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ORDERING PLURALISM

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Abstract
In the traditional legal culture, the expression of “ordering pluralism” is rather unusual. Pluralism implies differences, dispersion and fragmentation, whereas “legal order” leads us to think in terms of a unified structure. From this perspective, a legal order is necessarily unified, hierarchical and almost static. But our legal history has changed and we must rise to the challenge of changing our minds. The world is not static but interactive and rapidly evolving. In Europe, a supranational legal order was established after the end of World War II. In the whole world, the end of Cold War accelerated the so-called globalisation of law. In this new global world, we have to observe the different processes used for ordering pluralism by integrating the plural without reducing it to the identical. Using “ordering”, rather than “ordered” pluralism, because it is a way to stress the processes of integration rather than the results, the movement rather than the model. Looking at these processes, we will identify different degrees of integration, different levels in space, and different speeds in time to analyse the possible answers to a series of questions: *How*? *Where*? *When*? And finally, *what will the future world order look like*? As the states become more and more interdependent, a radical conception of sovereignty seems to pave the way to the great legal disorder; but an absolute universalism may produce the risk of unifying and freezing the world order in a hegemonic way. If we refuse both extremes, we have no choice but to try to reconcile diversity and unity in “ordering pluralism” by imagining a pluralist model.

Keywords
Coordination – Fragmentation – Global Law – Globalisation– Harmonisation – International Law – Margin of appreciation – Pluralism – Regional Law – Speeds of Integration – State Law – Subsidiarity – Transnational Law – Unification – Universalism.

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In traditional legal culture, the expression “ordering pluralism” is rather unusual, in fact it seems to be a kind of monster. Pluralism implies differences, dispersion and fragmentation, whereas “legal order” leads us to think in terms of a unified structure, a structure which is hierarchical and static (or evolving very slowly).

But the world is not static. It is interactive and rapidly evolving, and so we must rise to the challenge of changing our minds as our legal history has changed. It has changed in Europe, where a supranational legal order was established after the end of World War II, and it has changed in the whole world, since the end of the Cold War accelerated the so-called globalisation of law (not only of Human Rights Law but also Trade Law, Labour Law, Environmental Law, Internet law, and many other fields such as Contract Law and Criminal Law).

In this new global world, I propose to observe the different processes for ordering pluralism by integrating the plural without reducing it to the identical. I say “ordering”, rather than “ordered” pluralism to stress the processes of integration rather than the results, the movement rather than the model. To understand these processes, we will try to evaluate different degrees of integration, different levels (in space), and different speeds (in time). In other words, we will analyse the possible answers to three questions: How? Where? and When?

How? The processes of integration among nations and beyond single nations are more or less integrated: the degree of integration depends on whether they provide for coordination, harmonisation or unification.

Where? These processes may organise at a national, regional or global level.

When? There are also different speeds of integration and we have to consider the temporal leads and lags created as integration develops over time.

Then, in conclusion, we will try to imagine the possible results: *what will the future world order look like*?

How?

How do the processes of integration develop? There are three possible answers. Through *coordination*: cross-referencing (imitating foreign law or referencing to decisions handed down by judges in foreign constitutional and international courts), implying very weak integration (as this is still a horizontal and not a binding process); through *harmonization*: by the approximation of different systems, which involves some hierarchy but is incomplete and flexible so that it allows some differences; and through *unification*: the most ambitious process as it transforms the plural into the single, the multiple into the one, by the creation of identical rules.

Coordination

Coordination, in the literal sense, is limited to horizontal interaction, through exchange and cross-referencing between one institution and another. It develops through state actors, such as legislators (the circulation of norms by imitation from one country to another) and judges (the so-called judicial dialogue). As old as this phenomenon may be, it is nowadays boosted by digital technologies, which facilitate access to legal data (national and international), and it is developing as the world is becoming more and more interdependent.

It is developing not only between European States, but even in US Supreme Court case law: two famous cases, *Lawrence v. Texas (03)* and *Roper v. Simmons (05)*, illustrate this practice: in *Lawrence* the Court struck down a state law criminalizing certain forms of homosexual conduct, and it supported its decision in part by referring to a somewhat similar case from the European Court of Human Rights

(*Dudgeon* 1981); in *Roper*, the Court struck down state laws that would have applied the death penalty to sixteen- or seventeen-year-old defendants (convicted of capital murder), and it supported its decision in part by referring to the fact that no other nation applied a death penalty to offenders under the age of 18.

American practice is particularly interesting because it has proved extremely controversial. Both dissenting justices and some commentators have criticized the Justices' practice of referring to foreign legal decisions. Moreover, forty members of Congress have introduced legislation that would severely limit the federal courts' use of foreign law in deciding constitutional issues. Since that time, judges and commentators have engaged in debate. Justice Scalia and Justice Breyer have debated the issue in their opinions and in Universities fora.

Those favouring the foreign-reference practice point to historical precedent. They add that the decisions of foreign courts are not binding and argue that, in an ever more democratic world with ever more independent judicial systems facing ever more similar problems, one nation's judges can and should learn from the experience of others'.

Those who oppose the use of foreign references distinguish historical practice, primarily on the ground that many of the foreign cases referenced come from nations with special jurisprudential ties to the US, namely Britain or the British Commonwealth. They add that nothing prevents an American judge from learning about foreign case law by *reading* the work of others or corresponding with foreign colleagues, but, they say, an opinion's *supporting citation* wrongly smuggles a foreign view of a foreign law into a Constitution that is, and was meant to be, American in meaning and application[1].

However, neither side says much about how the practice of cross-referencing within the US takes place in a broader geographical context. Judges around the world make increasing use of each other's opinions, and in the US Supreme Court the number of cases involving foreign or transnational law has been growing rapidly. In the year between *Lawrence* and *Roper*, the Court considered or referred to foreign law in at least 6 cases, without any adverse comment - 6 out of a total of 79 - it indicates the increasingly routine nature of this practice. The growing number of these ordinary cases suggests a need for American judges to better understand the requirements of law that is not purely domestic.

Furthermore, other horizontal interactions also intervene between non-State actors, including transnational companies, international organizations and even supranational judges, and additionally, there are a wide range of interregional exchanges, such as those between the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ); or between the ECHR and the Inter-American Court of Human Rights (IACHPR).

Even at the global level, the World Trade Organisation does not work in isolation. For example, it integrates certain rules of environmental law. Moreover, the recent debate regarding the WTO's reform shows that the issue of integrating fundamental rights is being raised more and more openly. Their recognition as universal standards could lead the organisation's Dispute Settlement Body to impose social and Human Rights clauses on Member States, allowing us to imagine a future interaction between the WTO and the new Human Rights Council, or between the WTO and the International Labour Organization.

However, such interactions are merely horizontal because the introduction of a vertical element would require the recognition of compulsory or *jus cogens* norms (still under debate), or the use of new concepts, such as global public goods (still at the discussion stage). In the absence of such a hierarchical element, interaction will continue to develop horizontally, even between different

[1] Judge Posner wrote, "To cite foreign law as authority is to flirt with the discredited (…) idea of a universal natural law; or to suppose fantastically that the world's judges constitute a single elite community of wisdom and conscience".

normative levels. See, for example, the dialogue between judges on the death penalty, where we can observe the increasing interaction between national supreme courts (of Canada, South Africa and the US), regional courts (European and inter-American human rights courts) and World bodies (the International Court of Justice and the Human Rights Committees monitoring State compliance with UN Covenants).

Nevertheless, without any hierarchy coordination remains incomplete. It opens legal orders and provides reciprocal information that may facilitate integration, but without any guarantees. On the other hand, introducing vertical unification too rapidly or rigidly runs the risk of rejection, and thus disintegration. That is why the second process is a compromise, partly horizontal and partly vertical.

Harmonisation

This word has musical resonances which recall happy former times when law was associated with song and poetry. But harmonisation is not harmony. The suffix indicates a movement toward harmony, a movement which already includes the goal of an integrated legal order, but yet not a unified one. It does not impose the strict conformity of national rules to international standards. In order to be accepted by different legal systems, it must preserve a certain flexibility, which involves recognising a national margin of appreciation. On the one hand, the "national" margin implies a national resistance to integration; on the other hand, the "margin" imposes a limit, a minimum degree of compatibility which preserves some integration.

As you know, this notion is not explicitly present in the European convention on human rights (ECHR), but was introduced by European judges who recognized it very early on as a consequence of the "subsidiarity" principle in cases involving restrictive or even derogatory measures, which were allowed by the Convention when necessary to protect different forms of "public order" (such as security, morals, health, and economic well being).

The ECHR foresaw seems to self-restraint itself, to limit to its own jurisdiction in some areas, particularly where differences between members states are so strong and so deeply linked to national cultures that it may be impossible for international judges to impose the same rule on every state (for example, on issues such as abortion, euthanasia, or wire tapping confronted with the protection of privacy). The legal reasoning was explained by the European judges: they considered that States are, in principle, better placed than international judges to determine the meaning of limitations based on reasons of public order. However, this does not mean that they refuse all control, only that it is limited by the degree of compatibility. In other words, the national margin of appreciation excludes binary reasoning: instead of an obligation of "strict conformity", under which all differences are excluded, the Court limits the obligation to "compatibility", which allows some differences. The margin involves reasoning according to gradation-based logic (fuzzy logic), which accepts incomplete integration.

Nevertheless, not all differences are accepted. Some degree of integration is preserved as the "margin" concept also sets limits which must not be exceeded. For example, abortion may be subject to more or less strict limitations (more in Ireland and Poland, less in France and Germany), but domestic law must effectively implement the right to abortion within the recognized limits (*Tysiac v. Poland*, 2007). Another example: the European judges accept that national systems control wire tapping very differently (by administrative authority, the judiciary, or parliamentary commission), but the European court does not give up its right to review, merely limiting its review according to the threshold of compatibility: if there is no control at all or no democratic control**.**

Moreover, the phenomenon is not limited to European law, since one may observe increasing reference to the doctrine concerning margins in a wide range of contexts, even in trade law or labour law. The national margin shows that it is possible to conceive of harmonisation as a process of ordering the One with respect to the Many, leading to partially distinct legal orders as usually occur in federal systems. Such a graduated approach can be compared with the US Supreme Court method

proposed by Justice Breyer in difficult cases, such as the "review of gun control regulation" (*Heller*, 2008). Instead of presuming either constitutionality or unconstitutionality, he favours an "interest balancing inquiry" and considers deference to legislative appreciation, which is particularly appropriate because "a local legislature has particular knowledge of local problems and insight into appropriate local solutions".

The consequence is that different localities may seek to solve similar problems in different ways. Let me quote Breyer's dissenting opinion: "The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them". This is not so different from the ECHR's consideration that national courts are better situated than European judges to determine the meaning of restrictions based on public order.

The notion of the national margin seems to be the best process for ordering pluralism, but it implies a transfer of power to the judges and then a risk of arbitrariness. Limiting the risk requires more transparency in the legal reasoning: it is necessary to make explicit the criteria which determine the width of the margin and its variations, and to apply the same criteria from one case to another.

Nevertheless, there is something unfinished about this process of approximation between legal systems which remain still different. Is *Unification* more appropriate?

Unification

Since coordination provides only a foretaste, preparing for but not providing integration, and since harmonization has revealed a complexity that may be synonymous with arbitrariness, unification may appear to be the only process of perfect integration. "Perfect" from a formal point of view – excluding local differences – unification makes it possible to imagine the regional or even global legal order in a hierarchical model like traditional national orders. However, from an empirical point of view unification involves such difficulties of implementation that it may be largely ineffective; and from an ethical point of view, its legitimacy is strongly contested.

Even when limited to a region like Europe, unification is not easy to practise: it is sufficient to remember that the European Constitutional Treaty did not explain how the motto "united in its diversity" could work on concrete issues (and it was suppressed by the Lisbon treaty). At the global level it is still more difficult, as legal integration appears to be rejected almost unanimously. Unification is no longer seen as a distant, unreal utopia, but as a nightmare that we fear may be realized in the model of global tyranny imagined by Kant. This fear is all the greater because times have changed since the Age of Enlightenment. In the age of Globalisation, a unique law is possibly becoming reality in the areas that I have cited, such as international criminal justice, international contract law, and internet law.

However, we must separate two processes: unification by transplantation, which is not pluralism; and by hybridization, which may involve pluralism. Transplantation is a unilateral process of unification, by extension or exportation from one system to another, as in the area of trade law, or in other areas such as culture. If the phenomenon were to be generalized, it would involve not only a risk of the hegemonic domination of one system over all the others, but also a lack of any diversity, the forgetting of history and the creativity of peoples.

Hybridization is different: it is a multilateral process. At the regional level I had the opportunity to practise it (with the draft called *Corpus Juris* and the European prosecutor). At the global level, international criminal justice is trying, with more or less success, to create new procedures by crossing different systems, thereby incorporating elements of legal diversity. For example, think of the evolution of criminal procedure from international criminal tribunals (ICTY and ICTR) to the

International Criminal Court (ICC): increasing judicial powers in the preliminary phase, accepting the transmission of a written file to the trial judge, increasing powers of the victim equal accusatorial/inquisitorial hybridisation. Such processes could be called "pluralist", even if they are still limited to western procedures, and not extended to the whole world.

Therefore, the risk of hegemony is still present. So, as every process of integration has positive but also negative effects, we probably need to combine and adapt them at different levels. Let us come to the second question: where do these processes of ordering pluralism develop?

2. Where?

At the national level

In a powerful country like the USA, the right level is the national level. Involving the independence of legislative and judicial powers, the autonomy of the national legal order excludes any hierarchy: even when an international convention is ratified, the American judges generally do not apply it unless the parliament has explicitly incorporated it into domestic law. For example, in the *Medellin case* (2008) about the death penalty, the Supreme Court decided that the constitutional clause regarding the supremacy of treaties does not require Texas to enforce the ICJ judgment ruling that the USA had violated the Vienna convention (but see Breyer's dissenting opinion: "in a world where commerce, trade and travel have become ever more international, that is a step in the wrong direction").

In Europe, the national level is still very important, but with huge differences. Firstly, European International Law reinforces judicial power, as national judges are becoming international judges, in the sense that they may, and must, exclude national law when it is contrary to European Law. Even in the United Kingdom, since the Human Rights Act, the ECHR has now become self executing, particularly on terrorism issues. See, for example, the decisions dealing with the Terrorism Act of 2001 (indefinite detentions, House of Lords, *A (FC) and others* 2004; ECHR, *A and others v. United Kingdom*, ECHR 2009) and the Prevention of Terrorism Act of 2005 (control orders, House of Lords, *AE, AF and AN v. Secretariat of State for the Home Department* 2009); or on the legality of the United Kingdom's domestic orders which implement the Security Council Resolution imposing UN Member States to freeze the assets of persons designated by the relevant Sanctions Committee to be 'associated with' Al-Qaida and the Taliban(the new United Kingdom's Supreme Court held hearings in October 2009).

Secondly, European Law weakens legislative power as it has compulsory effects: in 1990 France was condemned twice by the ECHR for using wire tapping without any legal basis (*Huvig* and *Kruslin* case); a year later, Parliament adopted a new law; in 2008 (*Medvedyev* case) France was condemned for the prosecutor not being independent enough to satisfy the due process principle (ECHR, art. 5). The decision of the "Grand chamber" (on a Government appeal) is still awaited. If a violation is found, the reform that the Government wants (to transfer powers from the investigating judge to the prosecutor) will probably be delayed and revised.

At the regional level

The regional level becomes crucial, particularly in Europe where judicial review by European judges is a reality. The consequence is that European countries must increasingly incorporate European acts and European case law into domestic law. This relationship between Europe and its member states may either be analysed as a future federal system or as anticipating a future world system.

Is Europe producing a federal system? Comparing the European legal system with the US federal system, the issue is still unclear.

On the one hand, the balance of powers between the member states and the Community is as delicate in Europe as in any federal system. In the area of shared competences, Europe is structured by the

subsidiarity principle: whenever states are unable to comply with community objectives, power is transferred to the Community level. Subsidiarity is paired with proportionality: 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. It functions like a dimmer switch: increasing integration if the member states do not attain Union objectives and decreasing it if they do.

On the other hand, there are many differences between the European System and the US federal system. For centuries European states grew independently with their own languages, constitutional organisation (the UK, a federal Germany, a centralised France) and legal systems (common law/civil law). Today, it is true that in some areas the European legal order may appear more deeply unified than the United States' order (see the issue of the death penalty), but in most areas it appears much more complex as it is both bipolar and multipolar.

Bipolarity is symbolised by the coexistence of two European supreme courts: the Strasbourg ECHR (for the big Europe of 47 states: the European Council including Russia and Turkey) and the Luxembourg ECJ (for the European Union 27 members' states): one focuses on Human Rights and the other on the market, even though the European Union has incorporated a Charter on Human Rights and plans to join the European Convention on Human Rights.

Multipolarity is, however, preserved in both areas by different legal techniques: the simpler one is the "opt-out" clause (members' states remain free not to integrate European law in some areas). For example, the Lisbon treaty has made the EU Charter on Human Rights (created by the Nice treaty) binding, but the Charter will not apply everywhere: the UK, Poland and the Czech Republic have obtained the ability to opt out: it seems difficult to allow such extensive pluralism in a federal system.

Is Europe anticipating a global order, acting as a laboratory for globalisation? By its complexity and fragmentation, Europe (including both the European Union and the Council of Europe) is anticipating a global legal world rather than producing a federal system. Observing its successes and failures, it seems clear that the emergence of a transnational legal order implies neither the fusion of national legal systems nor their complete separation, but instead the method that I call "ordering pluralism", because it combines the three processes of coordination, harmonisation and unification, and provides for common principles while preserving national differences.

Europe is perhaps also anticipating a global order with the progressive extension of its jurisdiction (art. 1 ECHR), as could result from *Al Saadoon v. the United Kingdom* about Iraq. Here, the applicants were detained by British forces in Iraq; they first complained to the English courts, and then to the ECHR. They consider that their requested transfer to the Iraqi authorities would violate the United Kingdom's non-refoulement obligations (art. 2 ECHR) as there was a serious risk of the death penalty. The first issue was whether the ECHR applies extraterritorially and the Court found that the applicants were within the United Kingdom's jurisdiction, and declared the application admissible (June 2009). There is extension (compare the *Bankovic* case, 2001), but it is not unlimited as the argument was not that the United Kingdom exercised control over a territory or a wider geographical area, but over *a place*: the place of detention in which the applicants were kept.

At the global level

The problem at the global level is that it does not reproduce exactly the same conditions as in Europe, since national interests conflict much more and international review is much weaker, particularly in the Human Rights area governed by the UDHR, which is split into two UN covenants, and there is no judicial review of their application. Nevertheless, the global level is the right level for solving a series of global issues, even if global implementation requires a kind of national margin of appreciation.

Amongst global issues, transnational private law has emerged in a variety of areas, such as the new *lex mercatoria*, international finance, internet banking law, and the law of cyberspace. But the most visible trend in transnational substantive law has been the emergence of what Harold Koh calls transnational public law: "the law of global governance, the law of transnational crime, the law of transnational injury and redress, the law of regulation of transnational markets, and the law of transnational dispute resolution"[2].

The consequence is sometimes surprising: regulations on greenhouse gases were adopted first at the global level (the UN Convention on Climate Change and the Kyoto Protocol), then at the European and national level; and crimes against humanity first appeared in the International Tribunal statutes and there is already a world Prosecutor (ICC Statute) but not yet a European Prosecutor. But global implementation is still complex and a margin of appreciation seems necessary at both national and regional levels.

A national margin: this is the meaning of the complementarity principle (art. 17 ICC Statute: a case is admissible at the global level only if the State which has jurisdiction over it is "unwilling or unable genuinely to carry out the investigation or prosecution". And it will be up to the ICC to evaluate states' willingness and ability.

And a regional margin: see the ECJ case *Kadi* (2008), about the transposition into the European Union's legal order of the UN Security Council resolutions ordering the freezing of funds for people on the list established by the sanctions Committee of the UNSC (in a rather authoritarian and unilateral way): the regulation was invalidated by the ECJ because it violated fundamental rights within the Community, as if the court was allowing itself to establish a kind of European margin of appreciation.

It is true that the margin of appreciation not only preserves pluralism in space, but there is also a kind of temporal margin, as it seems unrealistic to implement conventions at the same time everywhere (see the Kyoto protocol).

3. When?

Let us come to the last question: when does this process of integration develop? Different processes develop at different speeds and this may produce negative effects (asynchrony) if different areas evolve at different speeds, or positive effects (polychrony) if one area evolves at a different speed.

Asynchrony is a consequence of the fragmentation of international law: it is like a kind of race between different legal areas evolving at different speeds. Here are two examples:

First, in the race between Human Rights Law and Trade Law both processes of internationalisation began at the same time in the period immediately following the Second World War. Free trade was validated by the 1947 General Agreement on Tariffs and Trade (GATT) and the protection of human rights by the 1948 Universal Declaration on Human Rights. The process of integration was slow on both sides. But the creation of WTO in 1994 accelerated the movement in trade law, while the UDHR was weakened by being split into the two binding covenants of 1966, as well as by the lack of genuine judicial review.

A second example is the future race between the WTO and the International Labour Organisation as the implementation of ILO principles is improved ("Decline of Social Justice for a Fair Globalization", ILO, 2008).

[2] H. H. Koh, "Why Transnational Law Matters", *Penn State International Law Review*, Spring 2006, p. 745 s.

Polychrony refers to legal practices allowing states to incorporate international law (in a particular area) at their own pace.

In Europe there are examples of enhanced cooperation. The most famous is the "Schengen area", where some of the member states have agreed to improve free circulation by "doing away with" borders and passports inside, but providing strict control outside. Sometimes presented as a 'multi-speed' technique, this technique (which I have suggested calling polychrony) may contribute to ordering pluralism as a way of enabling the integration process to continue without 'the slowest wagon dictating the speed of the convoy', as former Chancellor Kohl put it. But it works only if there is a mechanism avoiding the "opt-out" practice and providing for a progressive agenda.

Similarly at the global level, some legal areas are evolving at different speeds when necessary due to the variety of national situations. This is the basis for the principle of 'common but differentiated responsibilities' establishing different time tracks but indicating the agenda (the UN Framework Convention on Climate Change, the Kyoto Protocol, and perhaps soon the Copenhagen agreement). The same method was also suggested for the WTO, as a way of allowing developing countries to make commitments and participate in the debate, rather than excluding them because they could not integrate at the same speed.

However, it is not so easy to transform a derogation strategy into an anticipation strategy (we shall see what happens in Copenhagen) as there is still a risk of transforming integration by transnational law into the disintegration of national and international law.

Conclusion

What will the result look like? Traditionally we had the choice between two theoretical models: a sovereignist model (with national legal orders still independent) and a universalist model (with a supranational integrated legal order). When looking at the current legal world, the most obvious result we can observe is neither a mere juxtaposition of national legal orders nor a well-established global legal order, but rather the series of apparently contradictory disorderly processes that we have tried to describe, as integration develops between national, regional and international systems.

To be slightly provocative, I have suggested substituting a cloud metaphor for Kelsen's well-known pyramid metaphor because legal systems are more like clouds than a static pyramid of norms, they seem to be deformed almost as soon as they take shape, before we even have the time to determine their outlines. The "cloud" metaphor seems particularly well suited to European construction, which is continually forming and deforming, but the situation is still more complex at the global level.

As states become more and more interdependent, it seems to me that a radical conception of sovereignty paves the way for greater legal disorder if national legal orders are competing with each over, and the big picture is still changing and evolving like clouds in the sky on a windy day. But an absolute universalism may produce the risk of unifying and freezing the world order in a hegemonic way, like the clouds engraved on the stone steps of the imperial city in Beijing, China.

If we refuse both extremes, we will have no choice but to try to reconcile diversity and unity in "ordering pluralism" by imagining a pluralist model - ordering the clouds.