide the foundations for this.

Law of the Future Vision on Civil Society

Civil society is an important driver for change and innovation. The role of civil society is changing, or at least the way civil society performs this role. Thanks to advanced ICT (leading to more information being available, and more ways to share this information and act upon it), nowadays civil society is able to act more and more as a global player. Civil society also works more and more in partnership with other players in the process of governance: government and business. It has an increasingly important role in the functioning of legal systems, especially regarding transnational issues, as a vehicle for legitimacy and accountability, and in the implementation and enforcement of rules.

Civil society is very diverse; law must provide an inclusive framework of participation for that diversity. Legal systems must provide space for civil society organisations to play that role.

Civil society is critical for democracy but it is more about voice than vote. It is a key component in enhancing legitimacy of governance and in bringing about state and global institutions that are perceived as legitimate. Through civil society the local becomes global and the global becomes local.

Perceptions of uneven enforcement of international rules are a point of serious concern which civil society will continue to highlight. The interaction between legal systems, their inter-dependence and connectedness is closely felt by civil society. Impunity has an effect across borders.

There is concern that the balance of power is not always fully achieved in reality, as the executive can often have the upper hand. This is true at the international level but, in many states, also at the national level. Civil society has a key role to fulfill in addressing this. It also has an important role to play in monitoring highly powerful transnational business actors and balancing their position of influence in global governance.

Civil society is also a key provider of (legal) information and, with that empowerment. End users are getting more and more tools with which they can resolve their own disputes. This is changing law and will continue to do so.

Research is required into how accountability can be organised beyond formal state institutions. In addition, more knowledge is needed about how legal information needs can be filled more effectively.

Educating the youth on justice, rule of law, and democracy is critical. The youth must be harnessed to think about what they get from them and how they can be part of improving these concepts, in theory and in practice, to better fit tomorrow's world.

Civil society sees a combination of 'Global Constitution' and 'Legal Internet' as a desired scenario: a global legal environment in which fundamental rules are publicly proclaimed and enforced, also creating an enabling environment for rule making by non-state actors.

Law of the Future Vision on Business

Business' principal interest in the law of the future is centred on having a level playing field, predictability, and effective and affordable processes.

Through the notion of corporate social responsibility (CSR), business has become more involved in what was once almost exclusively the public realm. This creates a more explicit duty on the part of businesses, but also as a rule maker and enforcer in - for example - the area of human rights and the environment. However, it is likely that CSR standards will ultimately need to have an anchor in public law.

Going beyond CSR, business can be an effective rule maker and enforcer of rules through contracts and horizontal relations. However, business can never oversee the whole spectrum of the public interest, nor should these actors be entrusted with such a task. Here, government continues to have crucial role. With the Internet and through individuals and civil society organisations the notions of trust (of society in business) and reputation will become key assets in the business environment.

Private and tax laws should encourage business to take a more long-term perspective of its activities and relationships.

Business should ensure that the common standards that it develops have an adequate legitimate foundation.

Inter-stakeholder mediation will be an increasingly efficient driver for better and more sustainable business practices, including independent and professional grievance mechanisms).

Research is needed to develop processes that can mitigate relations between business and communities; these processes should not always have to take the form of public, state-run processes.

The issue of corruption is a very serious one for business. Current legal responses are not always adequate and directed at the right addressee.

Business and law schools should develop inter-disciplinary legal education, also including the variety of regulatory tools, from hard law to soft law.



Law Scenarios to 2030



A future-oriented approach to the development of law and legal systems

- Generally, policy-makers can certainly benefit from adopting a more future-oriented approach.
- Governments and lawmakers are not used to employing a future-oriented approach in respect of legal issues. They would be well advised to adapt their practices so as to incorporate future-thinking and working with scenarios into their consideration of new legislation or regulation. In fact, as future-thinking is by its very nature a very dynamic exercise, governmental institutions, parliaments and courts will benefit from institutionalising such an approach, so that future-thinking becomes an integral part of what you do before installing new laws or major policy changes.
- Many businesses are far more familiar with future-thinking and scenarios-based strategies but they too could benefit from thinking more specifically about the future of law or the particular legal environment within which they operate. The same advice applies to civil society actors as well.
- There are many issues in the context of a future-oriented approach to law that ought to be further researched.
- In working on the Law Scenarios to 2030 we realised that very little knowledge is available as to what extra-legal factors are most determinative for the evolution of law and legal systems.
- The are many basic concepts, such as the rule of law, that require further research so as to understand how their meaning and function is changing as a result of changes in the legal environment.
- The law professional of the future should be trained in such a way to be able to successfully cope with future challenges of this profession.
- At present, it seems that legal education is quite traditional in nature, focusing very strongly on positive law, formal law and the national law of the particular state concerned. Without disregarding the importance of students to have a profound understanding of the specific legal system of their respective jurisdiction, this in itself might not be sufficient for dealing with the challenges of tomorrow.
- There should be greater emphasis on teaching law in context (e.g. vis-à-vis other disciplines). Rather than having such an emphasis on teaching the letter of the law, the practical impact of law must receive due attention. This requires much greater attention to empirics than one usually finds in legal education.
- Law students should not only understand the roots, origins and underlying logic of the particular national legal system they study, but they should also be exposed to more legal systems and, in principle, to legal plurality as a fact of life. Furthermore, not only that for a Dutch student it would make sense to know something about French law, for both it would be worthwhile to have some familiarity with what common law systems are all about. Furthermore, students from all of these institutions should not be wholly alien to, for example, Chinese law and Islamic law.
- International law should not be taught either as an entirely separate discipline or as single course in the general curriculum of law bachelors. Rather, the interrelationship between national legal orders and international law, including forms of informal and 'soft' law, is something that should better become part of the toolkit of each law student from an early stage.

Law of the Future Blogs

Civil society as part of the global legal environment | Monday, July 4, 2011



Sam Muller | For me Aryeh Neier, the director of the Open Society Institute, is in many ways Mister Civil Society; I have seen his hand in many of the cutting-edge international law endeavours of the past decades: the ICTY, the ICTR, the ICC, and the Publish What You Pay initiative being the most visible and impressive. What can he tell us about the law of the future and the future of law? Read more

International rules, national leeway, and the role of judges | Monday, June 20, 2011



Sam Muller | "One of the scenarios I see most clearly is one in which the national state gets more and more intertwined with regional public authorities," says Judge Geert Corstens, President of the Supreme Court of the Netherlands (Hoge Raad) as we start our interview in his stately office. A peaceful Scheveningen beach by Hendrik Willem Mesdag – boats, fishermen and the low afternoon sun – hangs prominently on one of the walls, adding to the reflective nature of our conversation. President Corstens considers carefully and speaks in a calm voice that almost always reduces very complex things to more simple terms, without losing nuance: "This allows for internationalisation, but also leaves national room for manoeuvre." Read more

The Future of Diplomacy | Friday, June 17, 2011



Laura Kistemaker | Parag Khanna, a very dynamic and young thinker, just published a new book: How to run the world. That would be somebody you'd want to interview when you are member of a team that is working to understand challenges of the law of the future and the future of law. Luckily, he thought we were worth giving an interview too. Read more

Guest post: What are the greatest challenges that law and legal systems need to cope with? | Friday, June 17, 2011



The Law of the Future Joint Action Programme is about creating a forum to discuss how we might envisage the global legal environment of the future. It goes without saying that the next generation should be included in this discussion. This 'Young Talent' is playing an important role during the Law of the Future Conference by organising a special workshop on 24 June. This guest blog post is submitted by **Victoria Daskalova**, student at Tilburg University. Read more

The Accountability Market | Thursday, June 16, 2011



Sam Muller | "We tend to over-emphasise the importance of the normative in understanding why things work," said Jonathan Koppell, Director of the School of Public Affairs at Arizona State University (see also Koppell's latest book: World Rule: Accountability, Legitimacy and the Design of Global Governance, University of Chicago Press, 2010), "We tell ourselves a story that the reason why legal systems are effective is because they are legitimate. This is true to some extent. But we overlook that once these things get going the self-interested motivations for abiding by a set of rules and a process in some ways really becomes more powerful than the legitimacy of that system." Read more

The state will change but it will not disappear | Wednesday, June 15, 2011



Sam Muller | "The State will not disappear. The key aspect of that is coercion," said Francis Fukuyama when we interviewed him for Law of the Future in a hotel on the Herengracht in Amsterdam which was as understatedly nice as he was thoughtful. "Law does not have its full effect unless there is enforcement, and only the state can, in the end, provide that. There is no other, better mechanism." Read more

Guest post: A Revolution or Evolution of Law? The Application of the Death Penalty in the next 20 years | Wednesday, June 15, 2011



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Guest post: Perilous Punctuation, Verbose Vocabulary and Treacherous Translations making Lethal Law | Wednesday, June 15, 2011



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Guest post: Accepting Pluralism of Law(s) to Promote "Fair" Globalisation | Wednesday, June 15, 2011



The Law of the Future Joint Action Programme is about creating a forum to discuss how we might envisage the global legal environment of the future. It goes without saying that the next generation should be included in this discussion. This 'Young Talent' is playing an important role during the Law of the Future Conference by organising a special workshop on 24 June. This guest blog post is submitted by **Klaas Hendrik Eller**, student of Law and Philosophy at the University of Cologne. Read more

Will selecting (yet again) a European as new IMF chief undermine the Fund's (perceived) legitimacy? | Friday, May 27, 2011



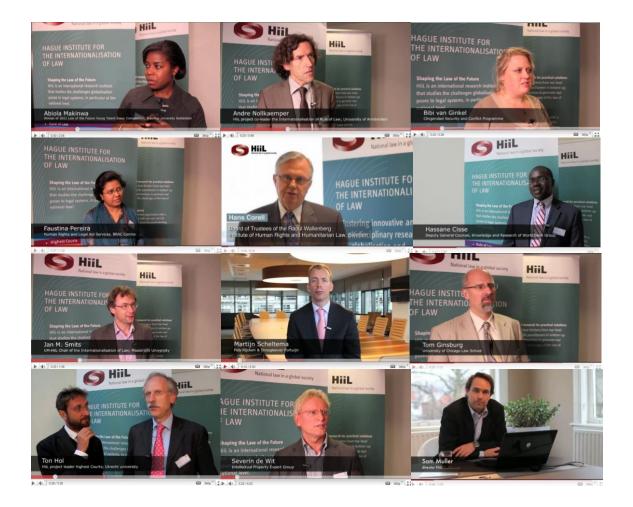
Morly Frishman | Following the severe accusations against him, Dominique Strauss-Kahn (DSK) resigned from the post of IMF Managing Director a week ago. While this story has many interesting legal aspects, the most interesting question from the perspective of international governance is: *who will be his successor as the new chief of the IMF*? (actually, the real question is: a national of which country will that person be)? Read more

More blogs have been created: read them all at www.lawofthefuture.org/blog

Law of the Future Tweets

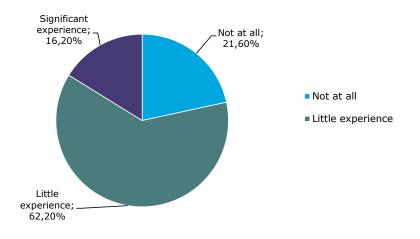


Law of the Future Videos



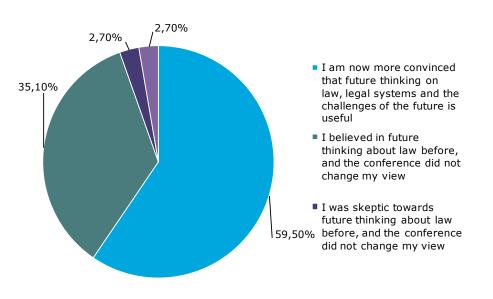
More videos have been created: check them all at www.youtube.com/hiilthehague

Feed back on the Law of the Future Forum 2011



Before the 2011 Law of the Future Conference, did you have any experience working with future thinking, and in particular future scenarios?

Chart 1: Participants' experience working on future thinking



Having participated in this conference, which of the following statements (choose one) best describes your view?

Chart 2: Participants' views after the 2011 Law of the Future Conference

The Law of the Future Joint Action Programme is initiated by:



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