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OPERANDO O DIREITO NUM CONTEXTO GLOBALIZADO: UMA COMPARAÇÃO MULTIDIMENSIONAL

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Abstract:
The present paper focuses on the analysis of the multidimensional comparison, i.e. how, in order to solve cases in a global context, lawyers should compare methods and solutions specific to national, international and regional (e.g., European) laws. The comparison should more specifically focus on two questions: the scope of application of the considered laws and the conditions in which they may be invoked.

Keywords: Operation of the Law. Global context. Comparison.

Resumo:
O presente texto apresenta uma análise comparativa multidimensional, exemplificando como advogados podem comparar métodos e soluções específicas dentro de direitos nacionais, regionais (p. ex. Direito europeu) e internacional a fim de solucionarem casos em um contexto global. Essa comparação deve centra-se especificamente em duas questões: o escopo dos direitos levados em consideração e as condições em que são invocados.

Palavras-chave: Operação do direito. Contexto global. Comparação.

Introduction

In a variety of global legal situations, the operation of the law has its own dynamic. It cannot result from the mere application of a method or a legal solution at a given moment, in a predetermined space and on a predetermined level, by a duly identified actor. In a given situation, several laws may apply, alternatively, cumulatively, at the same time or at different moments, in one or several spaces or on one or several levels, relied upon by one or by multiple actors. The lawyer has to be aware of this specific dynamic

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when considering different contexts – national, international or European: it shapes how the law applies.

In a general sense, comparison is the first step in the process when attempting to apply the law in the national, international and European context.[1] Generally confined to the mere study of national laws and an exercise of pure knowledge, "comparative law" deserves to be given a broader meaning in the perspective of global operation of the law. The comparison of national, international and European law involves a potential re-examination of the whole of the methods and solutions that may be called upon when dealing with a case or legal situation. It demands an investigation of the manner in which the law may be applied in a national, international or European environment. In practice, the comparison of laws in the triple national, international and European context should focus on tow different aspects: the scope of application of the considered laws (I), the conditions in which they may be invoked (II).

I – Comparing scopes of application

Legal methods and solutions formulated in different legal contexts – national, international or European – do not all necessarily have the same scope of application. It is therefore important to compare the material (A), spatial (B) and temporal (C) scope of the different laws that are present.

A – Material Scope

The material scope of application of the national, international and European laws that may apply to a given situation can be defined with the help of legal classifications (a) which may be organised into a typology (b).

a – *Recourse to legal classifications*

In order to determine the situations to which a legal rule applies, the lawyer refers to legal classifications: what category of the classification is relevant for the considered facts? In general, concrete facts needs to be considered in a more abstract and general manner. Situations have to be legally defined (e.g., an action, an event, an object or a person) and their place in relation to several mutually exclusive legal categories determined (e.g., a contract or a or tort; a thing or a person). This operation

[1] For a presentation of the general method of application of the law in a global context, see BERGÉ, J.-S.; HELLERINGER, G. Applying the law in the national, international and European context: Applied global legal pluralism. *Oxford Legal Studies*, n. 70, 2013. Disponível em: <http://ssrn.com/abstract=2293290>.

of "qualification" allows the lawyer to determine whether a given case qualifies to fall within the material scope of application of a given legal rule. This scope is defined by reference to legal notions and categories that are often abstract but is interpreted and given a more concrete stand. These two opposite and complementary movements in the reasoning, concretisation of the categories and abstraction of the facts, allow the lawyer to find which category given facts fit into and to determine what sort of legal rule applies to a given situation.

In a context of global legal pluralism, the source and content of legal notions and categories can vary according to whether they are drawn from the national, international or European level. It is therefore useful to compare them. Different examples can we offered, respectively related to goods, contracts, persons and situations.

Some goods, such as medicines for example, are subject to a specific legal regime that takes their specificities into account. They form a whole separate legal category. The legal classification of "medicine" can vary according to the law that is applied to it on a national, international or European level.[2] For example, a definition of a medicine may be found in Article L 5111-1 of the French Public Health Code. In European Union law, the European Court of Justice has had occasion to interpret a large number of secondary legal texts now codified by *Directive 2001/83/EC of 6 November 2001 on the Community Code Relating to Medicinal Products for Human Use*. Even the European Court of Human Rights has ruled on this subject in the triple context of French law, European Union law and Council of Europe Law.[3] The World Health Organisation (WHO) also participates in the development of definitions notably by proposing classifications for different types of medicines.

Concerning contracts, the distinction between the sale of goods and the provision of services poses a well-known problem of legal classification. As the legal regimes governing contracts for sale and contracts for the provision of services do not necessarily obey the same legal rules (for example, in relation to the determination of the price or the competent court), it is important to identify for each situation the corresponding contractual model. The key to the distinction between the two contracts can vary from one context to another according to the legal source under consideration. In French domestic law, for example, the distinction results notably from the Court of Cassation's interpretation of Articles 1582 and 1792 of the Civil Code. In European law, the distinction is employed in secondary laws.[4] In international law, an instrument

2 See, for example, one of the Court's first decisions: CJEC, 30 November 1983, case 227/82, Van Bennekom.
3 ECHR, 15 Nov. 1996, case 17862/91, Cantoni v. France.
4 For example, Regulation (EU) n. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 7.1.b.

specifically dedicated to the international sale of goods distinguishes between contracts for sale and complex contracts, which combine the delivery of goods and services.[5]

Concerning persons, different national, international and European instruments apply specifically to children. In order to determine whether a person falls into this legal category, it is necessary to examine the laws present to determine whether they are materially applicable. Sometimes, these laws contain classification criteria. Thus, for example, French law makes parents responsible in tort for the actions of their "minor children",[6] thus excluding children who have reached the age of 18 and emancipated minors. The New York Convention on the Rights of the Child (UN – 1989), for its part, defines children as "every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier".[7] Finally, the Charter of Fundamental Rights of the European Union (CFREU) dedicates an article to the "Rights of the Child" but does not propose a definition of the notion.[8]

At last, regarding situations, an important distinction is sometimes made between domestic situations and international situations. When this distinction is made, it has the potential to control the operation of specific legal rules according to whether one is in one category or the other. The most characteristic example of this is arbitration in French law, which distinguishes clearly between the legal solutions that apply to arbitration in general[9] and international arbitration in particular.[10] We also find this distinction in international instruments designed specifically to deal with international situations, such as international transport[11] or agency.[12] The distinction is also present in provisions of European Union law that are intended to apply specifically to traffic flows within the European zone and do not apply to situations that are purely internal to a Member State or to situations involving third party States.[13] But this is not a general rule. It is common, in fact, for laws formulated in a national context to apply without distinction to domestic situations or international or European situations.[14] The same phenomenon may be observed at an international or European level.[15]

5 1980 Vienna Convention on Contracts for the International Sale of Goods - UN – UNICITRAL, Art. 3.
6 Article 1384 paragraphs 4 and 7 of the Civil Code.
7 Article 1.
8 Article 24.
9 Article 1442 *et seq*. Code of Civil Procedure.
10 Article 1492 *et seq*. Code of Civil Procedure.
11 For example: The 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air.
12 For example: The 1978 Hague Convention on the Law Applying to Agency, Hague Conference.
13 For example: Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.
14 For example, an international contract for sale made subject to French law by the parties.
15 For example, a European or international instrument creating a uniform law that applies without distinction

b – *The different types of legal classification*

Several lessons may be gleaned from the comparison of different legal classifications developed in a national, international or European context.

The lawyer may, first, find himself in the presence of a classification that is universally recognised at all levels of law or, on the contrary, of classifications that vary according to the context considered.

Returning the examples above concerning persons, we can observe that the definition of a child has a universal character. Thus, for example, the Charter of the European Union, while it does not define the term, implicitly refers to the definition given in the New York Convention. But, if we look more closely, we can see that this definition also suffers from particularism. The New York Convention reserves, in effect, the case in which the age of majority is attained before 18 years in virtue of applicable legislation. This solution leaves space for two variables. The first concerns the case in which a regulation fixes the threshold of civil, criminal or sexual majority, for example, at a level below the age of 18 years. The second concerns causes of the emancipation of minors. The result is a heterogeneity of solutions that is not visible at first glance.

The lawyer may, for that matter, observe that the classification he uses exists at his own level in an autonomous manner or, conversely, that it is borrowed from another level than his own. Concerning contracts, the distinction between the contract for sale and the contract for services is a good example of a classification that is sometimes autonomous and sometimes dependent. For an autonomous classification, it is necessary to consider the hypothesis in which a lawyer working in one context (national, international or European) is able to find the classification he seeks at his own level. For example, if we are concerned with applying domestic law in order to determine if we have before us a contract for sale or a contract for the provision of services, it is quite certainly in this domestic context (it does not matter whether it is national or foreign at this stage in the process of comparison) that we must seek the classification in question. For a dependent classification, it is necessary to envisage a different case in which the lawyer is compelled to look for the classification in question in a different context from that in which he normally works. For example, if a lawyer of European law wishes to operate the distinction between a contract for sale and a contract for the provision of services used by the Regulation (EU) No. 1.215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, he is compelled, under the case law of the Court of Justice of the European Union, to have recourse to national classifications, insofar as the

to domestic, international and European situations; another example: a European law relating to freedom of movement applied to a situation purely internal to a Member State.

distinction between a contract for sale and a contract for services is not presently defined at the European level in the specific context of this instrument of private international law.

The lawyer may, finally, observe that certain qualifications are supplementary, in the sense that legal subjects may, to a certain extent, opt out of them, whereas others are clearly imperative. Two examples concerning arbitration and the contract for sale of goods could be taken. Are the classifications specified in a given law to distinguish, for example, domestic arbitration from international arbitration or the contract for sale from the contract for services inviolable, or can they be modified by a contrary will? In other words, can one derogate from a rule, which is intended to apply only to certain situations when the parties find themselves in another situation? The answer to this question varies according to the nature of the rule that defines the material scope of the law in question. If we consider that the classification is imperative, it will not be possible to derogate from it. Conversely, if it is supplementary, it is possible for the intended subjects of the rule to use it differently. For example, French arbitration laws are imperative in the sense that the parties to a domestic arbitration process cannot voluntarily make themselves subject to the less restrictive rules that apply to international arbitration. On the other hand, it is permissible, under certain conditions, for parties to a contract for services to choose to have the 1980 Vienna Convention on the international sale of goods apply to them even though it normally excludes this type of contract.

In different scenarios, the question of the application of national, international or European law does not appear in the same light. It is therefore necessary to proceed, at the first stage of legal analysis, to their comparison.

B – Spatial scope

The definition of the spatial scope of application of national, international and European law is the subject of a particular inquiry (a) which reveals a great diversity of solutions (b).

a – *The question of the applicability in space of national, international and European law*

The legal methods and solutions developed in the national, international or European context do not only have a material scope of application. They also have a scope of applicability in space. This scope allows us to localise from a strictly geographic point of view, the concrete situations that are subject to the materially applicable laws. It is useful for a lawyer to be able to refer to this scope in a context of global legal pluralism in which he may be somewhat disoriented by the profusion of laws on offer.

This spatial scope is sometime explicitly defined by reference to criteria of location. These criteria may potentially deal with: natural persons: their nationality,

domicile or residence; corporations (in private or public law): the location of their registered office or the law that established them; goods: the place in which they are located or perhaps registered; contracts: the place in which they were adopted, concluded or executed; torts: the place in which they originally occurred and/or the place in which they produced their effects, etc.

According to the legal nature of the situation in question and the context of the application of the law under consideration, the lawyer may be invited to use one or other of these criteria.

These localisation criteria are generally incorporated into rules. According to their broadest definition, we call these "rules of spatial applicability".[16] They may be present at all levels of law: national, international or European.

Spatial applicability rules can concern national, international or European law. Here are a few examples:

- applicability of domestic law: provisions of domestic law that define the scope of application in space of domestic law;[17]
- applicability of international law: the provisions contained in an instrument of international law which tends to locate the situations to which it applies in space;[18]
- applicability of European law: the provisions of primary or secondary law which designate situations in space that European law intends to govern.[19]

b – *The diversity of solutions*

A comparison of the criteria and rules of spatial applicability defined in the national, international or European context can reveal a great diversity of solutions that

[16] See the major study by FALLON, M. Les règles d'applicabilité en droit international privé. In: *Mélanges offerts à Raymond Vander Elst*. Brussels: Nemesis, 1986. p. 285-322. p. 285.

[17] For example, Articles 113-1 et seq. of the French Criminal Code which distinguish rules of applicability of the French criminal law according to several criteria, notably whether the crime took place on French or foreign territory, whether the perpetrator and the victim were of French or foreign nationality.

[18] For example, the 1980 Vienna Convention on the international sale of goods which notably applies to contracts concluded between parties established in different State Signatories, Article 1.1.a.

[19] For example, Art. 20 TFEU which reserves the benefit of European citizenship and the rights attaching to it to persons with the nationality of at least one Member State; Article 4.1 of Regulation (EU) No. 1.215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to which the rules of direct competence do not apply, in principle, unless the defendant is domiciled in a Member State.

vary according to the legal question posed and the context, or contexts, concerned. To find his way among them, the lawyer must try to impose order.

The case we have already encountered is that in which a rule from a national, international or European source is explicitly accompanied by a rule of spatial applicability.[20] These solutions governing applicability may be restricted to public or private law rules, basic rules or procedural rules.

The analysis of some of these rules calls for a deeper examination. Rules of spatial applicability do not all have the same legal meaning and do not all produce the same effects. It is necessary to distinguish certain particularities. Among other possibilities, three particularities are evoked here.

The first particularity concerns rules with a strong institutional dimension. The spatial dimensions of the national, international or European rules that govern the functioning of administrative or judicial institutions normally vary according to the legal system of which they form a part. A national authority is naturally bound by the rules of the State that established it. The same is true for institutions established by an international or European treaty. Their activities are governed by the primary and secondary legal rules that form the legal system that founded them. In these different situations, it is the law that establishes the headquarters of the institution that applies without it being necessary to define it precisely. If this domestic function were to be altered by an external source of law, we would have a situation of a combination of laws. But this applicability of "foreign" institutional rules belonging to a different legal system from that to which the institution concerned is attached remains an exception to the principle of the applicability of the forum law of the institution.

For example, the functioning of the French Court of Cassation, the Council of State or the Constitutional Council is naturally governed by French law.[21] For an international court, such as the International Court of Justice or the International Criminal Court, for example, the treaty that established the court determines the applicable rules that govern its functioning.[22] For a European court, such as the Court of Justice of the EU or the European Court of Human Rights, it is also necessary to refer to the legal texts that are in force in the legal system in question.[23]

The second peculiarity distinguishes between rules of spatial applicability according to whether they concern material rules, rules of conflicts of laws or rules of conflicts of jurisdictions. The legal solutions that define the scope of application of a

[20] See above, previous paragraph, the different examples proposed.
[21] 1958 Constitution, institutional laws, etc.
[22] The United Nations Charter (1945) and the Statute of Rome (1998).
[23] EU (e.g. the 1957 European Economic Community, which became the European Community in 1992) or European Convention of Human Rights (1950).

law in the national, international or European legal space can, in effect, concern material rules, which have the purpose of offering a solution to a given basic question, or rules of conflicts of laws, which designate the law that usually applies, or rules of conflicts of jurisdictions, which govern questions of the international competence of national courts and how legal decisions travel. This distinction between three families of rules comes to us from private international law. But it also partly operates in public law which, although it does not employ rules of conflicts of law or of jurisdictions, is often called upon to delimit the scope of application of its material rules.

The majority of rules of applicability deal with material rules. In international private law, they are often confused with "mandatory rules" which, as their name indicates, apply immediately according to their own criteria of applicability, without the need for recourse to a connecting factor.[24] Rules of applicability are very common in mandatory rules and can also be found in European Union law.[25]

Sometimes, it is the rule of conflicts of laws itself which is the object of a rule of applicability. The rule that determines the applicable law in a situation of conflict of laws is thus subject to a rule of applicability in space. The most well-known example in international law is an old one: the Hague Convention of 1956 on the law applicable to maintenance obligations towards children, of which Article 6 limits the scope of the Convention to the designation of the applicable law in a State Signatory. This type of clause does not appear in the more recent instruments formulated by the Hague Conference of International Private Law. In European Union law, the rule of applicability can affect rules of conflicts of law that have a strong material flavour.[26]

Finally, where rules of conflict of jurisdictions are concerned, it is necessary to note several distinctions. National rules in principle have a strictly national foundation. The international competence of French courts or the exequatur of foreign decisions on national soil are naturally subject to national rules of procedure. If the solution to a conflict of jurisdictions is found in a provision of international or European law it is necessary to distinguish whether these concern the direct competence of the courts or the exequatur of the decisions. On the first point, all solutions may be envisaged: some instruments apply to courts in Member States, without any other criterion of applicability.[27] On the

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[24] For example, in French law, Art. 311-15 of the Civil Code on the effects of apparent civil status in relation to paternity when the child and at least one of his two parents is resident in France, regardless of the law that normally applies to them.

[25] For a systematic analysis of these rules of applicability in the EU context, see S. Francq, L'applicabilité du droit communautaire dérivé au regard des méthodes du droit international privé, Bruylant-LGDJ, 2005.

[26] See, for example, Directive 96/71 of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

[27] For example, Regulation (EC) No. 2.201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility);

second point, it goes without saying that the international or European rules concerning the enforceability of decisions by foreign courts apply only to decisions delivered by the courts of State signatories.[28]

The third peculiarity relates to the vocabulary that may be used to vary the spatial applicability of national, international or European law. A distinction may be made between laws, which can apply without spatial limitations and those of a geographically limited applicability. Sometimes the first are referred to using the expression "universal applicability" whereas the second have the characteristic of being of "self-limited applicability". These two expressions are nonetheless misleading. It is rare in fact for one rule to be truly universally applicable and indirect methods exist for defining the spatial scope of application of a rule, which do not operate through self-limitation.

Situations of the so-called "universal" applicability of law, which is to say in the absence of *a priori* limitations on the geographical scope of the rules under consideration, exist in all legal contexts. In national law, the term is often used in criminal law matters, whenever a judge is competent to prosecute criminal behaviours that do not have a strict connection with the national territory. That being said, it is necessary to distinguish two scenarios. On one hand are those scenarios in which universal competence is absolute, as is or has been the case in certain countries (for example, previously in Belgium and today in Spain) and on the other are those scenarios in which such competence is more reasoned.[29] In the first case, the national judge can have jurisdiction over crimes that have no connection to the national territory. In the second case, the presence on French soil of a person suspected of a crime committed abroad can be one of the minimal conditions of the applicability of the law. Such so-called "universal" competences in criminal matters are also enshrined in their non-absolute version in several specific international instruments.[30]

The question of universal applicability is also often raised in relation to human rights. The development of these rights, notably in the regional context of the Council of Europe, with the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950), raises vigorous debates on the truly universal character of the Western values contained in this instrument. The debate is not only philosophical or sociological in nature. It also has a legal dimension relating to the geographical scope of the instrument. One question that is notably raised is whether the

others, on the contrary, add extra criteria, taking into account for example the domicile of the defendant (for example, Regulation (EU) No. 1.215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[28] See, in relation to European law, the two examples above.

[29] Articles 689-1 of the Code of Criminal Procedure.

[30] For example, the 1984 New York Convention against torture and other cruel, inhuman or degrading treatment or punishment – UN.

ECHR should be applied in situations located in countries outside the Council of Europe for the sole reason that they have been presented to a judge in a Member State and that the latter has delivered a decision that could be criticised by the European Court of Human Rights.

On the other hand, there is the relatively technical question of whether one or several legal methods exist for limiting the geographical scope of a rule. The answer has been given by one author who proposed to classify rules of applicability.[31] He distinguishes between direct and indirect rules of applicability in the following way. The first are provisions of self-limitation of the type we have already presented. The second are bilateral or unilateral rules of conflicts of laws, which designate the law that normally applies in space to govern a legal relation (the law governing the residence of a person, the location of a good, the place in which a tort occurred or a legal act was concluded, etc.). The latter exist at every level, national,[32] international[33] or European.[34]

Finally a fourth and last particularity concerns scenarios in which geographical applicability depends on the will of those who wish to voluntarily submit themselves to the rule. The situation here is similar to the one we encountered earlier in relation to rules of material applicability. In effect, such a choice is sometimes possible whereas in other cases, spatial applicability is imposed imperatively.

In contract law, parties have a certain degree of autonomy, which may lead them to choose for a national, international or European law to apply to their contract which, in the absence of such a choice, would not normally apply. The choice of the parties may thus have the effect of extending or restricting the spatial scope of applicability of the national, international or European law in question. For example, the parties to a purely domestic contract, concluded and executed in one country, may decide to make themselves subject to the law of another country[35] or an international convention creating a uniform law for international contracts[36] or even European principles which have no

[31] FALLON, M. *Les règles d'applicabilité en droit international privé, in Mélanges offerts à Raymond Vander Elst*. Bruxelles: Éd. Némésis, 1986. p. 285. See by the same author: FALLON, M. Les frontières spatiales du droit privé européen selon le droit de l'Union européenne. In: POILLOT, E.; RUEDA, I. (Ed.). Les frontières du droit privé européen. *The Boundaries of European private law.* Bruxelles: Larcier, 2012. p. 65.

[32] For example, Article 309 of the French Civil Code which establishes a unilateral rule of conflict of laws in matters of divorce.

[33] For example, the numerous Hague Conventions that standardise conflicts of laws: http://www.hcch.net.

[34] For example, Regulation (EC) n. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Regulation (EC) n. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I); Regulation (EU) n. 1.259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III).

[35] For example, they might decide to apply Japanese law to a contract located in France.

[36] For example, the 1956 "CMR" Geneva Convention on transport by road which normally applies only to international transport.

binding legal effect.[37] Are these choices valid? The general answer to this question, which has the potential to vary from one legal system to another, holds true in the context of French law in two main propositions. The choice must not have the effect of allowing the parties to avoid respecting any law.[38] The choice is also restricted by the imperative provisions that normally apply to the contract in the absence of a choice of law by the parties.[39] Subject to these two reservations and in the absence of rules specific to a given area of law, the parties to a contract have a certain control over the spatial scope of applicability of contractual rules. In certain areas (in this case transportation), this practice is referred to as a "paramount clause" each time the parties to the contract decide to make themselves subject to an international convention even though it does not normally apply given its spatial scope of applicability.[40]

C – Temporal scope

The question of the effects of the law through time naturally arises in the triple national, international and European environment. Every legal system on each of these different levels proposes solutions in this regard.

These solutions may relate to the affirmation of a general principle concerning the important question of the retroactivity of legal texts. The affirmation of a general principle of the non-retroactivity of a new law of or a new treaty or secondary law may be present at every level of law. We find a general formulation of this principle in French law[41] and in the Vienna Convention on the law of treaties[42] for example. It is also present, in the narrower case of criminal law, in national law,[43] international law[44] and European law.[45] The legal value of the principle is defined by each legal system. In French law, the principle of non-retroactivity is not considered mandatory, in the

37 For example, the principles of European contract law devised by the Lando Commission.

38 This is the scenario of the contract concluded in the absence of law, see the following ever-cited case: Cour de Cassation, Civ., 21 juin 1950, Messageries maritimes, ANCEL, B.; LEQUETTE, Y. *Les grands arrêts de la jurisprudence française de droit international privé.* 5. ed. Paris: Dalloz, 2006. n. 22.

39 See, for example, concerning the CMR Convention, cited above: Cour de Cassation, Com., 1er juillet 1997, Cour de Cassation, Com., 1er juillet 1997, pourvoi n. 95-12221.

40 For an analysis of this question in the context of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in particular Article 3, see notably the commentary of: P. Deumier and J.-B. Racine, Règlement Rome I: le mariage entre la logique communautaire et la logique conflictuelle, RDC 2008, 1309, P. Lagarde and A. Tenenbaum, De la convention de Rome au règlement Rome I, RCDIP 2008, 727; S. Francq, Le règlement "Rome I" sur la loi applicable aux obligations contractuelles. De quelques changements…, JDI 2009, 41.

41 Article 2 of the Civil Code.

42 Article 28.

43 In France, Article 8 of the 1793 DDHC.

44 Article 15 of the ICCPR.

45 Article 7 of the ECHR and Article 49 on the CFREU.

sense that another law can derogate from it, on the condition that it respects different rules or principles. The same is true for general international law which allows States to formulate retroactive solutions within their area of competence. Conversely, where provisions specific to the application of the criminal law in force on the day the crime is committed are concerned, their intangible value is recognised both by domestic laws of a constitutional nature and international and European laws. Some legal systems go further by allowing the retrospective application of a more lenient criminal law. The European Union, for example, has thus considered, in the voice of the Court of Justice, that "the principle of the retroactive application of the most lenient penalty is part of the common constitutional traditions of Member States".[46]

The rules governing the temporal scope of application can also concern the date upon which a new law entered into force and the organisation of transitional legal provisions. Each time reference is made to a domestic, international or European text, it is necessary to take into account the general rules of entry into force laid down by every legal system and to verify that the law in question does not derogate from them through the deployment of specific solutions of transitional law. Regarding the first, we find in domestic law[47] and in international law[48] general regulations on the modalities of the entry into force of newly adopted laws. Regarding the second, it is necessary to proceed on a case-by-case basis and to verify for each law whether it specifies its date of entry into force and, if relevant, the modalities of its application in time. This practice is particularly frequent in European Union law which does not contain general rules on this subject equivalent to those found in national or international law (cited above). Notably, where treaties, regulations or directives are concerned, it is very common to find transitional rules which sometimes extend for long periods (for example the construction of the common market followed a calendar lasting a decade and a half; more recently, the accession of new States from Central and Eastern Europe and the development of new European policies have been subject to transitional rules intended to considerably delay the effects of the new legal instruments introduced

Such rules are, finally, capable of handling the troublesome issue of the limitation of the temporal effects of case law being overturned. A report has been published in France on the issue of the temporal effects of overturning case law.[49] The facts of the problem are well-known. The overturning of a judicial interpretation of a law can have a retroactive effect. We consider, in effect, that the new interpretation of a law is part of the

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[46] CJEU, 3 May 2005, Berlusconi, case C-387/02.

[47] For example, in France, Ordonnance n. 2004-164 of 20 February 2004.

[48] Vienna Convention on the law of treaties, Article 24.

[49] MOLFESSIS, N. (Dir.). *Les revirements de jurisprudence*. Rapport remis à Monsieur le Premier Président Guy Canivet. Paris: Litec, 2005.

law itself, so that it is to be treated as if it always existed. Except for definitive judicial decisions, which cannot be disturbed, the new interpretation applies to all situations, whether anterior or posterior to the decision that was delivered. In order to prevent the retroactive reversal of case law from suddenly jeopardising a large number of pre-existing situations, the question of whether a judge may limit the effects of his decision in time arises. An initiative led by a high-ranking French judge and a working group composed of academics, judges and lawyers has resulted in the publication of a research paper on this subject. On such a delicate subject as the temporal effect of judicial decisions, it appeared necessary not only to call upon the experiences of French and foreign courts but also to give a prominent place to European case law. The European courts did, in effect, very quickly[50] have cause to limit the temporal effects of their decisions, including in cases in which case law has not technically speaking been overturned (verifying the legality of EU law or making a preliminary ruling). This European practice could not be overlooked in the context of a study with a more limited object.

II – Comparing conditions of enforceability

Considered narrowly, the possibility for a legal subject to invoke domestic law in the national legal order, international law in the international order and European law in one of the two great European legal systems does not raise any issue in relation to the phenomenon of global legal pluralism considered in this work. The opposite is true every time a legal method or solution derived from one context may be invoked by a legal subject in another context. Different scenarios may be envisaged in this regard (A) which do not all share the same legal implications (B).

A – Cases of enforceability in the triple national, international or European context

For the purposes of this analysis, three scenarios may be distinguished according to whether enforceability is at issue in a situation involving the relationship between international law and national law (a), European law and national law (b) or international law and European law (c).

a – *Enforceability and the relationship between international law and national law*

If we consider, to start with, the relationship between the international and national legal contexts, we observe that the question of enforceability has mainly

[50] See the first decision delivered in this regard: CJEC, 8 April 1976, Defrenne, case 43/75.

been addressed from the perspective of the incorporation of instruments of international law into domestic law, particularly international treaties. The most frequently invoked scenario is that of the reliance of a private law subject on an international convention before a national administrative or judicial authority. The claimant pleas international law in an attempt to alter a decision-making process normally governed by the provisions of the domestic law that applies.

Several examples exist, the most studied in the French context being that of the enforceability of the New York Convention on the rights of the child (UN, 1989).[51] The possibility for a party to invoke the New York Convention on the rights of the child for his own benefit is the subject of abundant case law notably on the part of the two superior courts in administrative and judicial matters. Although the present positions of the Council of State[52] and of the Court of Cassation[53] now converge in the sense that certain provisions of the instrument do apply, this was not always the case. The courts remain hesitant, for the present, concerning certain articles. For each provision of the Convention, a distinction must be made between purely declaratory formulations which may not be used to obtain a particular result and those which, on the contrary, may be enforced in the national context. For example, Article 3-1 of the Convention[54] has been recognised to have direct effect, in contrast to Article 24.[55]

Is the reverse of this first scenario of the enforceability of international law by a domestic court true? Can national law be invoked before an international court? Although considered much less frequently, this question is answered in the affirmative. The taking into account, by an international court, of the existence of national measures for the execution of an international obligation offers an illustration.

The most common case is that of a State that invokes the provisions of its national law in order to attempt to demonstrate that it has satisfied its international obligations. In international law, it is accepted that a State is held responsible if it fails to incorporate the execution measures required for the respect and performance of its

[51] See notably on this issue with the numerous cases cited: D. Alland, l'applicabilité directe du droit international considérée du point de vue de l'office du juge, RGDIP 1998, p. 203; P. Courbe, L'application directe de la Convention des Nations unies sur les droits de l'enfant, D. 2006, 1487; B. Bonnet, Le Conseil d'État et la Convention internationale des droits de l'enfant à l'heure du bilan, D. 2010, 1031.

[52] Council of State 10 March 1995, petition n. *141083*.

[53] 1st Civil Chamber, 14 June 2005, appeal n. *04-16942*.

[54] "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

[55] "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services".

international engagements into domestic law.[56] In order to avoid sanction, the State in question may decide to invoke the provisions of its own national law for its own benefit to demonstrate that the international engagements have been respected. The question of whether national law may be invoked in an international context may be the object of a legal discussion on the ability of national law to satisfy international requirements. The nature of this type of discussion can vary widely within one international court. This is the case, in particular, of the examinations into the conformity of national law with the law of the World Trade Organisation (WTO) carried out by the Dispute Settlement Body panels and the Appellate Body that prepare the decisions delivered by the Dispute Settlement Body. Depending on the nature of the case, the WTO bodies pursue either a general and abstract examination of the national law, contenting itself with verifying the existence of such law, or an examination of the concrete effects of the application of the national law.[57]

In another, very specific, case, national law is invoked before an international court in order to demonstrate the existence of a rule of international customary law. When examining the existence of rules of international customary law, the international lawyer scrutinises the practices of all actors involved, including States when they formulate solutions at their own level and when these are capable of having an impact on international situations. This method of analysis has been announced many times by the International Court of Justice.[58] A recent decision illustrates this practice.[59] On the issue of whether States, by virtue of a rule of international customary law, enjoyed jurisdictional immunity and immunity from execution in respect of actions for compensation taken against them for damage caused in wartime by their armed forces outside national territory, including in cases of grave violations (massacres), the ICJ had recourse to a comparative legal analysis. The international Court reviewed various national legislative and judicial solutions and concluded its comparative analysis by holding, notably, "that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict" (§. 78) and that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights

[56] PCIJ, opinion of 21 Feb. 1925 on the Exchange of Turkish and Greek populations, series B, n. 10, p. 20.

[57] See, notably, on this topic, the explanations and illustrations offered by: Y. Nouvel, Aspects généraux de la conformité du droit interne au droit de l'OMC, AFDI 2002, 657, in partic., 670.

[58] See the frequently cited statement: "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them" (ICJ, 3 June 1985, Continental Shelf Libyan Arab Jamahiriya/Malta, § 27).

[59] ICJ, 3 Feb. 2012, Jurisdictional Immunities of the State - Germany v. Italy; Greece (intervening).

law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case" (§. 91).

b – *Enforceability and the relationship between European law and national law*

The question of enforceability may also be raised in relation to European law and national law. The most frequently studied case is that of the enforceability of different sources of European law before national courts. Whether European treaties (for example, the TEU or TFEU or the ECHR) or secondary law (notably EU regulations and directives) are concerned, great attention is paid to the ability of the subjects of national law to invoke European provisions in cases against, for example, national authorities or cases between individuals.

The most emblematic case of this enforceability concerns directives that have not been transposed or have been incorrectly transposed. Directives occupy a unique place in the legal order of the European Union. European norms in their own right, they have an obligatory effect. Member States are obliged to transpose them into their national law and a large number of their provisions formulate clear, precise and unconditional legal rules. However, in contrast to regulations, decisions and treaties, Directives never have an immediate effect. The Treaty on the Functioning of the European Union expresses this very clearly: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods" (Article 288 TFEU). The operation of transposition does not pose any problem when the directive has been correctly inserted into national law. In the contrary case, the reconciliation of a directive with an incompatible rule of national law (be it lacunary or otherwise) raises the issue of the enforceability of European law in national law. The binding character of directives requires that they be recognised as effective to a certain degree. However, their lack of immediate effect militates in favour of a certain limit on this effectiveness, particularly in the case of a conflict with a provision of national law. European case law, scrupulously respecting the letter and spirit of the treaty, is careful to highlight this particular feature of directives, especially when compared to regulations. Contrary to the latter, directives do not derive any direct effect from the treaty in principle: they may not be directly invoked except where they are clear and precise and after the period for their transposition has expired.[60] Moreover, their direct effect has

[60] See notably, the ever-cited decision: CJEC, 4 Dec. 1974, Van Duyn, case 41/74.

been, until now, limited by the important distinction between regulations and directives established by the treaties. Any individual may invoke a directive that satisfies the three conditions of direct applicability in his or her relations with the State (or a dismembered entity), either to avoid a contrary national legal solution, or, where the case may be, to have the solution apply to him or her. Conversely, a directive cannot, in cases between citizens themselves, apply fully in place of an incompatible provision of national law.[61] This is not to say that directives cannot be invoked in any cases between citizens. The duty of the domestic judge to apply national law "in light of" (principle of interpretation in conformity) EU law can result in provisions contained in directives having an important effect in the context of a private legal action.[62] Similarly, it is not unusual for a general principle of EU law to be implied into a directive.[63]

The reverse scenario of the enforceability of national law by a European court also exists. In addition to the related situation described earlier regarding the relationship between international law and national law, which concerned cases in which national law is invoked by a State desirous of demonstrating that it respects its European engagements, one may imagine the less common case in which national law is invoked because it occupies its own special place in European legal reasoning. The law issuing from national legal traditions has an important position in European law. Solutions from national law are frequently invoked before the Court of Justice of the European Union or the European Court of Human Rights in order to influence the interpretation of European law. The most significant example in EU law concerns the definition of the general principles of EU law. The Court of Justice is often led to compare and contrast the legal traditions of different Member States in order to construct its own general legal principles.[64] Thus, for example, "legitimate expectations", "legal certainty", "proportionality", "the principle of respect for acquired rights", "the general principles of judicial procedure", "the principle of equality" and the "principle of good administration" are all of national origin. It is incontestable that European law has been constructed thanks to the aptitude of parties and judges to invoke general principles from national legal systems.[65] Before the European Court of Human Rights, the same approach motivates the comparison of national laws in the name of a veritable principle of "consensual" interpretation, aimed at confirming or disproving the existence of a European consensus on a given legal question (for example

[61] See, for a particularly explicit reaffirmation of this principle: CJEC, 14 July 1994, Faccini Dori, case C-91/92.

[62] See for example, CJEC, 13 Nov. 1990, Marleasing, case C-331/98.

[63] See in particular, regarding the principle of non-discrimination: CJEC, 22 Nov. 2005, Mangold, case C-144/04; comp. CJEC, 19 Jan. 2010, Kücükdeveci, case C-555/07.

[64] For an early application of this method: CJCE, 12 July 1957, Algera, joint cases 7/56, 3/57 to 7/57.

[65] See notably on this theme: J. Molinier (dir.), Les principes fondateurs de l'Union européenne, PUF, 2005.

the status of illegitimate children, euthanasia, the law applying to homosexual couples, anonymous childbirth etc.). Here also we see that comparative law is invoked to support the formulation of a solution of European law, although judges are not always adept at this exercise.[66]

c – *Enforceability and the relationship between international law and European law*

The third form of enforceability concerns the relationship between international law and European law. International law is frequently invoked in the context of European law. A law may potentially be invoked by any legal actor: domestic legal subjects, international legal subjects or European legal subjects. All sources of international law may potentially be concerned: international customary law, treaties, secondary law. It frequently features in the area of fundamental rights where international human rights instruments are regularly invoked to aid the formulation of solutions of European law (EU or Council of Europe): the UN Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights adopted by the UN General Assembly in 1966, etc. But the enforceability of international law in the European context is sometimes more problematic.

The emblematic case is that of the enforceability of agreements or decisions made within the framework of the World Trade Organisation (WTO) and its dispute settlement body (DSB) being invoked before EU authorities. The rules governing the enforceability of international agreements within the legal system of the European Union derive for the most part from the case law of the Court of Justice.[67] The Court of Justice sometimes refuses to recognise the direct effect of conventions or international decisions binding on the EU. The best-known example is that of agreements concluded within the framework of the World Trade Organisation (WTO) and the decisions of the Dispute Resolution Body (DRB). The Court of Justice does not wish to allow international trade rules to interfere with the legality of European secondary laws or to support legal actions against the EU.[68] This attitude is understandable and is, to tell the truth, fair play, insofar as the same practice is engaged in by several of Europe's commercial partners. The

[66] For a critical analysis of the manner in which the European Court of Human Rights handles comparative arguments, see À propos du dynamisme interprétatif de la Cour européenne des droits de l'homme, JCP G, 2001, I, 335.

[67] See the ever-cited case of CJCE, 12 Dec. 1972, International Fruit Company, cases 21 to 24/72. See also, having recourse to a principle of interpretation in conformity each time an international instrument is not of direct effect: CJEC, 16 June 2003, Cipra, case C-439/01.

[68] See notably: CJEC, 10 Dec. 2002, BAT and others, case C-491/01; on the famous banana case: CJEC, 1 March 2005, Van Parys, case C-377/02; CJEU, 9 Sept. 2008, FIAMM, C-120 and 121/06.

differential treatment given to international norms is nonetheless patent: the EU intends to favour the resolution of disputes with third party States by the Dispute Resolution Body but also aims to protect its own internal legal system from the potential influences of global trade rules by considerably restricting the possibility for these to be invoked before European courts.[69]

But other situations can also present themselves, notably in transportation law and environmental law. The Court of Justice has delivered a spectacular decision relating to general international law and to international transportation law and the environment.[70] This case concerned a preliminary reference on validity brought by the High Court of Justice of England and Wales in a case between the Air Transport Association of America, American Airlines Inc., Continental Airlines Inc. and United Airlines Inc. (hereafter referred to together as "ATAA and others") and the Secretary of State for Energy and Climate Change on the question of the validity of the measures adopted by the United Kingdom in implementing a European directive. The theme of the interactions between international law and European law (in this instance, European Union law) is central to this case. It fell to the court to identify, with great precision, "the only principles and provisions of international law, from among those mentioned by the referring court, that can be relied upon, in circumstances such as those of the main proceedings and for the purpose of assessing the validity" of a European Directive.[71] In response to this question, the Court of Justice held that only the following principles could be applied, (limited judicial review for principles of customary law and full judicial review for treaty obligations): "the principle that each State has complete and exclusive sovereignty over its airspace; the principle that no State may validly purport to subject any part of the high seas to its sovereignty; and the principle which guarantees freedom to fly over the high seas and second: Articles 7 and 11(1) and (2)(c) of the Open Skies Agreement (concluded between the European Communities and the United States in 2007 and modified in 2010), and Article 15(3) of that agreement read in conjunction with Articles 2 and 3(4) thereof." (paragraph 111 of the judgment). Conversely, this judicial frame of reference did not include the Chicago Convention on International Civil Aviation (1944), The Kyoto Protocol (1997) to the United Nations Framework Convention on Climate Change or the existence of a rule of international customary law according to

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69 See in particular on these issues, F. Schmied, Les effets des accords de l'OMC dans l'ordre juridique de l'Union européenne et ses États membres, Fondation Varenne, 2012.

70 CJEU, 21 Dec. 2011, ATAA, case C-366/10.

71 Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, judgment, paragraph 111.

which the principle that a ship on the high seas is in subject only to the law of its flag applies by analogy to aircraft flying over the high seas.

The question of enforceability was thus notably discussed in this case in relation to the Open Skies Agreement (above). The classical approach of the Court of Justice is composed of two steps. It gauges, first, the general economy of the international instrument: "Since the Open Skies Agreement establishes certain rules designed to apply directly and immediately to airlines and thereby to confer upon them rights and freedoms which are capable of being relied upon against the parties to that agreement, and the nature and the broad logic of the agreement do not so preclude, the conclusion can be drawn that the Court may assess the validity of an act of European Union law, such as Directive 2008/101, in the light of the provisions of the agreement".[72] It then proceeds, second, to examine "whether the provisions of the Open Skies Agreement that are mentioned by the referring court appear, as regards their content, to be unconditional and sufficiently precise, so as to enable the Court to examine the validity of Directive 2008/101 in the light of those particular provisions".[73] This examination leads the court, notably, to consider that "it must be accepted that Article 11(1) and (2)(c) of the Open Skies Agreement, so far as concerns the obligation to exempt the fuel load of aircraft engaged in international air services between the European Union and the United States from taxes, duties, fees and charges, with the exception of charges based on the cost of the service provided, may be relied upon in the context of the present reference for a preliminary ruling for the purpose of assessing the validity of Directive 2008/101 in the light of that provision".[74]

The reverse case of European law being invoked in an international law context is also possible. Certainly, European law has only a regional dimension. It cannot have equal standing with general international law, notably before international courts such as the International Court of Justice. But the enforceability of European law on the international scene is not merely academic. It arises perfectly commonly every time European law is confronted with the demands of international law. This is the case, for example, of confrontations between European regulations and global free market requirements before the dispute resolution body of the World Trade Organisation. Examples may also be found in recent case law from the International Court of Justice. In the famous "hormone beef" case,[75] European regulations were invoked several times before the WTO dispute resolution body. We know in particular that the European Union had adopted Directive 2003/74/EC of the European Parliament and of the Council of 22

[72] Judgment, paragraph 84.
[73] Judgment, paragraph 85.
[74] Judgment, paragraph 94.
[75] WTO, DS48, European Communities — Measures Concerning Meat and Meat Products (Hormones).

September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stock farming of certain substances having a hormonal or thyrostatic action and of beta-agonists, in order to conform with the recommendations and decisions of the WTO in the case between it and the United States and Canada. The enforceability of European law here allowed the WTO to verify that a measure of European secondary law met the requirements of the WTO and thus could put an end to the counter-measures put in place by the European Union's opponents in the case. Furthermore, the former recently reiterated that, in relation to the latest European measures to be introduced, a specific verification procedure had to be followed by the parties to the conflict.[76]

B – The different meanings of enforceability in the triple national, international or European context

In every legal system, the ability to call for the application of legal methods or solutions can vary widely according to the maker (a) and the object (b) of the plea.

a – *The variable "subject": who invokes the law?*

The different scenarios of enforceability envisaged in the triple national, international and European context implies that a wide range of extremely disparate situations can arise according to the characteristics of the legal subject(s) in question.

We can distinguish, in effect, different categories of legal subjects: subjects of public law and subjects of private law; subjects of domestic law and subjects of international law and, as the case may be, subjects of European law. These two groups are liable to overlap. Subjects of domestic law may also be subjects of public law (a State or a public institution) or private law (a natural person or a private corporation). In the case of subjects of international law and, eventually, of European law, it was long considered that these could not be anything but public law subjects (States, international or European organisations, international or European public institutions, holders of legal personality) but the place of private law actors is becoming more commonly recognised (non-governmental organisations, international or European private companies and natural persons).

The type of subject allows us to distinguish two broad types of enforceability: vertical enforceability (between a public body and a natural person) and horizontal

[76] Procedure established by Article 21.5 of the Understanding on rules and procedures governing the settlement of disputes found in annex 2 to the WTO Agreement). See on this subject and on this case, the explanations of H. Ruiz Fabri and P. Monnier, Chronique de règlement des différends, JDI 2009, spec. 924 *et seq*.

enforceability (between private entities). This distinction is not unique to the theme of global legal pluralism.[77] But it presents particular characteristics in the triple national, international and European context.

First, let us consider the issues relating to vertical enforceability. The term "vertical" is commonly used in relation to enforceability to designate the relationship between a national public institution and one or more subjects of private law. This relationship is of interest to the theme of global legal pluralism and enforceability where the legal subject wishes to use developments in international or European law to influence and sometimes to alter the position of a public institution on a legal issue. The question of whether the law invoked may be relied upon before that public institution can be crucial. It forms part of the strategic tools that the different actors in the case may use to counter or, on the other hand, maintain a public action. In effect, if a legal rule, the existence of which is not contested, cannot be invoked by a party against a State or a public entity, it is not capable of producing the desired legal effect. The examples are legion. Here we will mention two examples, drawn from the enforceability of international or European law by French administrative courts. The first deals with the aforementioned question of whether the New York Convention on the rights of the child may be invoked in French law. The second relates to the possibility for European Union directives to displace domestic provisions when an administrative act is contested (see, the famous "Cohn-Bendit" case[78] which hostile to this possibility and which was abandoned after more than 30 years of resistance by French administrative law judges).[79]

It is also necessary to consider situations of horizontal enforceability. In the international and European context, the term "horizontal" refers to the applicability of international or European law to the relationship between two private law subjects. For example, the question may be posed whether an instrument of international or European law can be applied to a married couple who wish to divorce, to parties to a commercial contract who contest its validity or, more generally, to a private law dispute. This applicability is notably a function of the recognised ability of private persons to invoke

[77] In French law we think, for example, in the case of vertical relationships, of the much-debated question of the enforceability of the Environmental Charter adopted in 2004 and annexed to the French Constitution (see notably on this subject: CE, ass., 3 Oct. 2008, n. 297931, Cne Annecy; Cons. const., 19 June 2008, dec. n. 2008-564 DC; B. Mathieu, "Incertitudes quant à la portée de certains principes inscrits dans la Charte constitutionnelle de l'environnement", La Semaine Juridique éd. G 2009, II 10028). Concerning horizontal relationships, the question has regularly been raised before the Court of Cassation in relation to the validity of private contracts concluded in violation of the rules governing the exercise of regulated activities (for example banking, financial trading, insurance etc. See notably Cour de Cassation, Ass. Plén. 4 March 2005, D. 2005, p. 785 and 836 with the respective analyses of B. Sousi-Roubi and X. Delpech).

[78] Conseil d'État Ass., 22 Dec. 1978, Rec. Lebon, 524.

[79] Conseil d'État Ass., 30 Oct. 2009, Perreux, Req. n. 298348.

a method or solution of international or European law in their relations. The question raises relatively few difficulties where the purpose of the international or European legal instrument in question is to govern private legal relations directly.[80]

The issue is more complex, on the other hand, where the provision of international or European law in question concerns something other than a horizontal private law relationship. Two illustrations can be offered. The first concerns what is generally referred to as "the horizontality of human rights". This expression refers to the aptitude of these rights to be invoked and, where necessary, recognised in the context of private legal relations. A domestic court could thus be led to consider that fundamental rights of an international or European source have been violated by the actions of private persons and that, for this reason, they ought to be recognised at the domestic level, as otherwise the case might lead to prosecution at another, notably European, level, before the ECHR.[81] Domestic courts contribute significantly to the interpretation of fundamental rights recognised on the European level and their interpretations are sometimes very creative and wide-ranging.[82] The second illustration relates to the enforceability of the economic freedom of movement enshrined in EU law in relations between private entities. The intrusion of economic freedoms into horizontal relations is incontestably the result of the extensive case law of the Court of Justice which has regularly pronounced on the impact of European law in cases of horizontal litigation brought before national courts.[83] In all these cases, it came to the court to decide whether the European law of freedom of movement could be invoked before them to change the direction of a case between private entities. At the heart of the discussion, we find the theme of the enforceability of European Union law in private relations.[84]

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[80] For example, a European regulation or an international convention governing questions of law relating to international divorces or governing a particular type of law.

[81] For different examples relating to a clause in a will: ECHR, 13 July, Pla and Puncernau v. Andorra, App. No. 69.498/01, to a rental agreement: ECHR, 19 June 2006, Hutten-Crapska v. Poland, App. No. 35.014/97 or to an employment contract: ECHR 29 February 2000, Fuentes Bobo v. Spain, App. No. 39.293/98.

[82] See, often cited in private law: Cour de Cassation, soc., 12 January 1999, Spileers, pourvoi No. 96-40.755: on the right to respect for one's home; Cour de Cassation, civ. 3rd, 6 March 1996, Office public d'habitations de la Ville de Paris c/ Mme Mel Yedei, pourvoi No. 93-11113: on the right to respect for family life.

[83] For some still-famous cases: CJEC, 12 Dec. 1974, Walrave, case 36/74 concerning discrimination; CJEC, 22 Jan. 1981, Dansk Supermarked, case 58/80 concerning intellectual property; CJEC 15 Dec. 1995, Bosman, case C-415/93 concerning sporting activity; CJEC, 6 June 2000, Angonese, case C-281/98 relating to a private employee recruitment competition; CJEC, 11 Dec. 2007, Viking, case C-438/05 and 18 Dec. 2007, Laval, case C-341/05 in labour law.

[84] For an analysis of this case law and its implications on a theoretical level, see: Sur un sens de la distinction public/privé dans le droit de l'Union européenne, RTDE 2010, 823. See more generally on the impact of European law on private law situations: A. Hartkamp, European Law and National Private Law, Kluwer, 2012.

These two types of enforceability do not cover all of the cases presented previously. Vertical enforceability does not include situations in which domestic law is invoked in the international or European context. As for horizontal enforceability, this generally excludes relations between public actors. In order to attempt to take these phenomena into account, it is necessary to go beyond this categorization based on the "subject" of the enforceability to turn to its object.

b – *The variable "object": what is invoked?*

Enforceability has multiple meanings which vary according to what is invoked, which is to say the result desired by the legal subject. This variability is not unique to relations between national, international and European law. In every legal system, the issue of the gradation of the effects a legal rule is capable of producing is raised. Nonetheless, global legal pluralism casts its own light on this question. In the triple national, international or European context, the object of enforceability is, in effect, subject to two main variables.

The first concerns the choice of vocabulary for approaching questions of the enforceability of international or European law, notably in the national context. The expressions "direct effect", "self-executing" or "immediacy" are commonly employed to describe the ability of international or European law to bestow rights and duties upon individuals. Supranational sources of law are of direct effect, self-executing or of immediate effect insofar as they are binding not only on the States that created them, but also on legal subjects who may invoke them. Although direct effect, self-executing character and immediacy remain useful notions, if only due to their theoretical foundations (who is the law aimed at?), one may observe that they are in competition with the term "enforceability" which, in its different forms, takes into account the variety of legal solutions.

The direct effect, self-executing character or immediate effect of European law was envisaged as early as 1928 by the Permanent Court of International Justice.[85] This was proclaimed very early on to be the cardinal quality of European law, established as such by the treaties[86] or affirmed by case law.[87] The intensity of the direct effect of European law nonetheless varies strongly from one legal system to another, and sometimes even within each system, and from one norm to another. In international law, it is the intention of the signatories to an international treaty that counts. An international instrument has the

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[85] PCIJ, 3 March 1928, Jurisdiction of the Courts of Danzig, series B, n. 15.

[86] For example, Article 1 of the ECHR and Article 288 TFEU.

[87] CJEC, 5 Feb. 1963, Van Gend en Loos, case 26/62.

potential to be of direct effect if the States that ratified it intended to adopt clear, precise and unconditional provisions creating rights and duties for individuals. Most often, State signatories retain control over the definition of this direct effect. It is often for domestic courts to evaluate the situation case-by-case.[88] In European Union law and the law of the European Convention for the Protection of Human Rights and Fundamental Freedoms the solutions are better supported. The presence of two European courts (ECHR and ECJ) and the level of integration achieved by the EU and the ECPHFF easily explain this. There is abundant case law on the question that has been taken up by national courts.[89] But the solutions are not always uniform. Divergences in interpretation remain between the European context and the national context.[90]

Assuming that these divergences can be overcome, the terms "direct effect", "self-executing" or "immediate" present another disadvantage. They are not always precisely defined. Very often, the lawyer who uses them is obliged to specify whether he has in mind a vertical or horizontal effect[91] or a partial or total effect. To remedy this situation, European legal scholars have drawn on the case law of the Court of Justice to graduate direct effect by distinguishing different forms of enforceability.[92] Thus may be distinguished: 1° exclusion, which allows for the avoidance, or disapplication, of a domestic law that would be contrary to a European law of any type: primary law/secondary law, with direct effect or without;[93] 2° compensation, which allows the State to be held responsible in tort for failing to meet its European obligations;[94] 3° substitution, which involves the direct application of the European law by its pure and simple substitution for the contrary national law;[95] 4° interpretation in conformity, which demands, insofar as possible, an interpretation of the non-European norm (domestic or international) that conforms as closely as possible with European law.[96] All these distinctions drawn from European law may be extended without problem to international law where it is able

[88] See, as an example, the French judicial interpretation of the New York Convention on the rights of the child in France, *supra*; compare on the subject of the ILO conventions: Conseil d'État, ass., 11 April 2012, Req. n. 322326, Gisti.

[89] For a synthetic approach to direct effect within the EU and COE, see BERGÉ, J.-S; ROBIN-OLIVIER, S. *Droit européen*. Union européenne – Conseil de l'Europe. 2. ed. Paris: PUF, 2011. n. 432 and 462 *et seq*.

[90] For a famous illustration from French law, see *supra*.

[91] On this distinction, see *supra*.

[92] See in particular the work of (SIMON, D. *Le système juridique communautaire*. 3. ed. Paris: PUF, 2001. esp. n. 342 *et seq*.).

[93] For one of the first judgments: CJEC, 13 July 1972, Commission v. Italy, case 48/71.

[94] CJEC, 19 November 1991, Francovich, cases C-6/90 and C-9/90; CJEC, 5 March 1996, Brasserie du Pêcheur and Factortame III, cases C-46/93 and C-48/93.

[95] See the landmark decision in CJEC, 9 March 1978, Simmenthal, case 106/77.

[96] See in particular: CJEC, 13 Nov. 1990, Marleasing, case C-106/89; CJCE, 16 June 2003, Cipra, case C-439/01.

to offer an equivalent level of uniformity of legal solutions. But very often, national particularities triumph.

The second variable relates to the nature of the effect sought by enforcement. Schematically, we may consider that in a multilevel approach to law, the act of invoking a legal method or solution developed in another context (national, international or European) may take three different forms. The enforceability of a norm may, first, proceed from a purely optional attitude in the sense that no legal actor is obliged to take it into account. The law invoked produces, in its strongest form, a simple "factual effect". Conversely, the law may be invoked because it has a truly mandatory character in a given situation. Finally, the third case, closer to the second than to the first, the law may be invoked because it alters the legal situation of the opposing party who, without being the immediate addressee of the law, must take it into account. We may then speak of an opposable effect.

The invocation of a legal method or solution in a context other than that in which it was formulated is capable of producing a "factual effect" wherever it does not constitute binding law. Three, very distinct, examples may be envisaged. The act of invoking ECHR case law before a non-European court, in order to influence the course of national decision-making, may produce a factual effect. The piece of European case law invoked is not legally binding on the foreign court. But the latter may be led to take it into account as a legal fact.[97]

The second illustration relates to the enforceability of a provision of international law not vested with direct effect in national law. In this situation, the international law provision cannot be invoked by a party to produce a binding legal effect. Despite this, it may be invoked to produce a factual effect.[98]

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[97] See, for a remarkable illustration, the decision of the United States Supreme Court delivered in the case of Lawrence v. Texas (02-102) 539 US 558 (2003) relating to the criminal prohibition of certain sexual practices; for an analysis of the context and the controversies raised by the borrowing of European law by the American Supreme Court: CANIVET, G. Les influences croisées entre juridictions nationales et internationals. Eloge de la «bénévolance» des juges. *Revue des sciences criminelles et de droit pénal comparé*, Paris, n. 4, p. 799-817, 2005; see also the in-depth study of (BISMUTH, R. L'utilisation de sources de droit étrangères dans la jurisprudence de la Cour suprême des Etats-Unis. *Revue Internationale de Droit Comparé*, Lyon, v. 62, n. 1, p. 105-133, 2010.

[98] For a remarkable illustration in French case law relating to a United Nations resolution: Civ. 1st, 25 April 2006, appeal n. 02-17344: "Held that although the resolutions of the United Nations Security Council are binding on Member States, they do not, in France, have any direct effect insofar as the rules they establish have not been rendered obligatory or transposed into national law; that failing that, they may be taken into consideration by the judge as a legal fact" ("Attendu que si les résolutions du Conseil de Sécurité des Nations Unies s'imposent aux États membres, elles n'ont, en France, pas d'effet direct tant que les prescriptions qu'elles édictent n'ont pas, en droit interne, été rendues obligatoires ou transposées; qu'à défaut, elles peuvent être prises en considération par le juge en tant que fait juridique"), *Revue Critique de Droit International Privé*, v. 96, 2007113 note S. Lemaire.

A final series of illustrations relates to the circumstances in which a provision of national law is invoked before an international or European court in the context of a discussion on the compatibility of the laws under consideration. Very often, national law does not produce a binding effect strictly speaking, or even an opposable effect. But it exists as a fact that must be taken into account at the stage of the application of international and European law in order to produce legal effects.[99]

The distinction between the mandatory effect and the opposable effect is well-known in contract law. It results from the principle of the relative effect of a contract. A contract is binding on the parties and it may, in certain conditions, be enforced against or enforced by a third party. This distinction is commonly used in the law of international or European treaties in which we distinguish the effects of international conventions for the parties that have adopted them from the effects for third parties, whether these be States, international or European organisations or even private persons. In a context of strong global legal pluralism, this distinction is very interesting. It is common, in effect, for an instrument of international or European law to be invoked by persons who are not direct parties to it. This is the case whenever the instrument is invoked by a natural person. But this scenario of opposability may also concern States or third party international organisations. European Union law is conducive to this type of situation.

The *Bogiatzi case*[100] is an illustrative example. What did this case concern? The Court of Justice was called upon to make a preliminary ruling on questions raised by a national court dealing with a civil case taken against an air carrier registered in Luxembourg in relation to an accident that occurred while an inter-European flight was boarding. Two of these questions concerned, first, whether the Warsaw Convention (amended at the Hague in 1955) was one of the norms forming the legal order of the European Union that the Court of Justice was charged with interpreting and, second, whether, in any case, this international instrument could be invoked to complete the regime of civil liability established by a European regulation (Regulation (EC) n. 2027/97/EC, in the version that applied to the facts of the case). To the first question, the Court of Justice replied in the negative, considering that the European Community had not succeeded to the Member States that had signed the instrument in question. On the second question, the

[99] For an analysis of this phenomenon in the context of the WTO, (BHUIYAN, S. *National law in WTO law*: Effectiveness and Good Governance in the World Trading System. Cambridge: Cambridge University Press, 2007. spec. p. 41). On the related question of the "taking into account" of a foreign law of state origin, see the work of (FOHRER-DEDEURWAERDER, E. *La prise en considération des normes* étrangères. Paris: LGDJ, 2008). On the notion of "factual effect" applied to foreign judgments, see (CUNIBERTI, G.; NORMAND, C.; CORNETTE, F. *Droit international de l'exécution*: recouvrement des créances civiles et commerciales. Paris: LGDJ, 2011. spec. p. 36.).

[100] CJEC, 22 Oct. 2009, case C-301/08.

court considered that the Warsaw Convention could be invoked to complete the regime of civil liability defined by the text of European secondary law, which was silent on this point. These two answers are interesting. The first illustrates a well-known line of case law on the mandatory effect of international conventions signed by Member States in the European legal system.[101] The second answer is part of a strong tendency of European law to interact with the sources of international law that surround it through the concept of opposability. The international convention is opposable to the European legal order as soon as the latter chooses to follow the international instrument in its own legal decisions: "(…) it is clear from (…) Regulation No. 2.027/97 (…) that, where the regulation does not preclude the application of the Warsaw Convention in order to raise the level of protection of passengers, that protection involves the regulation and the system established by the convention *being complementary and equivalent* to each other".[102]

Conclusion

In a global context, the rules of the method need to be clarified. Contrary to a popular view, the lawyer cannot do what he likes when he likes in a global context. Plurality of laws provides for demanding tasks for the lawyer who has to explore the complexity of the situation: several national, international and European laws applying to the same situation, and several national, international and European contexts in which these laws may be implemented.

For this purpose, the multidimensional comparison that we described is a necessary step. It allows the lawyer to fully grasp the similarities and differences that characterise the application of the law in contexts that are national and international as well as European. This knowledge is a pre-requisite to convincingly argue for the applicable solution. In particular, besides the direct effect, self-executing or immediacy cases, it is possible to refer to a legal method or solution in a context different from the one in which it was formulated. Even if it does represent binding law, a "factual effect" can be recognised.

Lyon, April 2015.

[101] CJEC, 12 Dec. 1972, cases 21/72 to 24/72, International Fruit Company.

[102] Judgment para. 43, not underlined in the text. For an in-depth analysis of this phenomenon in the area of industrial property, see (DAHMEN, K. Ben. *Interactions du droit international et du droit de l'Union européenne*: expression d'un pluralisme juridique rénové en matière de protection de la propriété industrielle. Paris: Ed. L'Harmattan, 2012. 1.062 p.).

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