



JEAN-MARC SAUVE

Head of the French Council of State

Mireille Delmas-Marty, Professor at the Collège de France

Merci de nous avoir éclairés sur des problèmes difficiles, que ce soit la complexité entre les systèmes européens ou la complexité des systèmes nationaux les uns par rapport aux autres, puisque vous avez notamment évoqué le Tribunal constitutionnel fédéral allemand, avec ses positions spécifiques. A travers ces explications sur la complexité de l'internationalisation du droit, en particulier à l'échelle européenne, nous sommes à présent mieux à même d'apprécier votre conclusion positive sur « le réseau des systèmes interconnectés qui composent le monde juridique moderne ».

Je voudrais maintenant donner la parole à Jean-Marc Sauvé qui préside le Conseil d'Etat français, pas seulement le Conseil d'Etat français mais aussi l'Association des cours administratives européennes. Il participe pour beaucoup à cette ouverture des juridictions françaises au droit international, principalement, mais pas exclusivement, au droit européen. Il nous parlera de l'ensemble des questions liées à l'internationalisation du droit.

Jean-Marc Sauvé, Head of the French Council of State

Globalisation is a radically new paradigm that is causing us to change our way of perceiving the global society. What has ensued from this is the development of 'a world-system [...], a total social phenomenon in the proper sense of the term, a referent-in-itself', which goes beyond the phenomenon of globalisation and is characterised by the extension of economic, political and cultural exchange to a global level¹.

The legal implications of this phenomenon are, as in many other domains, enormous, because the very idea of globalisation carries within itself the seed of a progressive obliteration of territories and thus, of the territoriality of the law and of right. It can, for example, lead to a different way of conceiving the sovereignty of states. It is also causing radical change in the way norms are produced.

Professor Delmas-Marty² has also clearly shown the axiological dimension that sustains the internationalisation of the law, particularly, a universal aspiration to defend fundamental values inscribed in the instruments that protect the rights of man. It has also very justifiably pressed for the globalisation of phenomena – for example, the globalisation of crimes, risks and exclusions, virtual exchange – that are problematic for jurists.

Given how radical such changes are, bearing in mind their symbolic energy and practical implications, as well as the damage caused to structural concepts, it is not only legitimate but indeed necessary to ask whether our juridical orders are undergoing a process of destruction or of metamorphosis.

I hasten to add, however, that I do not give much credence to the destruction theory in the sense of a collapse in juridical orders. Globalisation lays claim to just as many juridical rules as it seeks to topple, if not the reverse, and these rules must be able to find expression in juridical systems. I do not believe it is realistic that a universalist perspective can lead, at least in next several decades, to a complete obliteration of the State, enabling the idea of a universal republic, which even Kant, in his cosmopolitan vision, refused to entertain³.

¹ G. Rocher, 'La mondialisation : un phénomène pluriel', in D. Mercure (ed.), *Une société-monde ? Les dynamiques sociales de la mondialisation*, Presses de l'Université Laval, De Boeck, 2001.

² See, among others, M. Delmas-Marty, *Les forces imaginantes du droit. Le relatif et l'universel*, Seuil, 2004.

³ A. Renaut, 'Le refus de la république universelle', in *Kant aujourd'hui*, Aubier, 1997, p. 471.

The word 'metamorphosis' seems to me to be a better rendering of the current transformations. There are changes in form, nature and structure taking place in juridical orders which are so significant that the latter are no longer recognisable. I would like, by stepping back from my range of view as president of a supreme national jurisdiction, the French Council of State (*Conseil d'Etat*), to highlight the existence of a strong dynamic of integration between juridical systems (I). However, this process of integration generates tensions that it must learn to reabsorb (II).

I. The dynamic of integration of juridical systems

This dynamic possesses three characteristics: the full reception of international norms by the internal law (1); the emergence of a common public law, particularly within the European space (2); the openness and interdependence that have come to dominate relations between jurisdictional systems (3).

1. In 1989, the French Council of State brought about a veritable juridical and even cultural revolution with the *Nicolo* decision⁴ which, through a new interpretation of Article 55 of our Constitution, redefined the respective places of national law and treaties and, of course, European law, especially the law of the Union. It asserted on this occasion that the stipulations of a treaty must prevail over the provisions of any national law that may be contrary, even when these are more recent.

Apart from treaties, it has also been recognised that international practice can produce effects on internal law, which, if these cannot be completely assimilated to those of treaties, are taken fully into account⁵.

By accepting this major reversal in perspective⁶, the Council of State has found itself forced to assume new responsibilities. Firstly, its control over the conditions set by Article 55 – regular ratification of international conventions and reciprocity reservation – has steadily grown⁷. Secondly, the Council of State has been forced to specify the conditions in which a defendant can avail himself of the stipulations of a treaty. Through a decision of April 2012, issued by its highest court of judgment, it confirmed that, if necessary, stipulations of a treaty having direct effect can be invoked before it against any national laws or regulations contrary thereto, but above all it judged that stipulations shall have direct effect if, mindful of the intention expressed by the parties and the general economy of the treaty invoked, as well as its contents and its terms, they do not have the exclusive object of governing relations between States and do not require the intervention of any additional acts in order to produce the effects with regard to individuals⁸. This direction in jurisprudence is widening the scope of the stipulations of treaties that have direct effect.

The dynamic of integration is much stronger within the framework of Europe and, in particular, that of the European Union, to which our Constitution devotes a specific Title addressing in particular its articulation with the French juridical order⁹. Through a number of decisions made between 2006 and 2009¹⁰, the Council of State

⁴ CE, Ass., 20 October 1989, *Nicolo*, Rec. p. 190.

⁵ See in particular CE, Ass., 6 June 1997, *Aquarone*, n° 148683 et CE, Sect., 14 October 2011, *Saleh*, n° 329788. See also B. Stirn, 'La place de la coutume internationale en droit public français', presentation given during a colloquium on 21 September 2012 at the Ministry of Foreign Affairs on the topic of 'Le juge et la coutume internationale', available at <http://www.conseil-etat.fr/fr/discours-et-interventions/la-place-de-la-coutume-internationale-en-droit-public-francais.html>.

⁶ See also, with regard to the Court of Cassation, Cass., mixed chamber, 24 May 1975, *Société des cafés Jacques Vabre*, D.1975.497. The Council of State used to agree in the past that conventional provisions should prevail over earlier laws but not later laws (CE, Sect., 1 March 1968, *Syndicat général des fabricants de semoule de France*, Rec. p. 149).

⁷ Regarding these points, see in particular GAJA, commentary on the *Nicolo* decision.

⁸ CE, Ass., 11 April 2012, *Groupe d'information et de soutien des immigrés*, n° 322326, Rec. p. 142.

⁹ Article 88-1 of the Constitution.

¹⁰ CE, Ass., 11 December 2006, *Société De Groot En Slot Allium B.V.*, n° 234560, Rec. p. 512; CE, Ass., 8 February 2007, *Société ARCELOR Atlantique et Lorraine*, n° 287110, Rec. p. 55; CE, Ass., 8 February 2007, *Gardedieu*, n° 279522, Rec. p. 78; CE, Sect.,



completed its construction of the edifice, already very widely engaged, that ensures the effectiveness and primacy of the law of the European Union, as desired by constitutive treaties. These decisions illustrate the very strong integrative dynamic that reigns within this sphere.

2. This dynamic can be seen in the emergence of a common public law. The proliferation of instruments that defend the rights of man is the most obvious consequence of this.

This evolution is, however, more apparent in certain juridical spaces. This is particularly true of Europe. Apart from instruments that have deep juridical and symbolic purpose – the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union – there are true ‘shared orientating principles’¹¹ that are steadily emerging, to the point of constituting the foundations of a European administrative and constitutional law. Of these principles, some already play an important role. Apart from those of equitable process, non-discrimination, juridical security, proportionality and responsibility of public power, others such as the principle of good administration and particularly the right to be heard before any unfavourable individual decision, sanctioned by Article 14 of the Charter, will most likely grow in importance.

The meeting of national juridical systems and those of the European Union and the European Convention on Human Rights is thus resulting, through constant and increasingly intense exchange, in the construction of a *ius commune* functioning as one of the foundations of the European edifice¹².

3. In this context, judges can no longer live in a state of autarky. The juridical world in which we live is essentially characterised by the openness and interrelation of juridical systems, their direct and indirect influences and the permeability of juridical orders that are interdependent but do not have a hierarchy between them. These elements are absolutely essential for understanding the modern function of judging.

The relations maintained by judges can be formally provided for and organised. The most striking example is the obligation incumbent upon supreme jurisdictions to present a prejudicial question to the Court of Justice of the European Union in the case of doubt regarding the interpretation or validity of a provision of the law of the Union. Interpretations given on this basis are binding upon national jurisdictions¹³. Thus, a dialogue, which is not only peaceful but also extremely fruitful, is established between judges of different juridical systems, each working within his own field of competence. A dialogue of this sort will also be promoted by the entry into force of Protocol No. 16 to the European Convention on Human Rights, which is establishing a procedure for the request of a prejudicial opinion before the European Court.

Between judges belonging to different juridical orders, there is also a direct and indirect informal dialogue, mutual understanding, scrupulous observance of jurisprudence, anticipation of solutions and special attention to tendencies that cut through the solutions adopted by the other jurisdictions¹⁴. Certain notions are also embedded in the articulation between juridical systems. The notions of ‘national margin of appreciation’ and ‘European consensus’, for example, emphasise the recognition of the diversity of legal systems as well as the possibility of a common law.

10 April 2008, *Conseil national des barreaux*, n° 296845, Rec. p. ; CE, 10 April 2008, *Gestas*, n° 295831, Rec. p. 230; CE, Ass., 30 October 2009, *Mme Perreux*, n° 298348, Rec. p. 408.

¹¹ B. Stirn, *Vers un droit public européen*, Montchrestien, 2012, p. 91.

¹² *Ibid.*, p. 149.

¹³ CE, Ass., 11 December 2006, *Société De Groot En Slot Allium B.V.*, previously cited.

¹⁴ The attention given to comparative law within the Council of State is, moreover, organically manifested by the existence of a comparative law committee.

The significance of fundamental rights is reinforced most particularly in this dialogue¹⁵.

Globalisation, which generates its own share of uncertainties and questions, thus carries within itself a profound dynamic that tends to the integration of juridical systems. However, this is not, of course, without tensions which should be analysed and overcome.

II. The necessity of breaking the tensions between legal systems resulting from globalisation

These tensions are the result of competition between juridical orders which coexist without being integrated (1), as well as of resistance to the dynamic of integration of juridical orders (2).

1. The application of the law of a State outside of its territory is an inevitable consequence of globalisation and of the transition from a classic inter-state order to an open international society¹⁶.

There are various motivations that can compel States to seek or promote an extraterritorial application of their law. In this way, the internationalisation of exchange, particularly economic exchange, subjects them to the effects of acts or misconduct which have, however, only an indirect or even distant connection with their territory. This explains the American Sarbanes-Oxley Act, which, following a number of scandals that arose around 2000 (most notably the Enron affair), imposed new rules governing the accounting and financial transparency of listed companies. A number of the provisions of this law are applicable to foreign companies that are listed in the United States as well as to non-American enterprises that certify the accounts of American subsidiaries or companies operating abroad. This law constitutes an instrument of internationalisation of the law of financial markets. It also strongly inspired the adoption of the French law on financial security of 1 August 2003¹⁷.

The extraterritoriality of certain procedures are also questionable. This, for example, is the case for foreign-cubed class actions, which rest on three foreign elements. In this way, a group action was brought to court in America by foreign investors against the interests of a foreign issuer because of operations on a financial market undertaken abroad¹⁸. The Supreme Court of the United States, however, in its *Morrison* decision of 2010, very strictly limited the possibility of such actions¹⁹.

This kind of change can be beneficial as it spreads principles that protect rights and liberties or enable better economic regulation. However, it also includes risks connected, in particular, to the asymmetry between States which do not all have the same possibility of imposing the extraterritorial application of their laws or of resisting the application of the laws of others. The alternative, which can be found in the construction of multilateral solutions, if it is in principle preferable, continues to be difficult to achieve within the scope that is most relevant, namely, the widest scope possible.

2. Although it hardly surprising to observe competition between juridical orders whose relations are limited, juridical systems that are more integrated are exposed, in their case, to the risk of resistance and opposition rather

¹⁵ With regard to this point, if you would allow me to refer to J.-M. Sauvé, 'Y a-t-il trop de droits fondamentaux ?', a presentation given during the formal opening of the new academic year at the Montpellier Faculty of Law, 18 September 2012, available at <http://www.conseil-etat.fr/fr/discours-et-interventions/y-a-t-il-trop-de-droits-fondamentaux.html>.

¹⁶ See in particular S. Battini, 'Globalisation and extraterritorial regulation: an unexceptional exception', *International Review of Public Administration*, 2011, available at <http://www.irpa.eu/wp-content/uploads/2011/09/Extraterritoriality-an-Unexceptional-Exception2.pdf>.

¹⁷ Law n° 2003-706 of 1 August 2003 on financial security.

¹⁸ N. Rontchevsky, 'Réparation du préjudice des actionnaires victimes de manipulations ou de tromperies en matière financière : des *foreign-cubed class actions* à une action de groupe à la française ?', *RTD Com.*, 2011, p. 753.

¹⁹ US Supreme Court, 26 July 2010, *Morrison v. National Australia Bank*, 08-1191.



than of competition. This specific tension is a result of the difficulty of finding a sustainable balance between juridical systems that each function according to an inherently coherent logic but that are not identical or directly transferable to the others.

In recent times, tensions have been focused for the most part on the primacy of the law of the European Union in relation to national constitutional norms which, on an internal level, are at the top of the hierarchy of norms. Some supreme national jurisdictions, for example, the German Federal Constitutional Court, have reaffirmed in several major decisions the two reservations that they oppose to the primacy of the law of the European Union – that of the protection of fundamental rights by the European Union equivalent to that which exists within internal constitutional law, and the other of respect of popular sovereignty and, more precisely, of the democratic legitimation of public decisions, here too in conformity with the national constitution and, when applicable, with German Fundamental Law²⁰. This dialectic is, however, not specific to Germany and other countries such as France share it to a large extent.

Consequently, how can the clash between the European juridical order and national constitutional orders be avoided? Generally, the potential tensions have, to a large extent, been quelled by conscientious efforts to reconcile the national interpretation of fundamental rights sanctioned by the constitutions of States and the reading of these, within their own order, by the Luxembourg Court as well as the Strasbourg Court. This desire for conciliation and coherence, which gives rise to an in-depth dialogue between national judges and European judges²¹, is also a mark of the relations between the two European juridical orders²².

This question of the reconciliation of national and international juridical orders arises, however, in renewed terms with the integration, in the Treaty on European Union, of the Charter of Fundamental Rights. Within the scope of the law of the Union, these fundamental rights apply in principle to the exclusion of those sanctioned by internal law so long as the matter at issue is entirely governed by the law of the Union. When the case is reversed, national standards guaranteeing rights can continue to be applied if they are higher so long as they do not compromise the principles of primacy, unity and effectiveness of the law of the Union. This is the vision at least of the European Court of Justice such as it appears from its recent Grand Chamber judgements in the cases of *Åkerberg Fransson* and *Melloni* of 26 February 2013²³.

²⁰ See in particular the decisions in *Solange I* (29 May 1974), *Solange II* (22 October 1986) and *Solange III* (7 June 2000) of the Federal Constitutional Court, as well as the judgement of 30 June 2009 concerning the Lisbon Treaty.

²¹ See in particular decisions n° 2004-496 DC of 10 June 2004 and n° 2006-540 DC of 27 July 2006 of the Constitutional Council as well as the decisions in *Société Arcelor Atlantique* (CE, ass., 8 February 2007, n° 287110, Rec. p. 56) and *Conseil national des barreaux* (CE, sect., 10 April 2008, n° 296845, Rec. p. 129).

²² Certain texts facilitate this conciliation. Thus, the provision according to which 'fundamental rights, insofar as they are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and insofar as they are the result of constitutional traditions that are common to Member States, constitute part of the law of the Union as general principles' (Article 6§3 of the Treaty on European Union). Thus, also, the provision contained in Article 52 of the Charter, in the terms of which, 'To the extent that the present Charter contains rights corresponding to the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and their scope are identical to those that are conferred to them by the said convention. This provision does not constitute an obstacle to the wider protection accorded by the law of the Union.' However, this conciliation can be particularly observed in the daily workings of the jurisprudence of the two orders. A reading of the judgements of the European courts clearly highlights the dialogue that the European jurisdictions maintain between themselves. With regard to asylum, for example, while in the *M.S.S.* judgement the European Court of Human Rights cited the prejudicial question that was brought before the Court of Justice of the European Union (CEDH, gd chb, 21 January 2011, *M.S.S. c. Belgique*, n° 30696/09, § 82), eleven months later, in its *N.S.* judgement, the Court of Justice, for its part, explicitly refers to the judgement of the European Court of Human Rights, which it scrutinised in its reasons for its judgement, in order to support the solution retained (CJUE, gd chb, 21 December 2011, *N.S. et autres*, aff. C-411/10, § 88-91).

²³ CJUE, Gr. ch., 26 February 2013, *Stefano Melloni contre Ministerio Fiscal*, C-399/11; CJUE, Gr. ch., 26 February 2013, *Åkerberg Fransson*, aff. C-617/10.

Tensions can also bubble up when a European jurisdiction is seen by a national jurisdiction as being too pushy about some of its opinions and when it is suspected of judiciary activism by stepping beyond the bounds of its office. Whether it is a case of the scope of application of the Charter of Fundamental Rights²⁴, the method of conciliation of certain fundamental rights, for example, between the right to a private life and freedom of expression²⁵ or the interpretation of certain general principles of the law of the Union²⁶, such tensions have been able to manifest or have the potential to appear. The decision being awaited from the Court in Karlsruhe regarding the mechanism of outright monetary transactions, which opened the door to the repurchase by the European Central Bank of government bonds on the secondary market, will make it possible to measure the resilience of the relationship between the juridical order of the Union and a given national juridical order. Between the risk of direct contradiction, a supreme jurisdiction indirectly establishing itself as a judge of the Union and the choice of close cooperation, in the form of prejudicial questions, many intermediate scenarios can be imagined. These difficulties, resistances and oppositions are inevitable and, at the end of the day, necessary in order to be able to escape certain conflicts. On the other hand, any political criticism of the work of a jurisdiction²⁷ or the repeated refusal of certain countries to submit to court decisions can appear to be illegitimate²⁸.

However, even if tensions exist, it is generally possible to avoid these using instruments for harmonious conciliation. Thus, the notions of 'national margin' and 'European consensus' that I have already mentioned make it possible to respect national specificities while moving toward a harmonisation of laws. The technique of consistent interpretation also causes the national judge to interpret, as much as he is able, his law or even his Constitution in conformity with the rights sanctioned by the European Union or the European Convention on Human Rights and interpreted in the light of the jurisprudence of each of its two European Courts²⁹. More generally, judges are aware that their task cannot be exercised in a solitary manner, with indifference to what others are thinking and to what is occurring outside of their courtroom. They thus respect the necessity of loyal cooperation and can anticipate, on the basis of the jurisprudence of a European Court, how this latter will evolve in the future. Certain notions, principles or methods of procedure are also spreading by capillary action. They are emerging gradually, almost furtively at first, then with more force, in the different juridical orders, simultaneously or almost so.

If, as a consequence, judges do not possess, in their 'box of tools', the means that can enable them *ex ante* to resolve all the risks of conflict and to reabsorb all tensions, their wisdom, prudence and sense of responsibility concur that reasonable and balanced solutions can be obtained for issues of constriction and potential conflict. Irrespective of the techniques and methods that have been mentioned, this is how things work and how they have been able to overcome all the risks of crisis and of contradiction for about 60 years.

*

* *

Thus, is the juridical order undergoing destruction or a metamorphosis?

²⁴ CJUE, 26 February 2013, *Åkerberg Fransson*, aff. C-617/10; BvG, 24 April 2013, 1 BvR 1215/07.

²⁵ See CEDH, 24 June 2004, *Von Hannover* and CEDH, 7 February 2012, *Von Hannover*.

²⁶ CJUE, 22 November 2005, *Mangold c. Helm*, aff. C-144/04. See for example O. Dubos, 'La Cour de justice, le renvoi préjudiciel, l'invocabilité des directives : de l'apostasie à l'hérésie ?', *JCP G*, 2006.II.10107, p. 1295 J. Wahluch, 'La guerre des juges n'aura pas lieu. A propos de la décision Honeywell de la Cour constitutionnelle fédérale allemande', *RTD eur.*, 2011, p. 329.

²⁷ See, for example, certain criticisms addressed during the Brighton Conference at the European Court of Human Rights.

²⁸ This is the case in the UK, for example, in affairs concerning the right to vote of detainees.

²⁹ M. Luciani, 'L'interprétation conforme et le dialogue des juges', in *Mélanges Bruno Genevois*, Dalloz, 2009, p. 695.

Globalisation is producing radical and unexpected effects which are compelling legal systems to adapt to this new reality, causing them to change profoundly but not to lose significance.

National juridical orders that were exclusive and self-sufficient are, clearly, in a process of recomposition. In this context, the role of a supreme national jurisdiction, its jurisprudence and its decision-making autonomy have certainly evolved a great deal over the last few decades. For all that, however, these jurisdictions have not come out of this process diminished or impoverished. On the contrary, they are participating fully in the new reality, conscious of the responsibilities that they bear when opening up to other national or international juridical systems which, for numerous but unavoidable reasons, are becoming less foreign to them day by day.

The entanglement of legal systems has the obvious consequence of the interdependence of these systems and judges but this interdependence does not signify the end of independence nor of harm to the eminent role that the law as well as judges must play. In order to be able to articulate the national legal systems that are our heritage and the international society that we are constructing, in order to ensure the regulation of public and private affairs in the global society that is emerging, we have greater need than ever before of the law and its multiple interpreters, both national and international. To forget it would be to risk constructing an inhumane, asymmetrical kind of globalisation that levels out all individuality or legitimate national difference. No one among us would desire that. We must, therefore, do what is necessary so that it can remain humane, balanced and diverse.

Mireille Delmas-Marty, Professor at the Collège de France

Nous n'avons n'a pas le temps d'ouvrir un débat.

Je voudrais seulement conclure par deux observations. Nous sommes rassurés, l'ordre juridique ne disparaît ni au plan national ni au plan international. Mais nous restons perplexes sur la question de savoir à quoi vont ressembler demain les ordres juridiques nationaux et ce futur ordre juridique global qui devra demeurer respectueux des diversités. C'était déjà le mystère de la devise européenne dans le projet de traité constitutionnel : « Unis dans la diversité ». Nous retrouvons ce mystère à l'échelle mondiale.

Thierry de Montbrial, President and Founder of the WPC

C'est pour ça que nous reprendrons ce sujet l'année prochaine !

Mireille Delmas-Marty, Professor at the Collège de France

Voilà ! Merci à tous.