

BERTRAND MATHIEU¹

Redefining the Relationship Between National Law and European Law

- **ABSTRACT:** *Relations between European legal orders and national legal orders present specificities that call into question the principles dictating how states are governed. As the scope of European activities expands, whether it is the European Union or Council of Europe, the potential for conflict is created. In this context, it is important to redefine these relationships and create regulatory mechanisms. This article aims to suggest avenues in this direction.*
- **KEYWORDS:** national law, European law, relationship between national law and European law.

Relations between legal orders, more specifically, between national legal orders and European legal orders – the Council of Europe and European Union – have upset legal mechanisms (the connection between legal norms no longer follow Kelsen’s pyramid) and political systems – the creation of polities that are neither unitary States, federations, nor empires – while borrowing from each of those categories.²

1. Impact of developments in European construction on state structures

Without calling into question the necessity and fruitfulness of European construction, it should be noted that the developments and directions taken by this construction affect the states’ institutional systems. Thus, the notion of democracy is at stake, the organisation of powers is affected by the rise of the judge, and the decision-making ability of national politicians is diminished.

1 Full Professor, Faculty of Law, University of Paris 1 Panthéon-Sorbonne, France; Vice-president, The International Association of Constitutional Law, bertrand.mathieu@univ-paris1.fr.

2 Cf. Bonnet, 2013.



■ 1.1. *Democracy affected by the evolution of European construction*

Liberal democracy has been considerably affected by the evolution of legal orders. First, democracy was born within the framework of state structures to the extent that it can be considered consubstantial with the state.

For its part, the European Union has its own particular characteristics. Originally organised around an essentially economic system, it has gradually extended its competence to issues that traditionally fell within the main core of state sovereignty and constitutional identity, and which are linked to the broad concept of the rule of law of which democracy is but a component. This applies not only to the concept of fundamental rights, but also to the organisation of state power.

The will – and from this viewpoint it does not matter that it has not succeeded – to draw up a Constitution of the European Union; the adoption of a Charter of Fundamental Rights and from another perspective, considerable broadening of the scope of rights protected by the European Convention on Human Rights; and ongoing process of ideological integration have profoundly modified the nature of the European project.

This has resulted in both a gradual submission of States to these logics as well as reactions of defence or closure in the face of encroachments on what constitutes the identity of certain States.

Brexit, the inclusion in the Russian Constitution of the primacy of constitutional rules over those stemming from the case law of the European Court of Human Rights, resistance of certain States to the European Union's migration policy, and use of measures aimed at regulating the power of judges bear witness to this resistance. Regarding national judges, the recourse to the functional notion of national identity as a (often theoretical) limit to European supremacy, and more firmly the recent decision of the German Constitutional Court (5 June 2020) resisting a form of financial integration also testifies to the difficulties in reconciling national sovereignty and European construction. From this perspective, trying to reconcile national sovereignty with European sovereignty is a deadlock, because while competences that touch on matters of sovereignty can be shared, sovereignty itself, by its very nature, cannot.

As a result of these developments, the requirements of the rule of law tend to take precedence over those imposed by the democratic principle.³

■ 1.2. *The judge as an essential actor in the evolution of European construction*

Apart from the substantial implications of this evolution, which explain many of the tensions, the result is a profound change in the mechanisms of the separation of powers. Indeed, democracy implies the primacy of politics, corrected in its liberal version by the judge's control of the conditions in which power is exercised. In reality, the rule of law tends to transfer power from the politician to the judge. There are many reasons for this: fundamental rights law is essentially created by the judge, and this law tends to

3 Cf. Mathieu, 2017.

prevail over any other requirement in all areas of social life and hence, in all branches of law. This development is generally regarded as positive, and overall, it is positive. However, behind this generic term of fundamental rights lies ideological issues that may call into question core elements of certain national identities. Moreover, the upholding of fundamental rights is achieved by balancing different or even opposing rights, which the judge controls using the powerful but sometimes arbitrary tool of the principle of proportionality. What interests us here in particular is the judge who is gradually gaining control of the system's relationships. In the absence of hierarchy or faced with multiple hierarchies, which amounts to the same thing, between norms belonging to several legal systems, the judges regulate system relationships, thereby directly intervening in the field of politics.

Realistically, and briefly, European integration in the system of the European Union and European Convention on Human Rights is the work of courts. These courts have taken upon themselves not only the task of settling disputes, but also effectively legislative and even constitutional work. In this sense, it has been described as jurisdictional federalism.

Judges regulate the relationship between legal systems. This is largely a factor in strengthening judicial power versus political power. The wide range of legal standards, particularly European ones, themselves fairly widely formulated by European courts, provides the national judge with more freedom than constraint. It provides him with the tools to assert his power in the face of political power. In this regard, it is interesting that the conflict between Germany and the European Union over the economic recovery plan is a conflict between the German Constitutional Court and Court of Justice of the European Union, not between political authorities.

Ultimately, only the national judge grants itself the ability to limit the expansion of European power beyond what he considers to exceed its limits, either because the contested decision contradicts requirements that fall within the core of national identity, or because it is seen as exceeding European competences.

The formulation or resolution of conflicts is essentially in the hands of judges, and these are decisions in which political power is largely supplanted by a technocratic power, a form of epistemocracy, that is, power based on the legitimacy of the expert.

■ **1.3. *The structural weakness of national political powers***

Faced with this construction, national political powers are weak and the protection of national identities, which is part of their mission, is difficult to ensure.

The crisis affecting national identities and their relationship with the European identity is first a crisis of political power. In this sense, the lack of citizens' confidence in their political leaders stems from the fact that the reality of power largely escapes those. Financial powers, economic powers, GAFA (which are as much economic powers as they are instruments for the standardisation of values), NGOs, and European structures tend to curb national political powers, which enjoy only marginal action or are given free rein in increasingly few areas (e.g. think of family law or bioethics).

In fact, in many countries, one key factor in the crisis of democracy is the disconnection between a citizen's vote and political decision-making. The real power lies elsewhere.

2. A potentially conflictual situation that calls for the search for solutions

The state of relations between European structures and their constituent nations is at once ill defined, evolving, and a source of conflict.

Beyond attempts to re-establish a pre-established and rigid hierarchy between systems that would lead either to the break-up of European structures or to the submission of States, it is a matter of reflecting on ways of regulating conflicts.

■ 2.1. An observation: the development of conflicts

Between the power of European institutions on one hand and exponential extension of their field of competence and normative system they produce on the other, the weakening of state power, which remains the theoretical framework of democratic political will, gives rise to the significant potential for conflict. From these conflicts, which are not assumed and are poorly resolved by jurisdictional procedures, nothing good can come. Either we will move towards a *de facto* federalism, which in the long term will give rise to revolts by citizens who will become mere spectators, or towards a breakdown of European structures due to the refusal of certain nations to submit and abdicate their sovereignty. In my opinion, the failure of Europe would bring with it many dangers; thus, we more than ever need an economic Europe, a social Europe, a financial Europe, a geopolitical Europe.

It is then necessary to reflect on a transformation of the European formula, which avoids both the negation of national identities and destructive inward-looking attitudes. One fruitful path in my viewpoint is that of the Europe of Nations. However, it is important not to stick to a slogan or cover with this formula some unacknowledged identity-based insularity. We probably need both Europe and Europe, and above all, a different Europe.

■ 2.2. Finding mechanisms of regulation

Within the very limited framework of this intervention, I would like to outline a few leads, which are both partial and too schematic.

2.2.1. Redefining the link between national and European competences

This definition must be the work of politicians. From this viewpoint and to the judges' credit, note that the development of judicial power takes place in the context of a refusal by politicians to exercise their power or inability to reach agreement.

This is a question of clearly determining what competences should be entrusted to European structures and which competences and powers should remain in the

hands of the States. To do this, what belongs to a European identity, which justifies the association of a number of States, and what belongs to national identity must be distinguished.

Reflection must face two directions, namely mapping out both national and European competences more precisely. This is a matter of reflecting on what the Member States intend to pool together. Europe is endowed with an economic and geopolitical purpose; it is less about regulating the daily life of citizens or interfering in the organisation of national powers. Similarly, the European Convention on Human Rights is a common heritage of essential fundamental rights that State Parties have undertaken to respect. It must not be used to impose on States the adoption of rules, values, or principles to which they have not subscribed and which result from the judges' conception of an evolution, suitable in their view, of a society without frontiers and roots.

2.2.2. Enforcing the principle of subsidiarity

In addition to this division by areas of competence, the principle of subsidiarity, which is affirmed in particular by the Treaty of Lisbon but also recognised in the framework of the European Convention on Human Rights, must be more rigorously implemented. This principle provides support to States that wish to defend their 'own corner'. However, the division of competences cannot be left solely to the case law of the Court of Justice of the European Union and European Court of Human Rights. Within the latter framework, this implies that an issue must be dealt with at the European level only if constitutional protection proves insufficient. Today, the European Court of Human Rights seems to be moving towards recognising the principle of subsidiarity on certain so-called societal issues,⁴ leaving them to the discretion of the national legislator. However, the assessment of the scope of this principle remains in its hands.

2.2.3. Shifting from an obligation of submission to an obligation of constructive dialogue

A conflict of the kind that has pitted the German Constitutional Court against the Court of Justice of the European Union (see above) is evidence both of the impasse that the requirement of a single vertical relationship between European and national courts constitutes and of the need to find a way to resolve conflicts. Thus, it is conceivable that in terms of the relationship between courts, national courts could re-interrogate European courts when a conflict occurs or is likely to occur. One could also imagine the creation of a kind of Tribunal des Conflits, composed—for problematic cases—of national and European judges to arbitrate conflicts of jurisdiction. This exists in France for conflicts of jurisdiction between the judicial and administrative judge. Some formations would be composed of European judges and judges from the country concerned to adjudicate conflicts regarding a specific State. Other formations could arbitrate conflicts

⁴ For example, in relation to parentage, see the judgments of the European Court of Human Rights in the case of *Ahrens v. Germany* (Application no. 45071/09) and in the case of *Kautzor v. Germany* (Application no. 23338/09).

involving European and national competences in general. This ‘court’ should not constitute a new structure of the Union, but a place for debate, dialogue, and even conflict resolution between judges. This obligation of dialogue would be institutionalised. This form of dialogue is particularly important at a time when the European Union is led to impose on States the respect of criteria related to the rule of law, although these criteria are not predefined except in a general manner. This procedure would also be necessary in the framework of the Council of Europe to avoid or try to avoid conflicts linked to the sometimes very constructive case law of the European Court of Human Rights. However, political authorities should be given the power of the last word in this matter.

These are mere lines of approach to open a debate necessary for a lack of evidence of solutions.

2.2.4. Strengthening the democratic function of the European Parliament

This proposal may seem marginal in view of the issues raised here. However, it appears crucial to create a democratic debate at the European level in the field of competences, which will have been previously redrawn.

Recognising that the Parliament is the democratic body of the European Union, the conditions for a genuine European political debate should be created, not on all subjects, but on matters falling within the competence of the Union. The election of Members of the European Parliament by proportional representation in the national context on issues of national policy falls short of this requirement. The identity of MEPs, their political distribution, and their ‘playing field’ are largely beyond citizens’ understanding. True democratisation of the European Union implies the existence of a political life at the Union level on European issues. If the European Union fails to materialise as a genuine competitive political area, democracy cannot exist within it.

To encourage this political and democratic emergence outcome, the lists of candidates for the European elections should be transnational to avoid being based solely on national political frameworks. However, to maintain the link between States and the European Parliament, a significant number of members (e.g. half) should also be elected by the national parliaments. One could logically fear that this reform could be part of federalism, which is at odds with the aforementioned Europe of the Nations. This would be the case if it were part of the design of a parliament composed of two chambers, one representing the People and the other the States. In contrast, combining deputies elected by the European people and those elected by national parliaments in a single chamber seems to me to be apt to avoid such a development.

Furthermore, the role of the European Parliament, like that of the national parliaments, must refocus on monitoring the action of European bodies, particularly the Commission, emphasising the role of the Council in determining the Union’s policy and that of the Commission in an executive function in the true sense of the word.

3. Closing thought

Nevertheless, these changes require the agreement of all States. In this area, as in others, before launching a debate on the institutional mechanisms, it is necessary to reflect on what we want the Europe of tomorrow to be.

Bibliography

- Bonnet, B. (2013) *Repenser les rapports entre les ordres juridiques*. Paris: LGDJ Lextenso.
- Mathieu, B. (2017) *Le droit contre la démocratie?* Paris: LGDJ Lextenso.