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Author(s): Jean-Sylvestre Bergé

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### Abstract:

*In a context of global legal pluralism, the application of the law can be analysed at several levels, namely national, international and regional. At each level, legal systems are organized around different normative hierarchies. This raises questions regarding the articulation of these constructions in a multilevel perspective of legal application that is both practical and theoretical. To answer these questions, two approaches are imaginable: a first that studies the application of normative hierarchies, level by level and, beyond that, legal system by legal system; a second that aims to make explicit the interactions that can result from the coexistence of different normative levels. This study favours the second approach while attempting to appreciate the material and formal utility of normative hierarchies each time a jurist questions the application of the law at different levels. Two conclusions can be drawn from this study: there is a plurality of normative hierarchies in a context of global legal pluralism; in a process of multilevel legal application, normative hierarchy coexists with other methods of reasoning.*

## ESSAY

### IMPLEMENTATION OF THE LAW, GLOBAL LEGAL PLURALISM AND HIERARCHY OF NORMS

JEAN-SYLVESTRE BERGÉ\*

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\* Professor at the Université Jean Moulin – Lyon 3, member of the International European and Comparative Law Team (Equipe de droit international européen et comparé (EDIEC)), co-director of the Réseau universitaire européen ELSJ (GDR CNRS): [jean-sylvestre.berge@univ-lyon3.fr](mailto:jean-sylvestre.berge@univ-lyon3.fr) <http://www.universitates.eu/jsberge>.

## 1. Introduction

This study is based on a conference presentation delivered in June 2011 at the Sorbonne, during a half-day of studies organised by the Association Française des lauréats de la Chancellerie des Universités de Paris (ALCUP) on the general topic of 'normative hierarchy'<sup>1</sup>. the study is part of a current research project<sup>2</sup> that aims to render explicit the methods of legal application in a triple national, international and European context. Without calling into question, and without even discussing, the numerous reflections on the methods of production and interpretation of the law at a global scale, such a research project aims to further the questions with which jurists (judges, attorneys, counsel, experts) of domestic, international or European law are frequently confronted at the stage of legal application. The practical perspective of legal application can potentially shed a light on the theoretical questions regarding the different ways a jurist can apprehend the relationships between domestic, regional and international legal systems and the norms contained therein.

In the following study, it is the utility of 'normative hierarchy' type constructions that is discussed at the stage of legal application at a national, international or European level.

## 2. Global legal pluralism and multilevel legal application

### 2.1 Global legal pluralism

Developed by Santi Romano<sup>3</sup> as an instrument to define legal order, legal pluralism has been largely used in legal theory, sociology and anthropology<sup>4</sup> to

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<sup>1</sup> L'ALCUP is presided over by Professor G. Teboul. It's secretary general is L. Soubelet. Professors J. Ghestin, Ph. Jestaz and G. Teboul also participated in this conference. The works of the association are regularly published at L'Harmattan (Paris).

<sup>2</sup> *Le pluralisme juridique mondial appliqué*, (Dalloz, forthcoming 2013) (Méthodes du droit collection).

<sup>3</sup> Santi Romano, *L'ordre juridique*, (P. Gothot and L. François tr., Dalloz 2002 reissue).

<sup>4</sup> For a global approach, along with the numerous bibliographical references, see Verbo, 'Pluralisme juridique' in A.-J. Arnaud (ed.), *Dictionnaire encyclopédique de théorie et sociologie du droit* (2nd edn, LGDJ 1993). See also, more recently, *Cahiers d'Anthropologie du droit, Les pluralismes juridiques*, (Karthala 2003); *Archives de philosophie du droit, Le pluralisme*, (Dalloz 2006). For a renewed analysis of these questions, see, in particular, M. Delmas-Marty, *Ordering*

describe the diversity of legal systems and the connections between them. Legal pluralism, without a doubt, has a more specific significance in the global environment that is both simpler and more modest.<sup>5</sup> Synonymous with internationalisation and regionalisation of the law, global legal pluralism<sup>6</sup> describes, in a context of globalisation of trade, a multiplicity of places of fabrication and application of law that appear outside of the state model. Law is no longer only constructed in the national sphere. As a result of the activity of international and regional (namely European) organisations, these organisations have a state origin (the United Nations, the World Trade Organisation, the International Labour Organisation, the Council of Europe, etc) or a private origin (non-governmental organisations, multinational corporations, trade unions, etc.). The national level, which is not a stranger to certain forms of legal pluralism, does not disappear. Rather, it coexists with models developed at the international and European contexts.

## 2.2 The Application of the law at different levels

The jurist devotes an important part of his work to mastering the application of the law in order to anticipate its effects. Whether he is a legal practitioner or an academic, counselor, litigator or decision maker, the jurist is called upon to create tools to help apply the law.

In a context of global legal pluralism, this application of the law can be imagined at different levels. The expression 'levels of legal application' does not necessarily have a very strong theoretical value. It does not serve to designate a specific 'system' or 'legal order'<sup>7</sup>. In a voluntarily vague way, this concept alludes to the idea that the jurist can be guided in his reflection or practice to apply the law in different legal environments. These environments include the

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*Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (N. Norberg tr., Hart 2009).

<sup>5</sup> On this particular significance, see: M. Delmas-Marty, *Les Forces imaginantes du droit – 1. Le relatif et l'universel* (Seuil 2004) 228.

<sup>6</sup> 'Global Legal Pluralism' has been regularly used since the end of the 1990s by one author: F. Snyder, 'Governing Economic Globalisation: Global Legal Pluralism and European Law', (1999) *Eur. Law Rev.* 334 (for a French version see : (2003) *Droit et Société* 435). This expression has had a certain success in English language legal literature. See: O. Perez, *Ecological Sensitivity and Global Legal Pluralism : Rethinking the Trade and Environment Conflict* (Hart 2004); P. S. Berman, 'Global Legal Pluralism', (2007) *South. Calif. Law Rev.*, 1155; R. Michaels, 'Global Legal Pluralism', (2009) *Annual Review of Law & Social Science* 45.

<sup>7</sup> Regarding the distinction between these two concepts, see, along with the numerous bibliographical references, the synthetic presentation proposed by par P. Deumier in his recent *Introduction générale au droit* (LGDJ 2011), n° 128 and the following numbers.

purely internal State environment, the national level, which includes the local level. This environment can go beyond State borders, either referring to relations between several States, or having a purely transnational dimension; this is the international level. Finally, the legal environment can also have a regional dimension, aimed at a specific region of the globe, such as, for example, the European level.

The objective of a multilevel approach to legal application is to take stock of the facts useful for resolving a case, regardless of whether these facts belong to the national, European or international level. It is up to the jurist to identify the relevant level or levels, that is to say the levels that are most likely to supply the methods and solutions useful for resolving a given case. Is the situation purely internal to a State, belonging *a priori* to the national level? On the contrary, is the situation international, mobilising resources of international law (either private or public) or transnational law? Finally, is the situation regional, subject to, for example, European law (the European Union or the Council of Europe)? The answers to these questions give a first indication as to what we can call the level of reference, or the level at which the case is primarily connected.

Once this first step is completed, the jurist can question the relevance of projecting the case to levels other than that which served as an *a priori* level of reference. Indeed, it is possible that a purely domestic situation may nonetheless be subject to rules elaborated at the international or European level. Similarly, we can imagine that a European or international situation involved the application of national law. Finally, we can imagine that a mainly international case can be transposed at the European level or vice-versa. Certain links between levels are apparent. On the contrary, others may be difficult to identify. To recognize them, one must have the dexterity to project the situation outside of its level of reference.

This identification work is very useful. It allows us to confront methods and solutions drawn from different levels. However, it is insufficient. In the perspective of laying out the facts extracted from their original environment, the jurist that applies the law cannot be satisfied with a down to earth and rudimentary approach that consists in comparing legal norms<sup>8</sup>. The comparison between the potentialities offered by different levels of legal application must also have a dynamic dimension where the work of the person comparing

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<sup>8</sup> Regarding this criticism, essentially formulated in a traditional context of comparing national legal systems, see particularly P. Legrand (ed.), *Comparer les droits, résolument* (Puf 2009). See also, critiquing this approach in terms of gaps between privatists and publicists, M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)* (Economica 2010) 43.

considers not only the applicable sources drawn from different levels (national, international or European), but also the legal environment of these sources. Thus, the application of national, international or European law does not necessarily respond to the same logic, depending on whether it is considered by a national, international or European<sup>9</sup> judge.<sup>10</sup>

### 3. The place of normative hierarchy in a context of legal application at the international or European level

#### 3.1 'Normative hierarchy' type constructions at different levels of legal application

A multilevel legal application that integrates a comparison of the different legal systems present highlights a plurality of 'normative hierarchy' type constructions. Whatever their level- national, international or European, all legal systems rest on a normative structure. State systems coexist with international and European systems. Each system potentially carries its own 'normative hierarchy', even if certain hierarchies are more explicit or elaborate than others. Today, the state systems present the most apparent hierarchies<sup>11</sup>. The phenomenon of normative ranking can also be observed at the international level.<sup>12</sup> The legal system of the European Union and, on a lesser scale that of the Council of Europe, also lend themselves to this type of analysis.<sup>13</sup>

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<sup>9</sup> For examples of legal situations successively submitted to judges belonging to different levels of legal application, see *infra*, § 4.2, the analysis suggested in terms of judicial circulation.

<sup>10</sup> The figure of the judge is the most useful to illustrate the intervention of a legal actor at different levels of national, international or European legal application. However, there it would not be inconvenient to substitute another institutional actor (a legislator or an executive authority) or a non-institutional actor (a jurist used to working in a national, international or European environment).

<sup>11</sup> See, during this conference, the historical presentation of professor Ph. Jestaz highlighting the recent character of 'normative hierarchy' type constructions in state configurations (*Rapport introductif sur la hiérarchie des normes* (L'Harmattan, forthcoming)).

<sup>12</sup> See, on this point, the analysis proposed during this conference by the professor G. Teboul (*A propos d'une règle coutumière internationale méconnue – remarques sur la subordination hiérarchique du droit international conventionnel au droit international coutumier*, L'Harmattan, forthcoming). See also, from the same author, 'Remarques sur le rang hiérarchique des conventions inter-étatiques et du droit international coutumier dans l'ordre juridique international' (2010) J. Droit Int. 705.

<sup>13</sup> On the development of a 'European law' that rests on a normative hierarchy within the European Union and, more modestly, the Council of Europe, see along with the numerous

This overview of different legal systems potentially present at the national, international and European levels demonstrates that, contrary to what one can think, 'normative hierarchy' type constructions are not threatened by the contemporary phenomenon of global legal pluralism. Rather, the opposite appears to be true. The propensity for legal systems to proliferate at different levels of legal application (proliferation of states, and, especially, of international and regional organisations along with the increased propensity of these organisations to apply law) leads to a veritable inflation of normative hierarchies. Thus, a plural reading of the law – or global legal pluralism – is inescapable. That is why it is preferable to speak of normative hierarchies (plural) when discussing multilevel legal application.

### 3.2 Two constants: the ranking of norms corresponds to a withdrawal of the system onto itself and a stigmatisation of the foreign norm

The plurality of legal systems and the resulting plurality of 'normative hierarchies' raise questions as to the operating mode used by these hierarchies at the stage of multilevel legal application. How does the application of normative hierarchy in a context of global legal pluralism manifest itself?

The answer to this question remains sensibly the same, no matter what case is imagined. Indeed, the ranking of norms is almost always translated by a withdrawal of the legal system on to itself, whether the legal system belongs to a national, international or European level. In a pluralist context, normative hierarchy does not appear to be a tool for coordinating legal systems<sup>14</sup>. On the contrary, it appears to be a tool for preserving the system when it is threatened or, more modestly, disturbed by other systems. Normative hierarchy is used to allow one or several fundamental norms from one system or legal solutions external to the legal system to take precedence every time the application of one of those norms or solutions is considered incompatible with the system in question.

To achieve this result, normative hierarchy is used as a tool to stigmatise the 'foreign' methods or solutions that threaten the system that the hierarchy is trying to preserve. Everything functions as if the system was closing in on itself,

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references cited: J.-S. Bergé and S. Robin-Olivier, *Droit européen* (2<sup>nd</sup> edition, PUF 2011) 337.

<sup>14</sup> For an observation of this type about the tools of public international law, see the thesis of L. Gannagé, *La hiérarchie des normes et les méthodes du droit international privé – Etude de droit international privé de la famille* (LGDJ 2001).

distinguishing its 'founding' norms from the norms that are 'fundamentally' foreign.<sup>15</sup>

The most well-known illustration of this phenomenon stems from domestic legal systems, every time that the system tries to make a domestic constitutional norm prevail over a 'foreign' norm, stemming from the international or European (or *a fortiori* another national) level. In France, for example, the ordinary judge and the constitutional judge have rendered judgments on this topic. Using identical formulations, the Conseil d'Etat and the Cour de Cassation both decided that the supremacy conferred upon international commitments by the Constitution (art. 55) does not apply, in the domestic legal order, to sections of the law with a constitutional value. As for the Conseil constitutionnel, it decided, in 2006,<sup>16</sup> following a series of decisions rendered in 2004 that transposing a community directive to domestic law was a constitutional obligation.

Using identical formulas, the Conseil d'Etat<sup>17</sup> and the Cour de Cassation<sup>18</sup> decided that the supremacy conferred to international commitments by the Constitution (Article 55) does not apply, in domestic law, to constitutional provisions<sup>19</sup>. As for the Conseil Constitutionnel, it decided, in 2006,<sup>20</sup> following a series of decisions rendered in 2004,<sup>21</sup> that the transposition into national law of an EU directive is the result of a constitutional requirement. It is then up to the Conseil constitutionnel, seized as provided for in article 61 of the Constitution of a law intended to transpose into national law an EU directive, to ensure compliance with this requirement. However, the control for this purpose is subject to a limit. The transposition of a directive cannot go against a

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<sup>15</sup> An interesting parallel can be made with the questions formulated during this conference by professor J. Ghestin regarding the participation of the contract in the elaboration of superior legal norms external to the French state (*La hiérarchie des normes et le contrat*, (L'Harmattan, forthcoming)) and that which is ours. In both cases, one must question the meaning, the value or the scope of a judicial act (contract, international convention, law, etc) when it is considered external to the system that gave rise to it. This question is interesting to the study of normative hierarchies each time that the judicial act is confronted with a norm considered in it its superior or fundamental dimension.

<sup>16</sup> See, notably, [2006] DC, 2006-540, <http://www.legifrance.gouv.fr/>.

<sup>17</sup> *Sarran et Levacher*, [1998] Cons. d'État, 200286 and 200287, <http://www.legifrance.gouv.fr/>.

<sup>18</sup> *Fraisse*, [2000] Cour de cass., ass. plén., 99-60274, <http://www.legifrance.gouv.fr/>.

<sup>19</sup> 'la suprématie conférée aux engagements internationaux par la Constitution (art. 55) ne s'applique pas, dans l'ordre interne, aux dispositions de valeur constitutionnelle'.

<sup>20</sup> See, notably, [2006] DC 2006-540, <http://www.legifrance.gouv.fr/>.

<sup>21</sup> See, notably, [2004] DC 2004-496, <http://www.legifrance.gouv.fr/>.



rule or principle inherent to the constitutional identity of France, except with the constituent's consent.<sup>22</sup> Thus, the preservation of the national Constitution can lead judges to refuse to apply a international or European standard.

Similar situations can be found in legal systems that formed at the international or European levels. The process is generally as follows. To rule out the possibility for a national standard to challenge the hierarchical structures established at the international or European levels, international and European judges consider that the national law is not legally enforceable. Did the Permanent Court of International Justice (PCIJ) not say, in a now famous decision, that a State cannot plead State its own constitution vis-à-vis another so as to avoid the obligations imposed by international law or treaties?<sup>23</sup> Similarly, has the Court of Justice of the European Union not considered that invoking violations of national constitutional norms cannot affect the validity of a Community measure or its effects on the territory of the State in question,<sup>24</sup> or, more generally, that the use of provisions of domestic law to limit the scope of application of community law cannot be accepted?<sup>25</sup>

The phenomenon is not just marked by a few leading cases that remained famous in the annals of national, international or European law. It is actually quite common. Every time an actor in a legal system, namely an institutional actor (judge, governor, and possibly, legislators) feel a reluctance to apply a method or a legal solution from elsewhere on the (more or less openly admitted) grounds that it does not have a natural place in the hierarchical constructions of the system in which the actor belongs, the actor contributes to a withdrawal of the system on to itself.

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<sup>22</sup> 'la transposition en droit interne d'une directive communautaire résulte d'une exigence constitutionnelle. Il appartient par suite au Conseil constitutionnel, saisi dans les conditions prévues par l'article 61 de la Constitution d'une loi ayant pour objet de transposer en droit interne une directive communautaire, de veiller au respect de cette exigence. Toutefois, le contrôle qu'il exerce à cet effet est soumis à une (...) limite (...). La transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti'.

<sup>23</sup> '(...) un État ne saurait invoquer vis-à-vis d'un autre État sa propre Constitution pour se soustraire aux obligations que lui imposent le droit international ou les traités en vigueur', see *Jurisdiction of the Courts of Danzig*, [1928] PCIJ, Series A/B n° 44.

<sup>24</sup> 'l'invocation d'atteintes à des normes constitutionnelles [nationales] ne saurait affecter la validité d'un acte de la Communauté ou ses effets sur le territoire de l'État en cause', see *International Handelsgesellschaft* (1970) CJEC, 11/70, 1125.

<sup>25</sup> 'le recours à des dispositions d'ordre juridique interne afin de limiter la portée des dispositions communautaires... ne saurait être admis', see *Commission v Grand-Duché* [1996] CJEC, C-473/93, Rec. I-3207.

This type of withdrawal on to itself can lead to practical results which are sometimes debatable. This is the case every time that this attitude reflects a sort of reflex, consisting of excluding, *a priori*, without any necessity, the application of all methods or solutions from outside of the legal system. We can cite two relatively recent examples, of varying importance but that have the advantage of being from two very different legal environments, which suggests the magnitude of the phenomenon. One is based on French jurisprudence which has taken more than twenty years to acquire the effect of justiciability normally produced by the directives of the European Union within the national legal order<sup>26</sup>. The second is the decision of the arbitral tribunal, ICSID (International Centre for Settlement of Investment Disputes), which declined to assess the compatibility of an international treaty with the law of the European Union, notably on the grounds that the latter should be regarded as a mere 'fact' in the international legal order.<sup>27</sup>

Such decisions and the reasoning behind them are probably the result of an analysis of the legal system obsessed with the dualist and monist readings<sup>28</sup> which, though today relativised<sup>29</sup>, are unable to cope with a pluralist approach

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<sup>26</sup> See, for example, in France, the difficulties confronted by the Conseil d'Etat in trying to go back on its jurisprudence ('*Cohn-Bendit*' (CE Ass., 22 déc. 1978, *Rec. Lebon*, 524) refusing to have the European directives produce a substitution effect when it is confronted with an individual administrative act. More than twenty years of jurisprudence needed to go by first. (CE Ass., 30 Oct. 2009, *Perreux* Req.n° 298348, <http://www.legifrance.gouv.fr/>).

<sup>27</sup> Compare with the partial sentence of January 30<sup>th</sup> 2007 in the *Eurotunnel v. France and the United Kingdom*, articulating different national, international and European laws around the question of a legal regime applicable to the relations between parties to a concession contract. On the more general question of the choice of applicable law in this type of case involving different levels of regulation: M. Forteau, 'Forum shopping et fragmentation du droit applicable aux relations internationales - le regard de l'internationaliste publiciste', in M. Forteau, J.-S. Bergé, M. Forteau, M.-L. Niboyet, J.-M. Thouvenin (eds.), *La fragmentation du droit applicable aux relations internationales – Regards croisés des internationalistes privatistes et publicistes* (Pedone 2011) 143. Compare with: Y. Kerbrat (ed.), *Forum Shopping et concurrence des procédures contentieuses internationales* (Bruylant 2011).

<sup>28</sup> For a synthetic presentation of the different dualist and monist theories, see, for example: A. Berramdane, *La hiérarchie des droits – Droits internes et droits européen et international* (L'Harmattan 2002) 17.

<sup>29</sup> M. Virally, *Sur un pont aux ânes : les rapports entre droit international et droits internes* (Mélanges Rolin, Pedone 1964) 488 ; see, more recently, arguing in favour of a dualist reading of the french legal system, generally presented as monist: A. Pellet, 'Vous avez dit 'monisme' ? Quelques banalités de bon sens sur l'impossibilité du prétendu monisme constitutionnel à la française', in *L'architecture du droit. Mélanges en l'honneur de Michel Troper* (Economica 2006), 827 ; M. Troper, 'Le pouvoir constituant et le droit international', *Recueil des cours de l'Académie de droit constitutionnel* (2007), vol. XVI, 357.

to legal systems.<sup>30</sup> In the dualist theories, the phenomenon of the withdrawal of the system is obvious, since it is always up to the jurist to use the resources present in the system to receive (reception theory) law that came from elsewhere. Monism, which claims to melt all systems into one, must also make a choice between a prioritization of internal or international law. The system, even a unitary one, withdraws on to its fundamental norm. Thus the same ordering phenomenon is at work.

No doubt one could do without these frames of reference that register freely the relationship between norms, in addition to the relationship between systems in a ordered representation.<sup>31</sup> This is what we would like to try now; to demonstrate that the 'normative hierarchy' type constructions do not have any real relevance in a context of multilevel legal application.

#### **4. What is the practical value of 'normative hierarchy' type constructions in a context of multilevel legal application?**

##### **4.1 The material approach to normative conflicts and normative hierarchy**

The hierarchy of legal systems has a static dimension in which the relationship of validity between norms rests on the existence of peremptory norms. The jurist must then become interested in the content, the substance of the norms to determine whether or not they are compatible with each other. From this perspective, the hierarchy of norms is used to rank their content. What happens in a context of global legal pluralism in which the jurist is required to conceive of the application of the law at different levels? Do 'hierarchy of norms' type construction have a value which we could refer to as 'material'? Our feeling is that, in a context of global legal pluralism, the material approach of conflicts of norms faces two realities of which the jurist is not always fully aware: the laws designed at different levels are not necessarily focused on the same object and are often complementary in their implementation.

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<sup>30</sup> On this specific point, the very convincing demonstration by D. Boden, *Le pluralisme juridique en droit international privé* (Arch. de Philo du droit 2006) vol. 49, 'Le pluralisme', 275.

<sup>31</sup> For a critical approach of the conception of normative hierarchy, seen as a simple piling up of norms, one on top of the other, in a given legal system, see, along with the works cited, the synthetic analysis by O. Pfersmann, 'Hiérarchie des normes', in D. Alland and S. Rials (eds) *Dictionnaire de la culture juridique* (Puf 2003) 779.

## 4.2 The weak utility of normative hierarchy in the presence of different laws

The jurist is accustomed to a mode of thinking about the law centred around major institutions: people, property, legal obligations, etc. The fact that he was trained primarily within a single level (often national) naturally leads him to consider that these institutions are equivalent at all levels of law. Yet that is not always the case. Indeed, sometimes an institution built in a specific legal level does not obey the same characteristics as those that can be observed on a different level. For every topic, it is thus necessary to determine if the concepts are similar or if they present a particular distinction.

In this regard, a distinction between the ‘sources’ of law and the ‘objects’ of law can help the jurist to conduct his work of confronting the present laws. The term ‘sources of law’ refers to the most commonly accepted hypothesis that the different levels of law are able to supply, like sources or springs, a single legal institution. For example, we can consider that there exists a single legal model of contract, which is supplied by domestic, international and European sources. We can apply the same reasoning to a brand protected by intellectual property rights. The brand is a distinctive sign protected by an exclusive right. Trademark law is particularly subject to three regulatory levels: national<sup>32</sup>, international<sup>33</sup> and European<sup>34</sup>. These different sources feed a single legal subject: the brand seen as a national title of industrial property. There is no difference in the nature of the object apprehended by national, international or European law.

Another example concerns the right to a nationality. Each State is free to define as it sees the conditions for granting, acquiring or losing ‘its’ nationality. No other source is intended to define the existence of a right to nationality in a foreign State. National law, however, coexists with international and European sources. The obligation of States to respect their international and European commitments may, however, sometimes force the State, often in very specific situations (multiple nationality or statelessness, for example), to respect principles and solutions that have been jointly defined. These different international and European sources co-exist with the right of citizenship regulated by each state. In this case, we can say that the same institution of

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<sup>32</sup> For example, in France the *Code de la propriété intellectuelle* (Code of Intellectual Property).

<sup>33</sup> For example, the Paris Convention of 1983 for the Protection of Industrial Property.

<sup>34</sup> For example, la Directive (CE) n° 89/104, December 21<sup>st</sup> 1988, the ‘First directive’, replaced by Directive 2008/95/CE, JO L 299 of November 8<sup>th</sup>, 2008.

national origin (nationality) feeds to other levels of law (international and European) without changing its legal nature.<sup>35</sup>

In another approach, legal institutions analyzed at different levels are not considered to be strictly equivalent. They possess their own foundations so they are not perfectly substitutable or competing. Instead, they have to sustainably co-exist, much like with the different levels of legal application that gave rise to them. There are fewer examples of this type than of the preceding type. Here, the law has reached a level of sophistication that is not always desirable. However, these examples exist and it is important to identify them.

Let us consider again the example of the brand. From our multilevel legal application perspective, the brand is not just a single right fed by several sources. It is also a 'object' of law in the sense that there are potentially as many objects of law as there are the sources of law. For example, the law of the European Union has created a Community (European), single (one way) and unitary (a single legal regime) trade mark, protected throughout the European Union<sup>36</sup>. This right of the Community trade mark does not cause the national, international and European trademark laws to disappear. It adds to them. Economic actors retain the choice to use one tool over another. In a specialized field, we can also consider that there exists the beginning of truly global brands. For example, the protection of the Olympic emblem by the Nairobi Treaty of 1981, which prohibits State Parties to grant a national brand for the Olympic sign, gives a form of international protection for the sign in question. Other examples can be imagined. Can we not consider that there is a difference in kind between the international contract, including one that meets the needs of international trade and the contract under national law? Similarly isn't a contract with a European dimension, distinct from the other two pre-existing forms, emerging? The jurist should at least consider this matter.

Another example can be sought in EU citizenship. The Treaty on the European Union established a European citizenship in addition to the nationality of nationals of Member States. This citizenship does not replace national citizenship (Article 9 TEU). It confers rights of a specifically European dimension: the right to move and to reside freely within the territory of the Member States, the right to vote in and to present oneself as a candidate for the European Parliament and municipal elections, the right to petition the European Parliament, the right to seek recourse to the European Ombudsman,

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<sup>35</sup> See, on the sources of the right to a nationality, P. Lagarde, *La nationalité française* (4<sup>th</sup> ed., Dalloz 2011) Introduction, 13.

<sup>36</sup> Council Regulation (EC) 40/94 on the Community trade mark, replaced by Council Regulation (EC) 207/2009 on the Community trade mark [2009] OJ L78.

etc. (Articles 20 et seq of the TEU). Even if it draws its source from nationality (nationals of Member States are citizens), citizenship forms a separate legal subject from nationality and is intended to interact with it.<sup>37</sup>

In the presence of different legal objects, analysis grids based on a hierarchy of norms are not useful. On the contrary, they often skew analysis. Particularly considering that the constructions of international and European law takes precedence over domestic law, even though those constructions are not necessarily on the same subject, the jurist artificially creates hierarchical relations that have no place in a material perspective.

Let us consider again the above illustrations of brands and citizenship. It is useless to consider, for example, that the Community trade mark takes precedence over national brands, since the system of the Community trade mark has not caused the system of national brands to disappear; rather, it coexists with it. It may, indeed, be possible that the validity of a community trademark be challenged by the prior existence of a national brand competitor or vice versa. There is no hierarchical relationship here between the two objects considered at two different levels.

The same type of reasoning can be applied to European citizenship in dealing with nationality. Indeed, it is not useful to oppose two legal objects by considering, for example, that European citizenship is used by the Court of Justice to settle disputes of nationality<sup>38</sup>. This analysis is simply wrong, since there is no conflict between citizenship and nationality. Instead, the two concepts are complementary; the second (the nationality of a Member State) gives rise to the first (European citizenship).

#### 4.3 The weak utility of normative hierarchy in the presence of complimentary laws

The preceding discussion of the potential coexistence of different legal institutions at the national, international and European levels suggests that the presence of complementary substantive rights is the assumption most

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<sup>37</sup> For a remarkable illustration of this interaction, see CJEU, Case C-135/08 *Rottmann* [2010] ECR I-1449. On the concept of European citizenship, see the very relevant analysis by C. Schönberger, *La citoyenneté européenne en tant que citoyenneté fédérale – Quelques leçons sur la citoyenneté à tirer du fédéralisme comparatif*, *Annuaire 2009 de l'Institut Michel Villey* (Dalloz 2010) 255.

<sup>38</sup> Two cases, in particular, have given rise to this type of analysis: Case C-148/02 *Garcia Avello* [2003] ECR I-11613 ; Case C-353/06 *Grunkin* [2008] ECR I-7639.

frequently encountered by the lawyer who works in a context of global legal pluralism. Countless examples exist, in fact, showing that the phenomenon is widespread. Two such examples will be presented here: the first historical, the second more contemporary.

The first example is taken from the Boll case of the International Court of Justice (ICJ)<sup>39</sup>. In 1958, the ICJ had to render a decision regarding the successful implementation of an international convention on private international law (the 1902 Convention Governing the Guardianship of Infants) in a dispute between the Netherlands and Sweden. The question was mainly whether a State (Sweden) could take an educational measure destined to protect a child whose status fell, according to the Convention, under the jurisdiction of another State (the Netherlands). In considering that Sweden had not violated its international obligations, the International Court of Justice ruled that ‘in spite of their points of contact and in spite, indeed, of the encroachments revealed in practice, the 1902 Convention on the guardianship of infants does not include within its scope the matter of the protection of children and of young persons as understood by the Swedish Law of June 6th, 1924. The 1902 Convention cannot therefore have given rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned, and accordingly the Court does not in the present case find any failure to observe that Convention on the part of Sweden’. The solution adopted by the international court rests on a combination of the two laws, the national law regarding measures to protect minors is considered complementary to the rules of private international law that can designate the law applicable to guardianship.

This historical example of complementarity between the provisions of international and national law can be usefully supplemented by other examples, namely those provided by the jurisprudence of the Court of Justice of the European Union. Indeed, the latter provides many examples of cases that combine national, international and European law. The Bogiatzi case is one such example<sup>40</sup>. In this case, the Court of Justice was asked to respond to questions raised by a national jurisdiction that had to deal with a civil action brought against an airline because of an incident that occurred at the boarding of a intra-European flight. These questions involved three potentially applicable sources of law: 1) the Warsaw Convention for the Unification of Certain Rules for International Carriage by Air (as amended at The Hague in

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<sup>39</sup> Case concerning the application of the convention of 1902 governing the guardianship of infants (*Netherlands v. Sweden*) [1958] ICJ Rep 66.

<sup>40</sup> Case C-301/08, [2009] ECR I-10185.

1955), 2) Regulation (EC) No 2027/97 of the Council of 9 October 1997 on air carrier liability in case of accident (as applicable to the facts of the case), and, 3) the internal rules of procedure allowing the victim to bring an action before a national court. The application of national and European law was not discussed before the Court of Justice. It was nevertheless evident. It is national law and only national law that allows a victim to institute proceeding before a state jurisdiction and to introduce various means for remedy, in appeal and in *cassation*. It is the law of the EU and only the law of the EU that grounded the legal action in tort directed particularly against the airline. However, this application was discussed in the Warsaw Convention which poses a statute of limitations of two years on such an action, the case having been introduced five years after the incident. In deciding that the agreement was ‘binding’ in the context of this case, the Court acknowledged that the outcome of the dispute would result from the combined application of three laws: the national law (which allows the claimant to seize a domestic court), European law (which gives the action its legal basis) and international law (which poses the statute of limitations on such a claim). The legal result thus obtained is the result of cumulative application of three rights, a result that could not have been achieved through the individual application of either one of those three rights. In this sense, it is permissible to speak of material complementarity.

The complementary nature of laws is not limited to a few specific cases, bearers of unexpected encounters between laws designed at different levels. It is also part of the extensive process demonstrating that the laws and legal systems involved often resort to another construction than normative hierarchy to define their relationships. We can refer to this construction as ‘implementation reports’. This term refers to the frequent assumption that the benefits built in different systems, who have to coexist and to be applied with each other, are not intended to exclude each other by a set hierarchy. It is therefore necessary to include their application in a lasting phenomenon of coexistence of norms if one wishes to be able to control all potential effects produced by a combinatorial type process. These effects are not exhausted after the application of one law in the place of another. They are part of the implementation of one law in the place of another<sup>41</sup>. These implementation reports are common in different models of multilevel legal application. Indeed, it is not uncommon to encounter at the international and European levels, sets of rights that are highly specialised, given the principles of specialization and

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<sup>41</sup> See, for a detailed analysis, our study: ‘Le droit à un procès équitable au sens de la coopération judiciaire en matière civile et pénale : l’hypothèse d’un rapport de mise en œuvre’, in F. Sudre et C. Picheral (eds), *Le droit à un procès équitable au sens du droit de l’Union européenne* (Droit et Justice Collection, Némésis-Anthémis 2011).



division of competences that govern international and regional organizations. These special rights coexist with national legal systems that maintain a general vocation, given the fullness of competences generally recognized for states. The coexistence of specialised and generalised laws greatly enhance the implementation reports, whether they be at the national, international or European level.

The preceding developments show that the hierarchy of norms is not the best tool to account for the material confrontation of rights developed at the national, international and European levels. Often, this confrontation is not part of a rivalry between standards with contradictory imperatives. Sometimes different, often complementary, these laws are part of the implementation reports which requires that the lawyer develops the intelligence that allows him to combine, rather than prioritize, the solutions present.

## **5. What is the formal value of 'normative hierarchy' type constructions in a context of multilevel legal application?**

### **5.1 The formal approach to normative conflicts and normative hierarchy**

The hierarchy of legal systems does not only have a static dimension. It also involves what Hans Kelsen called a 'dynamic' dimension<sup>42</sup>. The ratio between the standards of validity here rests on the existence of accreditation standards. The approach is formal. We are interested in the shape of the law, in its envelope, capable of producing a legal effect in a given legal system. Seen in this light, normative hierarchy is useful to prioritise forms and not contents.

What happens in a context of global legal pluralism in which the lawyer is trying to think of law enforcement at different levels? Do 'normative hierarchy' type constructions have a value which we will call here 'formal'?

We feel that, in a context of global legal pluralism, the formal approach of normative conflict faces two interrelated realities of which the jurist is not always fully aware: legal situations subject to different laws are likely to move from one level to another, and the quest by the jurist of the 'best' hierarchy

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<sup>42</sup> 'Un ordre juridique est un système dynamique de normes', H. Kelsen, 'Théorie pure du droit', (H. Thévenaz tr.), (1988) 37 Cahiers de Philosophie, Etre et penser, 2<sup>nd</sup> ed, 122 ; for a synthetic presentation of the author's analyses, see once again M. Troper, *La philosophie du droit* ; E. Millard, *Théorie générale du droit* (Dalloz 2006).

defeats the most predictable solutions, based on a formal hierarchy. Let us examine in turn these two hypotheses.

## 5.2 The relativity of normative hierarchy in the presence of the circulation of legal situations

The term 'circulation of legal situations' is not commonly used by jurists. The term 'movement' is not always included in specialised dictionaries. Here, it receives a relatively precise meaning<sup>43</sup>. Circulation refers to the set of phenomena that allows a situation to produce a legal effect (a 'mandatory' effect, an 'opposable' effect or even a 'factual' effect) in a legal area other than where it originated. The effect of these movements from one normative space to another may be perfectly identical, the legal circulation reproducing, feature by feature, a given legal effect in two distinct environments. However, this effect is often different, the circulation then being only partial, from any other given aspect of the circulating legal situation. The phenomenon is of interest whenever the impact of a situation arising in one legal environment is seen to occur again in another legal environment because of its origin. If the effects are total strangers to each other or are purely fortuitous<sup>44</sup>, it is no longer useful to talk about circulation.

Considered as part of multilevel (national, international and European) legal application, the circulation of legal situations has, as a principal vector, the mode of intervention of international and regional courts which co-exist with national courts. Indeed, the circulation of legal situations is part of the very process of access to most supranational courts, which is dominated by the principle of exhaustion of domestic remedies. Thus, as an author noted<sup>45</sup> regarding an action in diplomatic protection by a State after exhaustion of

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<sup>43</sup> The expression is, for example, absent from the *Dictionnaire de la globalisation*, A.-J. Arnaud (ed.) (LGDJ 2010) and though the term 'circulation' appears in *Vocabulaire juridique*, G. Comu (ed) (8<sup>th</sup> ed., Puf 2007), the definitions proposed do not coincide with those presented here. We prefer the terms 'échanges' (exchanges), 'd'influences croisées' (crossed influences) or 'cross-fertilization' (see, on this topic, S. Robin-Olivier et D. Fasquelle (eds.), *Les échanges entre les droits, l'expérience communautaire : une lecture des phénomènes de régionalisation et de mondialisation du droit* (Bruylant 2008).

<sup>44</sup> For a stigmatisation of the fortuitous character of the phenomenon of nesting of legal orders in certain situations: P. Brunet, 'L'articulation des normes – Analyse critique du pluralisme ordonné', in J.-B. Auby (ed), *L'influence du droit européen sur les catégories du droit public* (Dalloz 2010) 195, 200.

<sup>45</sup> M. Forteau, 'Le juge CIRDI envisagé du point de vue de son office: juge interne, juge international, ou l'un et l'autre à la fois?' in *Liber amicorum Jean-Pierre Cot: Le procès international* (Bruylant 2009) 101.

domestic remedies, the domestic and international judge are reputed to judge the same claim.<sup>46</sup> This circulation can also be seen in Europe. The preliminary ruling procedure before the Court of Justice of the European Union allows for movement from one legal situation to another. This is also the case for a motion brought before the European Court of Human Rights.

The fact that a legal situation can be successively examined at different levels has an impact on normative hierarchies. This circulation considerably relativises the scope given by each system to 'its own' normative hierarchy. So long as the situations were enclosed within a single level system, the normative hierarchy that carries a system can be of a potentially absolute effectiveness. The norms applied within a system are entitled by a superior norm within the system, the reasoning happening within a vacuum. So long as one situation can be subjected to various legal viewpoints, at different levels, there is a possibility to see a different normative hierarchy, that of another legal system, for a same situation. This legal pluralism has the effect of considerably relativising the hierarchical constructions present at different levels.

Let's take, for example, the case of freedom of association which is recognized as a fundamental right at different levels. In France, it has a constitutional value (paragraph 6 of the preamble of 1946). It is inscribed in international (for example, ILO Convention no 87) and European (CPHRFF, art. 11) treaties. Its application can be discussed before national and European jurisdictions. That is how legal situations that are objects of domestic courts have been brought before European jurisdictions with regards to the objectives of free circulation defined by the European Union<sup>47</sup> or by objectives of protection of fundamental rights by the Council of Europe.<sup>48</sup> Each system applies, successively, its own hierarchy. We know, for example, that within the European Union, the Court of justice confers to the freedom to circulate a fundamental value that limits the application of other fundamental rights, namely freedom of association<sup>49</sup>. Indeed, national judges increasingly frequently take charge of this fundamental dimension of global legal pluralism<sup>50</sup>.

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<sup>46</sup> Originally in French: 'le juge interne et le juge international sont réputés connaître de la même réclamation'.

<sup>47</sup> Case C-438/05, *Viking* [2008] ECR I-10779; Case C-341/05, *Laval* [2007] ECR I-11767.

<sup>48</sup> *Demir and Baykara v. Turkey* [2008] CEDH 34503/97.

<sup>49</sup> For a comparative analysis of the jurisprudence of the Court of Justice and the European Court of Human Rights on this topic, see S. Robin-Olivier, *Normative interactions and the Development of Labour Law, A European Perspective*, *Cambridge Yearbook of European Legal studies* (Hart 2009) 377.

<sup>50</sup> On this dimension, see E. Dubout et S. Touzé (eds.), *Les droits fondamentaux: charnières entre*

### 5.3 A strategic search for the 'best' normative hierarchy

The awareness by jurists, especially by those that are invested with a power (legislative, executive or judiciary), of the possibility for a legal situation to circulate potentially from one level to another fuels strategic visions. Indeed, the jurist can be tempted to look for what he considers (justly or not) to be the best normative hierarchy by anticipating, halting or provoking a movement of the legal situation from one level (national, international or European) to another.

This capacity of the jurist to play with the levels present must be clearly accepted as a form of instrumentalisation of normative hierarchies. Behind this instrumentalisation, one cannot prevent oneself from seeing a form of weakening of the formal hierarchy figure, capable of drawing the 'dynamic' of a system. Another concurrent dynamic that rests on legal pluralism (that is to say, for the interest of our topic, on a plurality of normative hierarchies used plurally) sets itself into place.

To illustrate this phenomenon, we shall use a case that attracted a lot of attention in France, regarding the introduction into the French constitution, in 2008 of a constitutionally important question ('question prioritaire de constitutionnalité') (art. 61-1 of the Constitution<sup>51</sup>). In a domestic procedure, a question of jurisdiction was raised before the Cour de cassation, a constitutionally important question in view of its eventual transmittal before the Conseil constitutionnel. The question formulated by the first judge raised the question of compatibility of an article of French law (article 78-2 paragraph 4 of the code of criminal procedure<sup>52</sup>) with the rights and liberties guaranteed by the constitution of the French Republic.<sup>53</sup> Refusing to limit itself to the strict wording of the question asked by the judge, the Cour de cassation used the writings of the claimant to move the discussion from the terrain of the constitutionality of the French law to that of its conformity with European law. To do so, the Court made two leaps in its reasoning. It began by questioning the compatibility of the rule of criminal procedure with an article of the European treaty on the free movement of persons (article 67 FTEU). Then, increasing slightly its generalisation, it asked the sensible question regarding the compatibility of certain rules of procedure relating to the important

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*ordres et systèmes juridiques* (Pedone 2010).

<sup>51</sup> This text is accessible at <http://www.legifrance.gouv.fr/>.

<sup>52</sup> This text is accessible at <http://www.legifrance.gouv.fr/>.

<sup>53</sup> 'les droits et libertés garantis par la Constitution de la République française'.

question of constitutionality (articles 23-2 et 23-5 of the ordinance of November 7<sup>th</sup> 1958, as modified by the organic law of December 2009) with the provisions of the European treaty on a preliminary ruling (article 267 FTEU). On this last question, the Cour de cassation questioned the European compatibility of the French purview that obliges an ordinary judge to first render judgement on constitutional matters when he is seized with a case that also question the conformity of a law to France's international commitments. Once these two steps were completed, the Cour de Cassation decided to suspend judgement and to address to prejudicial questions to the Court of Justice<sup>54</sup>. Without awaiting the Court of Justice's analysis, the French Conseil Constitutionnel<sup>55</sup>, as well as the Conseil d'Etat,<sup>56</sup> evaluated that there was no incompatibility between the organic French law and the European treaties. The court of justice rendered its decision in June 2010.<sup>57</sup> The Court of Justice made an effort to highlight the means for conciliation between European treaties and the margin of manoeuvre recognised in terms of institutional and procedural autonomy, all the while specifying that the French law was contrary to article 67 FTEU. When the proceedings resumed, the Cour de cassation decided not to refer the question of constitutional priority to the Conseil constitutionnel for the reason that only the domestic judge could take the provisional measures that were necessary given the incompatibility of the French penal law with the law of the European Union.<sup>58</sup>

The deliberate choice by the Cour de cassation not to transmit the question of constitutional priority to the Conseil constitutionnel illustrates rather remarkably the manner in which a jurist, here the judge, can want to use what he considers the 'best' normative hierarchy. In the context of this case, two formal hierarchies were at play: A hierarchy created by French law which orders that priority be given to either the procedural treatment of the control of constitutionality over the control of conventionality (articles 23-2 and 23-5 de of the ordinance of November 7<sup>th</sup> 1958 cited above, as modified by the organic law of December 10<sup>th</sup>, 2009) and a hierarchy developed by the Treaty of the European Union that obliges superior national courts to judge and to pose a prejudicial question to the Court of Justice in case of difficulties in applying European law (article 267 TUE). To escape the constraints inherent to the first hierarchical rule, the French judge places himself deliberately under the

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<sup>54</sup> Cassation., QPC, 16 April 2010, n° 10-4001 & 10-40002, <http://www.legifrance.gouv.fr/>.

<sup>55</sup> Decision n° 2010-605, 12 May 2010, <http://www.legifrance.gouv.fr/>.

<sup>56</sup> Conseil d'Etat, 14 mai 2010, Req. n° 312305, <http://www.legifrance.gouv.fr/>.

<sup>57</sup> CJEU, Cases C-188 & 189/10 *Melki & Abdeli* (judgment of 22 June 2010, not yet published).

<sup>58</sup> Cassation., QPC, 29 June 2010, n° 10-40001 & 10-40002, <http://www.legifrance.gouv.fr/>.

second hierarchical rule. The judicial situation submitted to the Cour de cassation in this case is literally delocalised. From the national level, it moves to the European level.

As criticisable as it may be with regards to the means of conciliation possible between two French and European rules of procedure,<sup>59</sup> this attitude draws, from our point of view, the logical consequences of a plurality of judicial systems. A major institutional actor here demonstrates his capacity to use the entirety of tools presented to him by the different systems to select, at a given time, the normative hierarchy under which to place himself. The solutions that result from this are not necessarily contradictory. However, one must accept that they may borrow different paths.

A plurality of legal systems, several normative hierarchies and situations likely to circulate from a national, international or European level to another, such is the environment in which the jurist is sometimes called upon to act.

## 6. Conclusions

There are two conclusions that can be drawn from this paper: normative hierarchies are, potentially, a plural phenomenon in a context of global legal pluralism; in a process of multilevel legal application, they coexist with other forms of legal reasoning.

The first conclusion rests on an observation made on several occasions in this study, according to which a same legal situation can be examined in the context of different legal systems, be they national, international or European. Each legal system potentially carries within it its own normative hierarchy. Thus, the jurist who wishes to consider the situation globally, taking into account all the legal systems potentially relevant to the situation at any given time, must question the existence of a plurality of normative hierarchies. The implication of this conclusion must not, however, be exaggerated. Global legal pluralism does not affect the singular normative hierarchy that we all know within different legal systems, be it in a national, international or European context. It only – though some would consider this to be a lot already – invites us to

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<sup>59</sup> See, amongst other analyses, along with the numerous other references cited: D. Simon, 'Les juges et la priorité de la question prioritaire de constitutionnalité : discordance provisoire ou cacophonie durable ?' [2011] RCDIP 1. See, as a counterpoint, the approach suggested by P. Puig (regarding, namely, the organic law), 'La question de constitutionnalité : prioritaire mais pas première...' [2010] RTD Civ. 66; compare, from the same author: 'Hiérarchie des normes: du système au principe' [2001] RTD Civ. 749.

consider that these systems exist plurally and, consequently, that the normative hierarchies are also plural. Indeed, there are potentially as many normative hierarchies as there are minimally organised normative systems. As soon as the jurist accepts to place himself in a comprehensive perspective where many distinct legal systems (be they at different national, international or European levels) can be asked to consider, at the same moment or at different times, a same legal situation, the jurist must inevitably question the existence of a plurality of normative hierarchies defined by several legal systems.

The second conclusion concerns the coexistence of a plurality of methods to apprehend the phenomenon of global legal pluralism at the stage of multilevel legal application at different national, international and European levels. In a context of global legal pluralism, normative hierarchy does not constitute a good first contact for the jurist. If the jurist buys into a pluralist vision of the law, he must then accept that different systems coexist at different levels. Thus his job will not limit itself to constructing a 'super' normative hierarchy, capable of merging in one system all the hierarchies that exist at various levels. On the contrary, the jurist will compare the systems<sup>60</sup>. If necessary, he will combine them<sup>61</sup>. The ordering of norms shall then intervene, at a different stage of legal reasoning<sup>62</sup>, if there is a need to enclose the solution within a single legal system. Indeed, it is one thing to build the system. It is another to allow the existence of a plurality of systems. The method is not the same. The first (construction of the systems) does not exclude the second (coexistence of the systems) since the construction of the systems is a condition for their coexistence. However, one must recognize that, in a perspective of multilevel legal application, the hierarchy of norms limits rather than gives impulse to a dynamic. Whether he is a judge, attorney, legislator, governor or academic, it is up to the individual jurist to determine, at any given time and for any given result, the intellectual procedure that seems the most appropriate. Normative hierarchy (or normative ranking) is a precious tool, but it is not the only tool. Others exist, namely comparison and combination of norms.<sup>63</sup>

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<sup>60</sup> See *supra*, the developments at § 1.2.

<sup>61</sup> See *supra*, the developments at § 3.3.

<sup>62</sup> See *supra*, the developments at § 4.3.

<sup>63</sup> On these three steps in reasoning, see, regarding the confrontation between private international law and the European law of the common market 'Le droit du marché intérieur et le droit international privé communautaire : de l'incomplétude à la cohérence' in V. Michel (ed.) *Le droit, les institutions et les politiques de l'Union européenne face à l'impératif de cohérence* (Presses universitaires de Strasbourg 2009), 339. See, regarding the more general theme of interactions between international and European law, the annual chronicle published in the *Journal du droit international* (n° 3 of each year, since 2009).