The internationalisation of law: fragmentation or recomposition?

Andrea Bortoluzzi
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The discussion on the internationalisation of law that follows draws its inspiration from a dialogue in the journal Esprit\(^1\) between two of the most learned French jurists with a wide awareness of the issues of the globalisation of law: Mireille Delmas-Marty, who, from 2003 to 2011 held the chair in Comparative Legal Studies and the Internationalisation of Law at the Collège de France, the author of a book “Vers une communauté de valeurs” (Paris, Le Seuil, 2011); and Alain Supiot, Professor at the Collège de France, where he holds the chair in “The Social State and Globalisation: A Legal Analysis of forms of Solidarity”.*

The dialogue is on a burning topical issue, in the light of the increasingly invasive spread of public law in Private Law States, which seems to overlook the international debate on matters of rights and which, even in Italy, emits continuous signals on such matters, above all through the incorporation of European law as a public-law function of the actions of private individuals rather than the pursuit of their primary interests that are protected by individual freedoms.

This also occurs in connection with the exercise of the inherent functions of the legal and financial professions, as has been the case with the very recent Legislative Decree on Competition (Italian Law 124, 4 August 2017).

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* The internationalisation of law

Marty begins the dialogue by defining the issue of the internationalisation of law as a dynamic movement or rather a body of movements fomented by the interactions between international laws (in the plural, due to their fragmentation) and domestic laws unrelated to the traditional concept of international law.

These movements advance not only through the interdependence of States but also their different legal systems, arising from the globalisation of flows and risks as well as the universalisation of values and, therefore, in legal terms of human rights.

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Do the growing frequency and complexity of these interactions indicate a pathology of the legal systems (their deconstruction or deformation), or a transition leading to a metamorphosis through the transformation of the legal order into a new concept?

According to Marty, they may point to the advent of an order that is neither sovereign nor imperialistic, that should be defined as "ordered pluralism", a model that, while respecting the differences, aims to impose order on them to avert chaos.

Supiot attributes a strong heuristic value to the term “internationalisation” that might offer scope for very different phenomena characterising contemporary law.

In a general sense, this points to the return of a normative model that used to represent the world as a body of nation States, each with its own full sovereignty.

Such a representation of the legal order linked with the individual sovereignty of States has never reflected the true situation, as relations between States have always been marked by links of dependency and alliance without losing the original capacity of representation; each national system has always been considered to be a closed system with its own rules, the keystone of which is the sovereignty of the State.

The internationalisation of law points first of all to one observation: that the sovereignty of the State has weakened owing to the impact of supra- or infra-national bodies, whose field of application extends beyond national frontiers.

This observation is based on certain undeniable evidence. First of all, there is evidence relating to the Member States of the European Union or the Council of Europe. The French Court of Cassation, while also dealing with pre-eminently domestic issues, bases its decisions on a broad spectrum of external sources (treaties, charters, directives, conventions). It also relates to poorer countries, whose legislation is placed under the supervision of international organisations, which make their aid conditional on those countries’ adoption of extremely restrictive provisions.
The structural adjustment programmes imposed by the International Monetary Fund are the legal framework for this monitoring of the more disadvantaged countries, the list of which includes some in Southern Europe. More generally, it also relates to recourse to the privatisation of the sources of law, the result of transferring to private bodies the task of drawing up transnational rules: the argument that these are technical matters helps to disguise the fact that the States are abdicating the power of regulation to private interests.

A diagnosis such as this, however, based on the above-mentioned observation, should be qualified as regards its scope. First of all, such an observation is Eurocentric: it cannot be said that the process of weakening State sovereignty in favour of the internationalisation of law is worldwide. Europe differs from States that have a continental dimension such as the United States, Brazil, India, China or Russia, which have not relinquished any of their sovereignty and have not been affected by such internationalisation. It should be pointed out that, at the European level, such a tendency could reach an impasse if a European democracy founded on a political project is not attained, since this would lead to a process of drawing up laws undemocratically.

The dichotomy between the local and the global being a cause of the weakening of State power might in the end be an optical illusion, since it is linked with a typically imperialistic view of relations. If the intention is to tackle the subject of the dialogue, this would entail looking at the future of States in the current context, which goes under the name of globalisation and is a context that places what in reality are very diverse factors under the name of the internationalisation of law:
- on the one hand, the structural and irreversible factors linked with the information technology revolution and the shared exposure of every country to health and climate risks.
- on the other, contingent factors associated with economic and financial deregulation.

A rigorous legal analysis could contribute to distinguishing between these two types of factors and a better understanding of how they combine in practice. It might also point the way to ridding the evils attendant on globalisation through recourse to the path of “mondialisation”: the world is a place that is habitable for humans. Mondialisation is an objective to whose realisation jurists may also contribute, whereas globalisation tends to designate Utopia,
the spontaneous creation of market order in the context of what Hayek calls the “great open society”.

Marty agrees that mondialisation and globalisation are terms that are often confused. Whereas the latter is applicable to products, the former implies the sharing of knowledge and a common understanding, in other words a universalism of values.

The Charter of human rights

One of the effects of the internationalisation of law is the incorporation of human rights into positive law. An inclusion of this kind is generally understood by looking at the system of sources as hierarchically overriding the law of individual States. Doubt is cast, however, on this overarching domination by those who believe that the system of human rights is heavily impregnated with values and principles derived from the Western world, and is therefore not attributable to a genuinely universal matrix of those values and principles. Marty recounts Michel Villey’s vehement criticisms of the claim that human rights have a universal root in the legal context beyond the borders of Italy, and thus the affirmation of a single right implies the negation of other rights from the same matrix, generating injustices, and Jean Carbonnier’s criticism that the proliferation of human rights implies that domestic courts often forget the fundamental rights inherent in an individual system. Criticisms of a universalism of this kind conceived hierarchically as overriding individual national systems have been made by International Conferences, such as the Bangkok Declaration on Asian values. These criticisms were partially mitigated in that Conference by those who, like the Japanese Professor Onuma Yasuaki, while agreeing with the theory of the strong Western impact of rights, had to recognise their universal value in that individual national cultures are subject to change over the course of time. Viewed from this perspective, the universalism of human rights is part of a dynamic process, in other words a process that is neither hierarchical nor immutable, but interactive and evolving.

This, then, is a departure from the view that human rights are hierarchically overarching and an acceptance that they are formed through an interactive process of reciprocal humanisation between different cultures. On this subject, Marty points out that US Supreme Court decisions on the death penalty for juveniles have been profoundly influenced by judgments of
the European Court of Human Rights and certain constitutional principles of African countries, which provoked the outrage of the US Senate.

The universalisation of rights implies a change in their content and functions. In the former case, their content changes according to their development: the move from strongly Western-influenced civil and political rights evolves with the affirmation of economic, social and cultural rights. And the justiciability of social rights is an entirely new phenomenon.

The affirmation of economic, social and cultural rights means that universalism has to be reconciled with diversity, and that the 1948 Universal Declaration of Human Rights has to be read together with the 2005 UNESCO Convention on Cultural Diversity.

The content also evolves with the affirmation of human rights, the rights of humanity, first expressed during the Nuremberg trials of crimes against humanity. This has recently led to the Security Council referring the prosecution of crimes against humanity perpetrated in Libya to the International Criminal Court.

Marty raises the issue of whether the new generation of human rights should be broadened to include the rights of protection of the ecosystem itself, beyond humanity, in the sense of action to be extended from the present to future generations of humanity.

As regards functions: the first function of human rights is to highlight resistance for the purpose of protecting human values that are intrinsic in non-derogable rights (prohibition of torture, slavery and inhuman treatment). The second is to make both States and transnational undertakings responsible. Although there exist a number of institutions and Courts that can pass judgment on individual States for failure to uphold rights, no such recourse exists with regard to transnational undertakings.

The issue of human rights has prompted Supiot to consider the possible routes towards the universalisation of those rights that do not stem from the Western barycentre.

According to Supiot the question does not arise with normative techniques and legislative outcomes, but from a comparison of the various belief
systems, without ignoring the dogma element inherent in all institutional systems.

To explain what is meant by a dogma concept, Supiot refers back to the Vedic tradition and the difference in that belief system that exists between immutable rules and those that may be amended or discarded depending on the circumstances. The former can be labelled as fundamental dogma, founded on a precept that is inviolable because it is inexplicable, one that may be celebrated or shown but that can be neither demonstrated nor modified. It is entirely possible to find dogmas of this kind in our own legal systems, too: there is the German Grundgesetz, for instance, Article 1 of which states that the dignity of the human person is “inviolable”; or “We hold these truths to be self-evident” in the US Declaration of Independence. It would be altogether irrational to deny that these principles are dogmatic in nature.

It is only by first recognising one’s own dogmatic corpus that work on its interpretation can be undertaken conjointly on an equal footing with civilisations based on other belief systems. Not until the dogmas underlying human rights in the West are acknowledged can an interpretation be evolved in a direction that takes account of the contributions of other civilisations. One example of this is the concept of the effective abolition of child labour contained in the ILO Declaration of 1998.

What the Declaration seeks to affirm is the principle that the only legitimate work for minors is school work. But what does this principle signify in environments in which the education of minors may entail their progressive involvement in the agricultural or craft work from which their family derives its living – contexts unknown in a compulsory schooling system?

The issue in such contexts is not to prohibit any productive work, but solely to ban work that simply exploits minors without making any contribution to their education. This is exemplified by Article 15-1 of the African Charter on the Rights and Welfare of the Child, according to which: “Children should be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with their physical, mental, spiritual, moral, or social development.”.

According to Supiot, this formula is undoubtedly more universal than that of the 1998 Declaration.
Sadly, those who drafted the 1998 Declaration simply ignored it.

According to Marty, the idea of contextualisation in the application of human rights and the evolving nature of such rights can be seen in the European Court when, to avoid the uniform application of human rights and the subsidiarity of the international legal framework, the Court resorts to the concept of the “national scope of application”.

As regards the idea of the system of beliefs as being implicit in every legal system, Marty refers to the concept of “sacred”, not “religious”, acknowledging that all systems of representation, including those of a secular nature, contain some mystery and are therefore impossible to prove. That being said, it is not because human rights comprise a hard core of non-derogable rights that they cannot be said to have an evolving nature.

Dogmatism is not immune to dogmatism, hence the risk of fundamentalism if the evolving nature of dogmas is not acknowledged.

Supiot shares Marty’s idea of contextualisation only if a founding principle such as dignity and rules or general principles that are not of the same order and respond only to contingent reasons are not put on the same level.

The territorial circumscription of laws

The internationalisation of law brings the term “space” on to the scene. Up to 1998 “space” in legal vocabulary referred to uninhabitable expanses of land without assignable borders. We talked about maritime, air and interstellar space. But never space in relation to land.

With the introduction of the single market, Europe for the first time made use of the concept of space or area to refer to a legal order detached from all territorial restrictions. And yet the civilising function of the law has always been to help to create, from a space that is unformed and uninhabitable, places that are habitable by human beings.

From Montesquieu to the Japanese lawyer Watsuji Tetsuro, civilising space means dealing with terrestrial measurements and giving them an essence and form as described in the old adage of Roman law “forma dat esse rei”, or, “form gives the essence of matter”.

A habitable world is one where relations between mankind and the land are established by rules that assign to each a liveable area. Our relationship with the land must be considered to be the notion of a being in a place. And this view has dominated European legal thought since Carl Schmitt’s Law of the Land.
The relationship of subject/object, person/thing can take on a different hue in different contexts, such as in Africa, where there is a distinction between village headmanship and mastership of the land. The first expresses a concept of dominance in the relationship between subject and object, and the second a concept of guarantor of the long-term sustainability of relations between human beings and the land. According to Supiot, in our legal systems the State takes the role of master of the land, that is guarantor of its protection against the risks of predation for future generations. This guarantee is undermined with the reappearance of the principle that the laws apply to the people in a space but extending also to the land through the principle of the free movement of goods, as stated by the European Court in the Alfredo Albore judgment of 2000. One implication of deterritorialisation is that work, money and the land itself cease to be meaningful in themselves; they become broadly speculative objects exchanged in markets freed from the protection of States but without being subject to strict international rules. This process naturally leads to the opposite process of reterritorialisation: reaffirmation of identity, xenophobia, construction of walls throughout the territory. According to il Nostro we are living in a state of tension between the two opposites of reterritorialisation and deterritorialisation.

According to Marty, deterritorialisation is caused not only by the law but by practices such as the movement of intangible flows or the propagation of environmental or health risks and, above all, by transnational undertakings. The law does not cause these phenomena but demonstrates its utter powerlessness to regulate them. States try to control the internet but with doubtful effectiveness and the broadly deterritorialised transnational and multinational undertakings have become real challenges for States. Marty gives the example of Chevron v Ecuador, which represents the attempt by the law to provide a territorial and extraterritorial response against environmental damage caused by an oil company in the extraction of oil in Ecuador’s Amazon region. However, the response of territorial law failed. It took ten years to come before an American Court. After a few years, the Court declared it was not competent to rule on the matter and referred the decision to an Ecuador Court (competent by territory), in the belief that such a Court would in fact have jurisdiction in conducting a case against a multinational. Despite the major
difficulties it encountered, the local Court found the oil company guilty in 2011 and ordered it to pay eight billion dollars. The parent company immediately apportioned all liability to the Ecuador subsidiary, counter-attacking by taking the judgment of the local Court to the Court in the Hague, invoking the lack of competence of the Ecuador Court. Further, they referred to the US RICO Act against corruption, and the victims of the environmental disaster thus found themselves accused of corruption in the United States.

If territorial law fails, all that remains is the route of extra-territoriality, which is recourse to the United States’ Alien Tort Statute; this concerns the violation of human rights of a political nature committed abroad by foreigners and which since 1998 has also been applied to businesses on the basis of a 2004 decision of the Supreme Court.

A recent judgment of the Chamber of the Tenth Circuit of New York of the Federal Court of Appeal cast doubts on such an application, ruling that the Alien Tort Statute does not apply to legal entities. We await a decision on this from the Supreme Court. Since neither territorial justice nor extra-territorial justice offers solutions to the problem, Marty asks whether a possible course of action might be to resort to an International Convention that sets the criterion as to the competence of the country of origin and, in the event of a denial of justice, offers the country of establishment the possibility of acting effectively or perhaps resorting to an international court such as the Criminal Court or the Permanent People’s Tribunal based in Bangalore, India.

Europe

According to Marty, looking through the lens of the internationalisation of law, Europe is a laboratory where one can analyse successes and failures.

With regard to successes: human rights, the evolution of civil and political rights and holding States accountable in respect of those rights are successes as even countries that consider themselves to be the home of such rights, such as France and the United Kingdom, can be penalised for failing to respect those rights.

They are also equally accountable given the progress in terms of the indivisibility of laws. Today there is an international instrument that does
away with the divisions between civil, political, economic, social and cultural rights: it is the Charter of Fundamental Rights of the European Union.

Those are the successes, but the failures include the two-speed integration of rights. European integration is very fast in terms of the market but much slower for social rights, which even seem to be regressing. Economic integration is advancing very quickly; it is social integration that is standing still or regressing.

And there is still the ambiguity of common prosecutions. Europe is a two-headed monster: on the one hand, the Europe of the market with the Court of Justice of the European Union and, on the other, the Europe of human rights, with the European Court of Human Rights.

The latter, after the events of 11 September, ruled systematically that, even in the case of terrorism or war, a State must not order or tolerate torture out of respect for the right to equal dignity.

On the European Union side, however, there has been a burgeoning of rules integrating criminal law of EU origin requiring the individual States to prosecute terrorism, together with a whole range of connected offences such as aiding terrorism, defined in an increasingly vague way, as if the objective of security must prevail over that of freedom and justice.

And, while it presses for integration for crimes committed under common law, the European Union holds back on integration for attacks on the financial interests of the Community, which, according to reliable estimates, amount to billions of euros.

This selective resistance to European integration by States demonstrates that the European area or space, understood to be a place of freedom, security and justice, is still far from being homogeneous.

Therefore, Europe proves to be a laboratory that, in a world in turmoil over the internationalisation of law, could identify the conditions enabling the pathologies of the Legal Order to be corrected and thereby encourage its metamorphosis into a pluralistic order.

Comment: the role of the practical jurist in the internationalisation of law.
The Italian examples of the Network Contract and the Simplified Limited Liability Company and with reduced capital. Subsidiarity and internationalisation.

Why have I chosen to discuss these two aspects of the internationalisation of law?
Because jurists in general, and therefore also legal practitioners, are not immune to the internationalisation of laws, because of the point of view of the corpus of their formative elements, because case-law is greatly influenced by the judgments of the International Courts and in particular the European Courts, because regulations are influenced by directives and treaties as well as by principles set by private sources for the formation of the rules and endorsed by transnational case-law, and because doctrine is influenced by studies to which comparative law is applied.

For example, the application of the new rules on Network Contracts or on Simplified Limited Liability Companies or Companies with Reduced Capital, greatly influenced by EU law, tends to favour business start-ups and entrepreneurship by young people. Trying to interpret these rules from an infra-regulatory point of view is reducing their scope, allowing them to stagnate in the system and thus making our legal order less open to the task of forming an ordered pluralism, as stated by Marty in her essay. It means working on the reterritorialisation of law, according to the ideas of Supiot.

Another discussion point concerns specific principles of our Legal Order, for example the “national scope of application”, which must, in the incorporation of international principles, take account of the national political, economic and cultural context of our country, as emphasised in Marty’s essay. In short, neither the legislator, the judge, the academic, nor the legal practitioner has the right to “get out of his own bed and not know how to get back in” as Jean Carbonnier said ironically, when commenting on the practice of the trampling on national laws by universal laws. It is a case of using both the various international and domestic courts and therefore applying them in due proportionality.

Looking at the case of the Simplified Limited Liability Company, I do not think that this balance was established at the legislative stage: encouraging entrepreneurship among young people according to the expectations of the European Union should not necessarily mean having to jeopardise the consolidated and refined procedure that our Legal Order sets out for allowing a company to limit its liability or, on the other hand, preventing such a procedure from violating fundamental rights, such as that of fair remuneration for the work of a professional whose work is caught by the procedure. In this way, the procedure harming a fundamental right has been saved. An example of disordered pluralism, which is continued in the interpretation work: on the one hand, simple reterritorialisation sponsored by
professional lobbies, on the other hand, simple deterritorialisation sponsored by business lobbies, each of which is trying, from different angles, to sabotage the precarious equilibrium on which the disordered pluralism created by the legislative provisions is based. For the moment, case-law remains silent on this topic.

Another example of disordered pluralism is the regulatory upheaval represented by Law 134/2012 governing network contracts. In order to deal with groupings of small and medium-sized enterprises, also favoured by the European Union at the fiscal and contributions level, wishing to reconcile the national context with international principles, the Law in this case also made the national legislator “get out of his own bed” without “knowing how to get back in”. The requirement, even at the national level, to allow small and medium-sized enterprises to achieve competitive size on the international markets, taking into account the rules within the system that already met that need, providing for their integration with soft instruments (mostly regarding associations) and also to favour them with measures of economic and fiscal support, had to contend, firstly, with the great speed of action of the Union in matters of economic integration, ignoring the procedures of our own system in matters of acquiring legal personality or fiscal autonomy, however imperfect. Secondly, having to meet the requirements of a minimum of guarantees against attacks on the Community budget which, although they are not yet in effect, are on the European agenda, adding a minimum level of accountability to the regulatory corpus.

Both these questions, the speed of economic integration and accountability in the European Union are discussed in the essay by Marty. This was how the legislator, with three different measures adopted in the space of one year, created strange monsters, entities without a legal personality but which can have capital, to which the system of consortium fund liability applies, set up with the minimum formal requirement of a simple digital signature (Article 24 CAD), and subject to the preparation of an annual statement of assets and liabilities in accordance with the provisions for the balance sheet of limited companies, with the right to acquire legal personality with the minimum formal requirements of a digitally signed deed (Article 25 CAD). Here the internationalisation of law leads only to chaos and not to ordered pluralism. Pressed by the great speed of economic integration, the national legislator abandons any “national scope of application” by turning his back on the legal economic context and therefore the types, procedures and forms of moral entities that are all part of our legal culture.
While hoping that the panic-button legislator has now come to the end of his burst of productivity, it is the task of those establishing case-law and doctrine and their application to try to find, within the new regulatory corpus, a balanced interpretation between internationalisation and the application of the national scope of application.

To that end, I shall try to put forward a possible way to interpret and apply the new rules on limited liability companies and network contracts. This Commentary on these two topics demonstrates how the internationalisation of law cannot derogate from the Statute of Human Rights and in particular their entry into our jurisprudence. Our legal system, as regards the collective enterprise, is expressed in types, which, through a system of checks and balances, guarantees the equilibrium between those who are involved in the business in various ways (investors, third-party creditors, employees) and therefore the equal valuation of the various social actors involved in the operation of the business. This equilibrium is also guaranteed by the rules as to form, also recognised by Supiot, who ascribes to the process of mondialisation and therefore of humanisation of law, respect for the old Latin adage “forma dat esse rei” (“form gives the essence of matter”). The entire system of national business law, through its continuing development due to the work of interpretation and the jurisprudence, which is also updated following constitutional principles, therefore appears to the writer to respect the Statute of Human Rights.

But are these newly-minted models we have discussed to be interpreted as a sign of internationalisation? In our view, the answer can only be negative. If European law is moving at two speeds, favouring economic integration and putting social integration on the back burner, what is the challenge and duty of an informed jurist? Is it to speed the wheels of the great economic integration project to the detriment of social rights, or to laying greater emphasis in his work on the need for a balance between freedom of economic rights and respect for social rights, and therefore a proper application of the Charter of Fundamental Rights? I think there can be absolutely no doubt that the answer must come down heavily in favour of the second of those options.
Therefore, if the duty of the jurist in these times of the internationalisation of law is as mooted above, then his work to apply and interpret it must be directed beyond merely ensuring legality and that the case complies with the rules. He must also look constantly to the Statute of Human Rights, given its evolution through its application by States, whatever their legal tradition, in the forms of written law, whether codes, acts, jurisprudence or case-laws.

The purpose of consulting the Statute of Human Rights is to ensure legality, which is ensuring compliance of the case not only with his own legal system but also with other legal systems, as preached by Paolo Grossi, who is well qualified to pronounce on this internationalisation of law, being one of our most knowledgeable and informed jurists in navigating, particularly in the historical sense, the vast sea of sources of the law.

Apart from proferring a valid criterion for interpretation to all categories of jurists, judges, academics, practitioners, that appears to be the only way forward for the law to have any hope of dealing successfully with the chaos, this essay highlights the role that law practitioners should take in their respective societies in the era of mondialisation. The much-vaunted subsidiarity of jurists as practitioners in European law is littered with their efforts to interpret how to ensure legality and also, as members of a social middle class, to take on the mantle of guarantor of responsibility for the Statute of Human Rights and to resist whoever holds power on the international scene, thereby meaning States and enterprises, and especially transnational enterprises. In short, the leap to allocate new functions to show that they are meeting a generic demand for national legality by the European Member States, which reduces jurists to mere bureaucrats carrying out functions that already belong to the State, reduces subsidiarity to a means of reterritorialising law and therefore, if seen from the point of view of internationalisation, as Supiot suggests, risks being only a phenomenon, and that is “worrying”.

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