

# **Tolerance Established by Law: The Autonomy of South Tyrol in Italy**

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For a long time an intensive debate has divided the theory and practice of ethnic conflict-resolution between advocates of consociationalism and their opponents. The debate has primarily been an internal one within the broader school of power-sharing. On one side in this debate were those who subscribed to the idea that conflict settlements were most stable and durable if they rested on relatively rigid institutional structures as originally described by Arend Lijphart in 1977: a grand coalition of political parties representing all major segments in a divided society; proportionality of legislative and executive representation and more generally in public service employment and the allocation of public funding; minority veto rights on all essential decisions; and segmental autonomy. Their opponents, mainly among them Donald Horowitz, held that such arrangements were morally unacceptable and practically prone to collapse. They suggested instead mainly electoral mechanisms to induce moderation and conflict-reduction, primarily the use of the alternative vote, a majoritarian preferential electoral system. The disagreements between consociationalists and integrationists have not subsided over the years.

This paper examines the model of autonomy, by the application of a consociational strategy, in Trentino-South Tyrol. Most peace accords fail. More precisely, if less dramatically, of the hundreds of agreements, ceasefires and declarations which have been concluded between hostile parties since the Second World War, relatively few of them have led to durable settlements. There is some notable success: South Tyrol in Italy did succeed in completely avoiding an escalation of violence in the 1960s through an autonomy package by the application of a consociational strategy. The main argument is that the “success” of the South Tyrolean model lies in a system of tolerance established by law, in the sense of a “mix” of legal instruments and institutions which preserve the different identities through autonomy and, on the other hand, enable co-operation through representation and participation.

## **Minorities in Italy**

Within Italian territory, approximately 2.5 million people (4.5 per cent of the population) belong to (at least) twelve minority groups. This fact makes Italy the European Union (EU) country in which most minorities live.

It is important to stress that the Italian constitution takes only language as a distinctive feature to identify minorities, because of the basic assumption, based on the French model of a

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“citizenship approach” and avoiding the concept of ethnicity, that the Italian nation is built on many linguistic groups. The concept of nation is to be understood as *demos* and not as *ethnos*. This fact does not mean that other minority features other than the linguistic are not recognized, but only that the protectional mechanisms are different. For the “other” minorities (racial, sexual, religious and so on) the general provision of the equality clause in article 3 of the constitution is issued, while linguistic minorities are protected on the basis of the special measures announced in article 6.

In addition, not all the linguistic minorities are officially recognized, so that, under the Italian constitutional law’s point of view, it is correct to speak about “protected” linguistic minorities. The third preliminary element for the comprehension of the Italian “minority constitution” is the difference in the minority safeguard system not only between protected and unprotected minorities, but also between the different protected minorities. It is also (not only possible, but also necessary) to distinguish the diverse protection systems within constitutional law. The criterion for the identification of protected minorities is basically territory. The affirmative minority rights are connected primarily to a territory rather than to its inhabitants, so that in the Italian constitutional system personal-related minority rights are rarely recognized. Persons belonging to a linguistic minority can use their rights only within a certain territory.

The constitution establishes twenty regions, to five regions have been granted special autonomous status, Sicily and Sardinia for the geographical status – both are islands – and Valle d’Aosta/Valle d’Aoste for their French-speaking minority, to Friuli Venezia Giulia for the Slovenian-speaking minority and Trentino Alto Adige/Südtirol for their German-speaking minority. Special autonomy provisions grant wide-ranging legislative and administrative power to the regions/province, and the influence of the central government has been reduced.

## **The Case of South Tyrol**

South Tyrol, situated in the very north of Italy on the border of Austria, covers only 2.5 per cent of Italian territory. The population of 450,000 inhabitants (corresponding to 0.8 per cent of Italy’s population) consists of three language groups: two-thirds German speakers, less than one-third Italian speakers and some 20,000 Ladin speakers (their language is also called Rhaeto-Romance).

The majority of German speakers live in the valleys and rural areas, whereas due to the immigration policies of the past and the attempts at industrialization, the Italian group is concentrated in the three major cities (Bozen/Bolzano, Meran/Merano and Brixen/Bressanone) and in the southern parts of the province, bordering on the province of Trento (Trentino) which is almost entirely Italian.

In some way, the conflict in South Tyrol reflects the main historical developments of the twentieth century: it dates back to the annexation of the former Austrian territory by Italy in 1919, which was done in spite of Woodrow Wilson’s declaration of self-determination as a guiding principle for the post-war order. The 1920s saw the aggressive policy of Italianization of the native German-speaking group by a totalitarian regime, the Italian fascists forcing Germans to change their names, rewriting place names, prohibiting Germans from speaking their language, restricting Germans to the countryside and promoting Italian immigration into the cities.

After the end of the Second World War, Italy established a first autonomy regime in order to fulfil its international obligations undertaken in 1946 through the De Gasperi-Gruber agreement (an international treaty between Italy and Austria which became part of Italy’s peace treaty, annexure IV). The Autonomy Statute drafted by Rome was deliberately designed to ensure that the cultural, economic, and social development of the South Tyrolean lay in Italian hands. Italy achieved this by

putting South Tyrol and the Province of Trentino together in one region, named Trentino-Alto Adige, with an Italian majority. Immigration into the province was promoted through subsidized public housing programmes. This increased the share of Italian speakers in the originally almost exclusively German-speaking population rising to 34 per cent in 1971. As a result, the post-war years were characterized by disputes and clashing interests of the South Tyrolean and Italian governments. South Tyrolean activists organized bomb attacks to which Italian authorities answered with harsh measures in South Tyrol. From 1955 onward, Austria played an increasingly larger role in South Tyrolean efforts to gain greater autonomy. At the same time, Austria brought the case to the attention of the UN. This marked the beginning of the internationalization of the conflict. On 31 October 1960, the UN General Assembly adopted a resolution on behalf of the South Tyrol question which confirmed that the Paris treaty committed Italy to establish autonomy for the protection of the ethnic South Tyrolean population and that Austria had a say in the matter. A new agreement was reached in 1969 (known as the “package”), consisting of a set of measures with an aim to establish effective autonomy in South Tyrol. The package consisted of 137 implementation measures.

Special joint commissions, in which the representatives of the state and the province had equal number and standing, were formed for negotiations on the implementation mechanism. Although formally part of ordinary law, the enactment decrees, which were the results of the negotiations within these joint commissions, did not need to be discussed (or even adopted) in the national parliament. Therefore their deliberation could be kept outside of normal political business; and experts from both sides could be involved in their elaboration.

It took twenty years to have all of its enactment laws adopted and implemented, so that formally the conflict was settled in 1992. Thanks to a procedure of consensus and collaboration between the various actors – representatives of the minority, the majority and of Austria, a foreign state – upon which the autonomy is based, as well as the resultant possibilities for control ensured that the process of minority-protection with its long-term orientation was not destroyed in the last link of the chain, i.e. in its concrete implementation.

In 1995, Austria joined the EU and in 1997 the Schengen Treaty was adopted, an event which transformed the border between Italy and Austria, formerly a strict line of division separating cultures, languages and peoples, into a mere administrative boundary.

The actual autonomy system maintains the region as a “roof” structure above the two provinces (Trentino almost 100 per cent Italian-speaking and South Tyrol with the majority German-speaking), but all substantive legislative and administrative powers are vested with the provinces. Nowadays the German linguistic minority in South Tyrol is the largest and best protected minority in Italy and probably the most well-handled minority in the whole world. The autonomy in Trentino-South Tyrol is often seen as a model for conflict-resolution. Of course, each demand for self-determination and each case of autonomy is different. It is influenced by a unique mix of various factors such as history, geography, tradition, economics, strategic considerations, the nature of the group desiring autonomy and the reasons for the establishment of an autonomous regime. Therefore, precedents cannot (and should not) be followed automatically. A simple “export” of models, their transfer and application to other situations should be generally ruled out. Autonomy covers a wide range of possibilities, from cultural autonomy and mere administrative decentralization to near independence: there is no “one size fits all” model. In this sense, it seems possible – and useful – to identify some lessons to be learned from the “history” of other conflicts, by studying them thoroughly and by analysing the influence of differences and parallels with respect to one’s own situation. In this context, a case which exemplifies a mutually beneficial solution of minority conflict via self-governance rather than secession is of great importance.

## Organization of South Tyrolean Society

The desire to conduct one's own affairs on the basis of independent responsibilities and through independent representatives can generally be regarded as a basic goal of minorities. South Tyrol's autonomy satisfies these aims through its key features: autonomy of legislation and administration, proportional ethnic representation and a commitment to bilinguality. Finally, but certainly fundamental, is the generous financial basis provided for the implementation of these provisions.

The whole institutional complex of the province of Bolzano (and of the region Trentino-South Tyrol, where relevant) is based on the strict separation of the two main linguistic groups, the German and the Italian, and the right given to the third one, the Ladins, numerically smaller, to be represented as such in the provincial parliament. This principle of coexistence imposed by law and based on an ethnically divided governance system provides for a large spectrum of affirmative minority rights especially in the fields of public jobs, education, and linguistic rights. Positions in public offices are reserved for citizens belonging to each of the three language groups, in proportion to the size of the group themselves as they appear in the official census. Since 1981, every resident must make a formal declaration as to his or her language group, which is the basis for the right to stand for public office, to be employed in the public administration or as a teacher, and to be given social housing. In addition, preference is given to citizens who have resided in the region for the past two years. This quota system, called proportional representation, is conceived as a form of reparation for Italianization during the fascist period.

The educational system is based on separation. A fundamental principle of today's autonomy is that elementary and secondary education be provided in the mother tongue of the child. Consequently, instruction in South Tyrol is given in separate German and Italian schools and language instruction in the second language of the province is mandatory. In the Ladin valleys, lessons are conducted in equal number of hours in German and Italian, and Ladin is taught as well. Furthermore, all teachers must be native speakers of the language they teach. In principle, parents are able to choose the school system which they would like their children to attend; a child can be refused only because of insufficient knowledge of the language of instruction in order to guarantee the character of the school and the efficiency of the lessons.

Concerning language rights, in South Tyrol German has parity with Italian, which is the official language of the state. Everybody can use either German or Italian (in limited areas also Ladin) in their dealing with public administration based in the province, the judiciary, as well as concessionaires of public services based in the province. The public employers must be bilingual (trilingual in the Ladin valleys) which has to be proved by a public examination. Since 1993, every judicial trial can be instituted also in German (previously German could be used but all minutes had to be written in Italian). Place names must be bilingual (trilingual in the Ladin valleys) and the province has also created a public media board with the duty to transmit German radio and television programmes.

As might be expected, measures such as safeguarding linguistic rights and the double and triple educational systems are very expensive. For the most part neither the province nor the region has the right to levy taxes. To cover the cost of autonomy the majority of the taxes and duties collected in the province goes to the province (around 90 per cent) and a small part flows to the region (5 per cent). The remaining 5 per cent is used by the state for tasks at local level.

## **Autonomous Powers**

South Tyrol's autonomous powers are quite outstanding. Its legislative powers are primarily concerned with economic, social, and cultural matters, e.g., place names, local customs and usages, town and country planning powers, environment, mining, agriculture, tourism, communications, and transport (areas in which the province has primary competence) and elementary and secondary education, commerce and public health (the province only has secondary competencies). The assembly (provincial council) is the law-making body and elects the provincial government which carries out the executive functions. According to the power-sharing model, the composition of the South Tyrolean government must be proportional to the ethnic groups in the council; the presidency of the council rotates between members of the different groups.

The dominant cleavage within the society remains ethnicity; other cleavages, such as class, are subordinated to ethnic polarization. Both the German/Ladin and the Italian groups have built up their own organizational structures and societal subsystems: kindergartens, schools, political parties, trade unions, public libraries, youth clubs, sports clubs, media, and churches are mono-ethnic. There is not much contact between the groups, for structural reasons (urban-rural antagonism and divided economic structure) and due to linguistic difficulties (fluency in both languages is still not reached, especially with the elder generations). The reality is therefore characterized by "parallel societies".

This segregation is, at least in part, counterbalanced by the territoriality principle, which adds a functional dimension, related to the territory as such, and to the application of law in the autonomous entity. Participation, integration and co-responsibility are achieved through the equality and equal standing of all citizens. The territorial dimension also offers the chance of a frequent exchange between majority and minority-positions: a German-speaking resident of Bozen/Bolzano, for instance, is a member of a minority in Italy, at the same time a member of the majority on provincial level, and again part of a minority in the city of Bozen/Bolzano. This should also help to understand the positions of others.

## **Tolerance Established by Law**

In South Tyrol, a complex and highly differentiated legal system has been created which calls for a mix of rotation, parity and proportional representation, and which might be characterized as "tolerance established by law". As a result of this system, the conflict was to a certain extent civilized and institutionalized and transformed into one between politicians over the interpretation of the Autonomy Statute. The main ingredient of the system is power-sharing or "conoscionalism", which includes the diffusion of power from the centre to the periphery, and comprises four main elements, all of which are present in South Tyrol:

1. Participation of the representatives of all significant groups in the government, through jointly exercising governmental (and particular executive) power, e.g., a grand coalition cabinet. According to the power-sharing model, the composition of the South Tyrolean government must be proportional to the ethnic groups in the council; the presidency of the council rotates between members of the different groups.
2. A high degree of autonomy for the groups (especially for issues which are not of common concern). The principle of cultural autonomy is established by article 2 of the Autonomy Statute, which states that the parity of rights of citizens of all language groups is recognized, and "their ethnic and cultural characteristics are protected". In other words, the differences between the three cultures are recognized and the "value" of this diversity highlighted. The

- cultural autonomy and the provisions for the protection and promotion of cultural characteristics, including the system of separated schools, are typical expressions of group protection. All decisions in these fields require a wide consensus within the respective group.
3. Proportionality as the basic standard of political representation, public service, appointments, and allocation of public funds. The Autonomy Statute provides for a system of proportional representation of the language groups for public employment and for the allocation of funds for cultural activities of the group, as well as for social welfare and services (i.e. housing).
  4. Minority veto was the ultimate weapon for the protection of vital interests, however only on issues of fundamental importance. The principle of equality of all residents, regardless of their group affiliation and the quasi-group personality of the language groups counterbalance the provisions on proportional representation. This is particularly true for the right to request separate voting by the language groups in the regional or provincial council, whenever a draft law is judged to be in violation of the parity of rights or the cultural characteristics of one group. The ultimate means available to the language groups in an action before the constitutional court, founded on the same motivation. These are emergency mechanisms in case the normal means of consultation in the organs should not work.

## **Conclusion**

In order to determine which of the institutions could potentially be applied or transferred to other situations, the specific framework conditions of an ethnic conflict must be considered, as they differ from country to country. In particular, the social segregation of ethnic groups, the level of democratization and the elite's willingness to compromise are important criteria when selecting a suitable model of comparison.

Among the most important factors requiring analysis in a given situation, is the historical development of the conflict. Traumatic historical experiences and antagonistic interpretations of historical events block understanding between the different ethnic groups. This is also true, at least to some extent, for South Tyrol, where the actual separated school system is still justified through historical experiences, namely the prohibition of the use of German in public, and the consequent secret underground schools set up during the period of forced assimilation by the Italian fascist regime.

The importance of language, which becomes the criterion for establishing ethnic identity and the line of demarcation determining the socio-cultural identity of the individual must also be acknowledged. Language is held to be both a sign of desire of the individual who speaks it to identify himself or herself with a particular culture and a means of determining individual membership of a specific social group. Although the Autonomy Statute refers to the ethnic and cultural characteristics of the various sections of the South Tyrolean population, it also refers to "language groups" in order to indicate the Italian-speaking, German-speaking and Ladin groups living in South Tyrol.

The geographical and demographic situation also needs to be taken into account, especially the question of compact-settlement areas of a minority, as decisive criteria for determining which form of autonomy to apply. In the case of South Tyrol both factors certainly favoured the establishment of a territorial autonomy.

What lessons can be learned from the South Tyrolean case?

Of fundamental importance is certainly the basic compromise achieved through the negotiations leading to the “package”: the explicit recognition of (cultural) diversity and the renouncement of incompatible positions by both sides.

What is particularly relevant for other minority conflicts is the successful process of internationalized conflict de-escalation, and the conjoint transformation of a conflict, whose course was by and large negative, into a positive process with peace and stability as direct and sustainable results. The single procedures can also offer interesting examples for other conflicts: the operational calendar with its detailed, pre-established time-frame, the institutionalized negotiations in special joint commissions of the state and of the province, a special procedure for the enactment of decrees, which cannot be changed unilaterally by the state and, finally, the guarantees, in particular the possibility of bringing disputes to the Italian constitutional court.

Of course, the possibility of applying single provisions regarding the autonomous powers and the relations between the different groups depends on the existence of the same or at least similar prerequisites, in particular on the presence of a self-contained settlement area and on the distinct language of the minority. Important seems to be the “mix” of (sometimes even contrasting) principles which, in the case of South Tyrol, do not only guarantee the protection of a minority, but, by means of stressing functional criteria (such as bilingualism of the public servant in order to create a bilingual administration), serve the governance of the territory as a whole.

But there are also certain dangers which are to some extent inherent consequences of the compromise between the minority and the state: statutes of territorial autonomy anchor ethnic differences in the state; they tend to weaken the principle of democratic equality and can, at worst, further aggravate a conflict by stressing ethnic cleavages. As a result, the future development of the South Tyrolean solution can also be questioned.

There is no doubt that the settlement of the conflict by the 2nd Autonomy Statute was a first and necessary step. Italy’s German and Ladin minorities were no longer threatened by assimilation. Achieving a compromise solution accepted by the majority of all those concerned – Italy, Austria and the South Tyroleans – was certainly due to tolerance and goodwill on all sides. The same should be true for the preservation of the achieved results and their gradual development towards a society more characterized by interethnic interaction and cooperation.

Hence, instead of territorial and institutional separation based on the belief in ethnic homogeneity and the identification of ethnicity and territory, only pluri-ethnic autonomy and integration based on multiple identities and loyalties and the de-coupling of territory and ethnicity can serve as a “model” for state-building and nation-building in post-conflict societies.

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# The Impact of Internationalization of Law upon the French Legal Order

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A country of Old Europe, like France, built and unified by kings since the Middle Ages, never needed a Declaration of Independence, claiming that it had to be ruled by its own laws. The royal legists were saying that the king was sovereign and “emperor in his realm”. Then the 1789 Declaration of Rights of Man and Citizen consecrated the transfer of sovereignty from the king to the nation. Probably less known was the 1946 Constitution – the last one of France before the 1958 Constitution now in force – which accepted limitations of French sovereignty for the benefit of peace and development of international relations. The 1940 defeat was certainly not foreign to this evolution, confirmed by the creation of the European Economic Community (1957) and the constitution of the Fifth Republic (1958) keeping the 1946 Preamble as a positive constitutional law.

Many jurists consider today in France that it remains a sovereignty of the French State – that means of a legal order creating its own rules – and inside the State of the constituent power – the Congress with the two Houses of Parliament or French people voting in a referendum – let alone a kind of specialized sovereignty for judicial organs deciding in last resort (we have in France three top courts: the Constitutional Council, the Court of cassation and the Council of State).

However, like all other countries in the world, France is involved in the process that develops the place of international law not only in foreign affairs – the external aspect of State sovereignty – but also in domestic affairs (the internal aspect of state sovereignty). As a proof of the conserved vigour of the state today, each country has its own legal net of insertion in the international legal order. Without being unique, the position of France towards international law and its place inside the national legal order is characterized by a specific combination of some features.

First, France is clearly since the end of the Second World War, and the precedent constitution of 1946, a so-called monist country whose constitution – nowadays, the one of 1958 – orders precisely that international treaties, once ratified, and international rules are incorporated in the French legal order, with a high level in the hierarchy of norms, that means above the parliamentary statute laws.<sup>1</sup> The differences are noticeable with India, a dualistic legal order, where Parliament has no role in treaty-making or ratification processes, international treaties do not become enforceable or automatically part of national law and municipal law prevails, even if contrary to international law.<sup>2</sup>

The sole limit to this superiority of international law is the primacy of French constitution as a fundamental norm in the internal order. French courts – that means administrative and judiciary courts – have in some recent cases decided that our constitution was independent of international

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treaties.<sup>3</sup> But this case law is not so nationalist that it could appear at first glance: the constitution itself orders the voluntary subjection of the French state to the rules of public international law. The Constitutional Council has used this rule to say that the superiority of European law was not an abdication of sovereignty, but a consequence of the will expressed by French people – at the same time by the constitution and by European treaties – to limit French sovereignty (DC 10<sup>th</sup> of June 2004). If this point of view is controversial (and does not appear clearly to a great part of the French public opinion, as testified by the political debate and the referendum failure in 2005 of the European constitutional treaty), it seems to us consistent with the monist conception: the unity of international law and domestic law is based on a constitution freely subjected to international law, particularly to the imperative rules of the international community. The monist system, used in USA, Netherlands, Spain and Belgium, but not in India or in Great Britain, remains favourable to a quick insertion of international law in the legal order.

As a second factor of French specificity, one must notice that France is party to many treaties and has ratified many of them. In 2000, the Council of State estimated at about 6,000 the number of treaties and agreements linking the French State – about 80 per cent of them are bilateral conventions.<sup>4</sup> For example, France has ratified the 1949 Geneva conventions about war rules, wounded persons, prisoners and civil protection (later for the two 1977 protocols, the second in 1984, the first in 2001), the 1951 Geneva convention about refugees, the two United Nations covenants (ICCPR and ICESCR), the 1989 UN convention on the rights of children, the 1998 Rome Status of the International Criminal Court. Among the Den Haag conventions about private international law, France has ratified nineteen, the most recent being the 33<sup>rd</sup> about adoption in 1993 (the 1985 convention about trusts is signed, but not ratified; for some of these conventions, for example, the one of the 1996 process of ratification is blocked by the competence of the EU since the Amsterdam treaty and the European Council rules “Brussels I” and “Brussels II” in 2000). With the transformation of European conventions about common rules of resolution of conflicts of laws – the 1968 Brussels convention about the execution of judgments, the 1980 Rome convention about contractual obligations and the 1998 Brussels II convention about decisions concerning divorce – in European regulation (Bruxelles I and II in 2000, Rome I in 1991, then recently Rome II in 2007 which is the first international private law related European regulation without precedent convention about delictual obligations), the French legal order has incorporated all the European rules about private international law.

Furthermore, France has been also one of the first countries to ratify the 1980 UNICITRAL Vienna Convention about international sales, which is applied (with a few decisions of the Court of cassation each year) by the French courts since 1988. Many of the International Labour Organization conventions are also ratified by France and incorporated in French law. On the contrary, France has not ratified the 1969 Vienna Convention about the law of treaties, fearing officially that the disposition about “*jus cogens*” could threaten the stability of international conventions.

As a member of the EU, France has been obliged to incorporate in the French legal order all the regulations, guidelines and decisions of the European legislator, which means principally the Council of Ministers with more and more co-decisions with the European Parliament. All these European rules are introduced directly in French order, as “secondary” law (authorized by primary law of treaties), without any ratification. Furthermore, regulations are self-executing and do not need any French complementary text for their implementation. Guidelines – made to harmonize European legislations – have normally to be transposed in the French national order by a statute law. But, if the deadline is over, the guideline can become self-executing, despite the absence of reaction of the French legislator. This rule, resulting first from the case law of the European Court of Justice

(ECJ), has been long discussed in France, but it is now admitted with some temperaments (in the administrative contentious procedure).<sup>5</sup> On the same token, the Constitutional Council has accepted to lose its control on domestic legislation transposing European guidelines, presumed to be consistent with the French constitution (DC 10<sup>th</sup> of June 2004). The Council of State has evaluated the number of European texts integrated in French law at around 14,000 in 2000 and since this time the European institutions have adopted about 600 regulations and 100 guidelines each year.<sup>6</sup> These data must be compared with a stock of about 9,000 statute laws and 120,000 decrees in force today in France.

Among the new laws voted each year by the French Parliament – whose number (to compare with India) is between 70 and 100 – one half is concerned with ratification of international agreements and the rest is greatly influenced by European guidelines. One says that between 60 per cent and 80 per cent of domestic legislation is now determined directly or indirectly by European law. Unfortunately we do not have more precise statistics and often a statute law contains few articles for transplanting European guidelines and a majority of articles without European link.

France is not really a “good pupil” in transposing European guidelines, accumulating delays and gross difficulties, even provoking in some cases the condemnation by ECJ for late or erroneous transposition – for example, about the 1985 guideline concerning liability of defective products, transposed only in 1998 with defaults condemned by the Luxemburg Court in 2002.

The impact of European legislation upon France is nevertheless of tremendous importance. In some cases European legislation confirms national trends, for example about consumer protection, which has begun in France before the development of a European policy on this matter. In other cases one can say that the French legislator is induced to go where it was not very prone to process, for example, about liberalization of services, decline of public monopolies or regulation of bird hunting.

The third factor to consider is the impact of the other European order, the one of the 1950 European Convention on Human Rights (ECHR). This convention has been for a long time in a kind of penumbra, because France has waited till 1974 to recognize the competence of the Strasburg Court and 1981 to authorize its citizens or residents to use individual recourse to this court – when all domestic procedures are finished. Furthermore, ECHR has developed its case law particularly since the years 1990s. From 1990 a case about electronic wire traps,<sup>7</sup> and 1992, a first case about degrading violence in police precincts,<sup>8</sup> before a second one in 1998 using the word “torture” for comparable circumstances<sup>9</sup> – France has been condemned many times and in some media-related questions about the succession rights of children borne from an adultery,<sup>10</sup> about imprisonment during the cassation procedure (ECHR 26<sup>th</sup> of July 2002 in the *Papon* affair concerning the deportation of Jews during the Vichy Regime), about freedom of speech (ECHR 1999 *Fressoz et Roire*, about the publishing of fiscal documents; ECHR 2000 *Du Roy et Malaurie* about prohibition of information concerning the criminal plaintiffs; ECHR 2001 *Association Ekin* about control of foreign publications ; ECHR 2002 *Colombani* about defamation towards a head of State; ECHR 2004 *Gubler* about the interdiction of the book of the doctor of late President Mitterrand; ECHR 2006 *Ginienski* about defamation towards the Christian community), without taking in account the numerous decisions about the “reasonable deadline” for process and judgment and the question of the place of the government commissary in administrative contentious procedure (ECHR 2001, *Kress* ; 2002 *Theraube* ; 2005 *Loyen et autres*). In 1999, and again in 2006 and 2007, the Strasburg Court has judged contrary to the ECHR French statute laws validating illegal administrative decisions for financial reasons.<sup>11</sup> The 1999 decision is the most striking because the 1994 statute law concerned was deemed non-retroactive by the French Constitutional Council. From 1998 to 2006, the Strasburg Court has

decided about fifty-five times by year about plaintiffs towards France and sanctioned about 49 violations of the ECHR. The more recent and spectacular decisions of condemnations concern the recourse of refugees during their entry in the French territory (ECHR 26<sup>th</sup> of April 2007, *Gebre-medhin*) and the refusal of child adoption for a homosexual woman (ECHR 22<sup>nd</sup> of January 2008, *Madam B.*), let alone one decision (ECHR 24<sup>th</sup> of July 2007, *Baucher*) about the absence of published reasons for a penal decision in false advertising.

Beyond the payment of compensation by the French state to the victim of the violation of the ECHR, these decisions have no binding effect for France to change its law. But, in fact, the political and media pressures, let alone the risks of other recourses and condemnations in similar cases are so strong factors to provoke, with a more or less long delay, a change in the French law. In some cases, parliament uses the legislative process to take account of the Strasbourg Court decisions in some articles of a statute law, without giving the impression that the whole law is motivated by the European case law: in 1991 (law of the 10<sup>th</sup> of July) about wire traps, in 2000 in the long law of the 15<sup>th</sup> of June reforming the penal procedures in accordance with the European standards, in 2000 again about hunting (after the decision of the ECHR, *Chassagnon* considering that the 1964 French law was inconsistent with the property right protected by the European convention), in 2001 about illegitimate children (Law of the 3<sup>rd</sup> of December reforming a great part of the dispositions of the Napoleonic Code on this subject, incorporating the question of children borne from an adultery), in 2007 about right of recourse for the refugees (but the law of the 20<sup>th</sup> of November 2007 has been criticized by NGOs as a lure).

In other cases, the change provoked by the ECHR has been in the French case law: in 1992, the Court of cassation decided in favour of transsexuals at the same time as the Strasbourg court, in 2002 (*Magiera*, 14<sup>th</sup> of June 2002) the administrative jurisdiction (after the judiciary one) used the Strasbourg case law about “reasonable delay” to condemn the French state, in 2003 (*Gisti affair*) the Council of State adopted the ruling of the ECHR about foreign publications in France and ordered the government to change the regulation. In 2007 (CE 26<sup>th</sup> of January 2007, *Gardelien*) the Council of State judged the French State liable for a “validating law” (like in the *Zielinski* affair contrary to the international obligations). Today, after years of resistance, a decree of the 6 March 2008 has begun new reforms in administrative justice<sup>12</sup> and the Council of State has agreed to modify the intervention (and even the name) of the government commissary in the administrative contentious process according to the ruling of the ECHR.

It is rather a matter of changing administrative or police practices about adoption by homosexuals or about torture: there is no need, here, to change law statute that permits adoption by bachelors (without discriminations between heterosexuals and homosexuals) and, of course, prohibits the use of torture. We must consider also the numerous cases where, beyond the condemnations of France, French judges use the ECHR case law to change their own rulings.

The development of European law has, indeed, provoked another legal revolution in France since 1975, concerning the relations between judges and municipal law. This change in the attitude of courts towards French statute law – until that point immune from any judicial review except the *a priori* control by the Constitutional Council – has followed the 1971 decision of the Constitutional Council to use the Declaration of Human Rights and the fundamental principles in the process of judicial review and the 1975 decision of the same council not to judge if French statute law was consistent with international norms. The window was thus open to let the judiciary and administrative courts to control this aspect of the hierarchy of norms. It gave birth to decisions from the Court of cassation since 1975,<sup>13</sup> then of the Council of State since 1989<sup>14</sup> to make the international or European law prevail even upon a French posterior law. Without saying it expressly

the French courts have invented a new kind of judicial review – rather scarce in comparative law – that is “conventional” review, with the use of conventional norms to take away the French statute law inconsistent with international law. As in the American-style judicial review, the statute concerned is not exactly nullified, but taken out of the debate in favour of the contrary international norm. For obvious reasons, the legislator is obliged – here again with more or less delay – to yield and to abrogate the controversial disposition. For example, the French parliament has voted, in 1977, a law prohibiting the publication in newspapers of electoral polls one week before the elections, in order not to influence the electors. In practice, this law has been violated by some newspapers – with the risks of penal suits – and avoided by internet progress. In 2001, after a penal suit following the 1997 elections and a disagreement between the first instance and the appellate judges, the Court of cassation decided that the French law was not consistent with article 10 of the ECHR about freedom of speech. The French Parliament could not do anything but abrogate the law in 2002 (law of the 19<sup>th</sup> of February 2002). It is significant that the Court of cassation – in the abstract published on its website, not in the reasons of the decision – has quoted the rulings in the same direction of the Belgian Council of State and of the Canadian Supreme Court.

We do not have statistical indications (the *Bulletin d'Information de la Cour de Cassation* publishes periodically its own case law about this subject, combined with the ECHR, ECJ and French appeal courts more important decisions about the same matter, but without statistical board) about the number of French statutes thus “ejected” of our national order by this way. We know only – that it is not surprising – that the argument is now commonly used by lawyers and that, for administrative contentious matters, about 40 per cent of the decisions of the Council of State in 2000 are quoting the ECHR.<sup>15</sup> Of course, in the great majority of cases, the courts judge the French statute consistent with the European convention and the case law of the ECHR, but at the same time they develop an interpretation of French law taking account of this European law. It seems that this control has developed the “Europeanization” of French law in two directions: in economical and social matters (like taxation, competition law, non-discrimination with the example of abrogation of prohibition of night labour for women) with the ECJ case law and in human rights matters with the ECHR case law. Some cases concern environmental law, like the Clemenceau navy ship – first directed towards India – in the Council of State decision of 15<sup>th</sup> of February 2006 (*Association Ban Asbestos France and Greenpeace*) invoking a 1993 European regulation about waste treatment (and also two European guidelines and an OECD decision).

Another form of impact of globalization is the growing use of foreign law in the legislative and the judicial process. Legal historians know that circulation of laws and legal transplants are old phenomena. France has been rather considered in the nineteenth century as a legal export country with the influence of Napoleonic code abroad. But, at the same time, France legislation has been also influenced by British legislation (about joint stock companies) or German ideas (about limited companies). American influence is officially limited in comparison with other countries, like Japan, but must not be undervalued, for example in the creation of the social security system<sup>16</sup> or in the implementation of take-over-bid in shares market in the 1970s then of stock options in the practice of remuneration of managers.

In recent years, foreign law has been more and more used in legislative debates in various ways: in an enquiry about the most efficient systems (the senate is rather prone to promote such enquiries in the reports about discussed bills), in an argument to borrow competitive rules (especially in a private bill, it was the case with many projects presented by members of Parliament since the 1980 about the introduction of a fiduciary institution like the trust) or to follow the global trend

(rather in the governmental argumentations to change French peculiarities deemed inconsistent with the liberal current or with European harmonization).

For example, the simplified limited company was introduced in 1994 with the mention of Dutch legislation, then developed towards a one-person company in 1999 by a private bill of a socialist deputy quoting the German reform of the “small limited company”. In 2000, the introduction of an appeal towards the criminal decisions of the assize courts – a strong rupture with the French Revolution tradition of sovereignty of juries – was justified by the alleged pressures of the ECHR. In fact, it was quite possible to maintain the *status quo*, as proved by the German example, in accordance with the right to recourse guaranteed by the European convention on human rights. This new law was part of a large *aggiornamento* of the French penal procedure developing the right to counsel (in police custody). This reform was preceded by studies and reports about reforms of inquisitorial procedures (as in Germany or in Italy) and adversarial systems, taking account of the evolutions of the British procedure (with the creation of the crown prosecution service). The same 2000 law drew the lesson from condemnations of France in criminal matters by the ECHR to decide a procedure to review the judgments after a violation of the European convention ascertained by the Strasbourg court. The idea has been clearly to adjust French criminal procedure to European standards.

More recently, on the same subject, the 2004 reform – wanted by the right majority criticizing the “leniency” of the 2000 law – used the American model of “plea guilty” or even “play bargaining” to reinforce the powers of the public ministry to propose forms of penal transactions to the offenders. Here the law professors seemed to have been consulted afterwards about the advantages and risks of borrowing elements to the American penal procedure.

The American model has been also quoted, with chapter 11 of the US Bankruptcy law, when the French Parliament has reformed the procedure of winding up companies (law of the 26<sup>th</sup> of July 2005). But European examples, coming from Germany, Spain and Great Britain were also invoked, perhaps to give a more Europeanized inspiration to the new statute law. It is also a European guideline – and not WTO pressures as in the case of 1999, 2002 and 2005 Amendments to Patent Law in India<sup>17</sup> – that is the origin of the most recent law in France about copyright (law of the 1<sup>st</sup> of August 2006 about authors’ rights, neighbour rights and information society).

In some cases, the French legislator is literally quartered between conflicting European and international rules. Two questions of labour law have presented such a situation in recent years. In 1991 and 1993 the ECJ has judged the prohibition of night work for women – one of the first protection for workwomen at the end of the nineteenth century and a symbol, with child labour laws, of social legislation in favour of weak persons – non-consistent with the European rules about non-discrimination (of salary and of employment) between men and women. Besides the trouble provoked by this dilemma – is it preferable to protect workwomen against hard labour conditions or to treat them equally with men? – among governmental agents and trade unions, there was a legal complication: France was party to an international labour convention prohibiting night work for women. Like other European countries, France was constrained by the case law of the Luxemburg court to denounce the ILO convention, then to vote the law of 9 May 2001 abrogating the general prohibition. It is, however, noteworthy that the outcome has been a compromise trying to ally the two goals of equality and protection for women: albeit not prohibited, the night work must remain exceptional for women and subjected to the conclusion of a collective bargaining.

More ambiguous is the second situation of conflicting supranational norms. Since 1991 (Höfner in 1991 and Job Center cases in 1997), the ECJ has judged that the monopoly of public employment agencies (for labour exchanges) was contrary to the European competition rules: such a

state agency had to be treated as an enterprise and accept to compete in the free market with private agencies. Again, this ruling was a complete change with old traditions of labour law – considering the labour exchanges companies as enslaving “horse-dealers” – and with an ILO convention. There were, nevertheless, differences with the precedent situation of night work of women. First, the monopoly of the state agency (ANPE in France) was a theoretical one: everybody knew that enterprises used private recruitment agencies (the sole obligation was, in fact, to inform the ANPE of the labour offer; besides the monopoly was not sanctioned in penal law). Second, the ILO has chosen to yield towards the European – and even worldwide business pressure – and has elaborated in 1996-1997 a new convention allowing competition in the labour market between private and public agencies. The problem is now that France has not adopted this convention – perhaps a cautious position towards the trade unions – and that the French legislator has waited until the law of 18 January 2005 to abrogate the monopoly of the state employment agency. One can approve the linkage between rules and facts, but it has been asked<sup>18</sup> what would happen if a French court refused to apply the 2005 law, considering that this law is not consistent with the old ILO convention still in force. As we see, the impact of international law on French legal order can be a factor of contradictions and incoherence.

The law about a new fiduciary institution (19 February 2007) is another curious example of these complex influences of foreign law. As we have said, there have been many projects to introduce something like the trust in French law, which have failed, in spite of the influence of the Den Haag 1985 convention about recognition of foreign trusts (signed, but not ratified by France), that means Anglo-American trusts in civil law countries. Finally the text voted is very far from trusts: it authorizes only the affectation (without a spirit of liberality) by a moral person (a company) of a part of its assets towards another moral person, with a very complex taxation regime. About control of immigration for familial regrouping, the actual government has proposed and voted the possibility of a DNA test to prove the motherhood of a child (law of 20 November 2007). Against the numerous critics of this project, President Nicolas Sarkozy said in a television interview: “This DNA test exists in eleven countries in Europe – including some Socialist ones, like Great Britain. How is it that it doesn’t pose a problem in these countries, but it creates a debate here?” Here again, the global trends were invoked to reform French law. It is not impossible that these examples have influenced the members of the Constitutional Council to decide that this aspect of the law was not inconsistent with the French constitution, whose principles are not very different of the ones of the ECHR. It is noticeable that the same law has corrected French law about recourse of refugees (before their admission on the French territory) as a consequence of the condemnation of France by the ECHR (*Gebremedhin*, 26<sup>th</sup> of April 2007).

Another phenomenon, present in many countries today, is the judicial recourse to foreign law in France. In fact, the range of this new kind of inspiration for judicial reasons studied recently by Basil Markesinis and Jörg Fedtke (2006), is very narrow in France where opinions (as well concurrent than dissident ones) of judges are forbidden.<sup>19</sup> The French Constitutional Council, which has refused to control the consistency of French statute laws with international law, cannot use directly in these reasons examples of rulings by foreign Supreme Courts: it has just begun to collect (and to give to its members) information about comparative constitutional court (with next year an American justice clerk employed near the Council). The Council of State applies a French administrative law for taking account of foreign law. The only jurisdiction open to such a perspective is the Court of cassation, particularly under the impulse of former First President Guy Canivet. Here again, foreign law cannot be quoted in laconic decisions using only rules incorporated in French law. But in the preparatory works – the relation of the report judge and the conclusions of the advocate-

general often published in important affairs – there is an opportunity to quote foreign law as an element of reflection about a problem common to several countries. In recent years, the Court of cassation has thus proceeded in cases involving compensation for a child born with a handicap due to an erroneous prenatal diagnostic (the famous *Perruche* case, 17 November 2000, an exceptional case where parliament has voted a counter-ruling, for the future, with the law of 4 March 2002, whose retrospective aspects have been condemned by the ECHR in 2005 and 2006), or eventual incrimination for involuntary homicide of a driver wounding a pregnant woman and causing the death of the foetus (29 June 2001), or access to proof in criminal affairs where religious ministers kept some information secret (Crim. 17 December 2002).<sup>20</sup> Accustomed in private international cases to collect information about foreign laws, the judges of the Court of cassation are using comparative law, without admitting it.<sup>21</sup>

A last kind of impact of legal globalization on French legal order concerns the degree of permeability of French law towards what is called “global law”: *lex mercatoria* developed by contracts and codes of conduct by multinational enterprises, awards decided by private business arbitrators, practices of mega law firms and pressures exercised by institutions of global governance (World Bank, IMF and WTO).<sup>22</sup> There is precisely a common agreement about the openness of France, particularly of the place of Paris, to these new trends giving birth, according some analysts, to a private transnational legal order.<sup>23</sup> First Paris is the place of the International Chamber of Commerce, which has developed since its creation in 1919 one of the most appreciated arbitration systems in the commercial world, perhaps the pioneer in developing sales of model contracts on its website. The reform of the French code of civil procedure, in the 1970s, has been the opportunity to encourage compromise clauses and to facilitate the exequatur process for applying arbitrators awards (art. 1493, 1494, 1498, decree of the 12 May 2011).<sup>24</sup> The law of 15 May 2001 (reforming article 2061 of the Civil Code) has allowed the compromise clause in all contracts between professionals (excluding consumers and labour contracts). France is thus very tolerant for international commercial contracts without link with the French law and giving effect to an eventual international arbitration.

Then, since 1975, France has welcomed foreign lawyers and firms in the legal profession (one special of legal counsel until the merging with advocates in 1990): the Anglo-American mega law firms have open secondary boards in Paris (and some in provincial cities like Lyon) for a long time, and French (if it possible to speak of the national character of these companies) big law firms (for example, Gide, Loyrette and Nouel with 700 lawyers) have developed national and international networks. The recent debate in India about reforming the 1961 Advocates Act and to admit foreign lawyers is closed in France since about ten years: European citizens can study in France, get the French degrees and examinations to become advocates, or exercise some years with their foreign title before asking to be admitted in a French local bar whereas non-European lawyers can obtain the title of French advocate after a special examination (the condition of reciprocity is considered fulfilled by all countries signatories of the WTO agreements).

Last but not least, some French academics have been the best advocates of “*lex mercatoria*” as a binding legal order since the 1960s with the works of Goldman, Fouchard, Kahn and Loquin. The unended polemics about the nature of “*lex mercatoria*” is however the proof of the difficulties to measure the real impact of these global rules concerning the special matter of international business law.

In a famous 2003 article, Ugo Mattei has defended the thesis of links between all these phenomena of legal globalization around a plan of “imperial law” in favour of an American hegemony.<sup>25</sup> This imperial law would try to impose a scheme of free market-oriented decentralized rules, an ideology based on “law and economics” postulates (in the reports *Doing Business*) and a

“reactive” judge-made law using the “human rights” discourse to dismember the active national politics of the welfare state.

We agree with many of these assertions: the progress of commercial global law is uncontested, there is a quick circulation of top courts case law (with recent examples including decisions of the Supreme Court of India quoting the case law of the ECHR),<sup>26</sup> the ideology of “law and economics” develops its influence upon academics, and the pressures created by Doing Business reports since 2004 foster competition towards deregulation.<sup>27</sup> In the 2008 report (from April 2006 to June 2007), France gets the 31<sup>st</sup> place in ease of doing business ranking, whereas India has the 120<sup>th</sup> rank, but for Employing workers facilities the rank of India is 85<sup>th</sup>, France’s 144<sup>th</sup>: obviously the recommendation is for more flexibility in labour market for the two countries!

However, we do not share the same degree of consensus with Professor Mattei about the use of international law for the sole profit of USA. If we take, as he did, the example of international penal law – from the Nuremberg trial to the Rome Statute of the ICC – we do not think that these institutions are war machines for the USA. Besides, this country has not ratified the Rome treaty and tries, by bilateral conventions, to protect the immunity of its troops. We are no more convinced by the purported instrumentalism of European projects of codification that would be used as a tool to obtain a free market without laws. One can disagree with the project – supported first by German academics and compared with American Restatements – of a Common Frame of Reference (Draft CFR) for contracts in Europe, and overall with the recent enlargement of this project towards law of extra-contractual obligations and law of things. But laws of the EU are not American laws and we consider that a strong European policy is a guarantee towards American hegemony. Concerning the case law of the Strasbourg Court, sometimes criticized in France as the “reign of money and sex”, we do not share this nationalistic attitude and prefer the way of the “dialogues of judges” as practised by many French courts. There is in Europe, as in India, a real risk of judicial supremacy based on a superficial convergence about legal principles of liberalization and directed against institutional and democratic forces.<sup>28</sup> When we read in a recent Indian Supreme Court case that “it will have to be kept in mind that the Courts around the world are taking an unkind view toward statutes of limitation overriding property rights”,<sup>29</sup> the argument of such a community of top courts’ viewpoints seems to us open to discussion. We consider as more cautious and positivist the opinion of the same court in the *Nair Service* case: “we do not mean to say that international law shall *ipso facto* be applied for interpretation of our domestic laws but the relevance thereof, we reiterate, in a grey area, cannot be lost sight of”.<sup>30</sup> This *ratio decidendi* makes a distinction – let to judicial arbitration – between clear acts of the legislative power (expression of the democratic will) and a “grey area” where the judge-made law can develop itself.

The use of international law is not a one-sided weapon against the welfare state and in favour of neo-liberalism. In France, we had the recent example of a new labour contract, created by a governmental ordinance of 2005 with precarious clauses (long period of essay and opportunity of firing the employee without reason). This contract has been challenged without result before the Council of State but with contrary decisions of the labour courts invoking the convention n 158 of the ILO. Finally, in November 2007, the board of the ILO has declared this kind of contract inconsistent with the convention n 158 and France will be obliged to abandon it. Despite a real trend towards relaxation of workmen protection in French labour law (with the primacy, since the law of the 4 May 2004, of an enterprise bargain agreement towards an industrial branch agreement), we do not have the idea, as in Australia with the Workchoices program since 2006, to allow individual contracts waiving imperative laws. If some big international enterprises try to develop – by private codes of conduct – their own labour law, it seems to us that the European model of protection is still

strong and likely to be defended by the European courts. Here again, Europeanization of law can be a shelter against the risk of galloping deregulation.

There is no irresistible decline of alternative policies confronted in periodical elections. We think, on the contrary, that there is a “room for manoeuvre” to resist some threats of globalization. In democracies, we are looking for a balance between active legislation (the “first say” of parliament) and reactive case law (the “final say” of top courts). By admitting a part of incoherence in our national legal systems and adapting our traditional legal cultures, we have to work for more association between legislative and judicial monitoring and for combining international engagement and preservation of a national space for social legislation.

## Notes

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<sup>1</sup> Article 55 of the 1958 French Constitution.

<sup>2</sup> Subhash C. Kashyap, “The Constitution of India and International Law” in Bimal N. Patel (ed.), *India and International Law*, Leiden, Martinus Nijhoff, 2005, p. 21-22

<sup>3</sup> CE 30<sup>th</sup> of October 1998, *Sarran and Levacher*; Cass. 2<sup>nd</sup> of June 2000, *Demoiselle Fraisse* about elections in New Caledonia Pacific territory with specific electoral conditions prescribed by a constitutional amendment.

<sup>4</sup> Conseil d’État, *La norme internationale en droit français*, Paris, La Documentation française, 2000, p. 18.

<sup>5</sup> One cannot challenge an individual administrative decision as inconsistent with a guideline not transposed in French law, but if this decision is justified by a French regulation contrary to this European guideline, the individual decision is void, because of a lack of legal basis.

<sup>6</sup> Public Report of the Council of State, 2006, p. 15.

<sup>7</sup> ECHR 24<sup>th</sup> of April 1990, *Kruslin and Huving v. France*

<sup>8</sup> ECHR 27<sup>th</sup> of August 1992, *Tomasi v. France*.

<sup>9</sup> ECHR 28<sup>th</sup> of July 1999, *Selmouni v. France*.

<sup>10</sup> ECHR 1<sup>st</sup> of February 2000, *Mazurek v. France*.

<sup>11</sup> ECHR 28<sup>th</sup> of October 1999, *Zielinski and Pradal v. France* ; 14<sup>th</sup> of February 2006, *Le Carpentier v. France* ; 16<sup>th</sup> of January 2007, *Chiesi v. France*.

<sup>12</sup> The decree confirms a complete separation between consultative and contentious functions of the Council of State, new reforms (with the support of the Council) are announced.

<sup>13</sup> Ch. mixte, Administration des Douanes, Société des Cafés Jacques Vabre et SARL Jean Weigel, 24<sup>th</sup> of May 1975.

<sup>14</sup> Council of State, 20 October 1989, *Nicolo*.

<sup>15</sup> Olivier Duthellet de Lamothe, « Contrôle de constitutionnalité et contrôle de conventionnalité », *Mélanges D. Labetoulle*, Paris, Dalloz, 2007, p. 315-327.

<sup>16</sup> Paul Durand, *Les Politiques contemporaines de Sécurité sociale*, Paris, Dalloz, 1953.

<sup>17</sup> Julien Chaisse, *Ensuring Conformity of Domestic Law with World Trade Organization Law. India as a Case Study*, Publications of the French Research Institute in India, 13, 2005.

<sup>18</sup> Emmanuel Dockès, *Droit du travail*, Paris, Dalloz, 2005, p. 162-164.

<sup>19</sup> Basil Markesinis, Jörg Fedtke, *Judicial Recourse to Foreign Law*, London, University College London Press, 2006.

<sup>20</sup> Guy Canivet, “The Practice of Comparative Law by the Supreme Courts. Brief Reflections on the Dialogue between the Judges in French and European Experience” in Basil Markesinis, Jörg Fedtke, *Judicial Recourse to Foreign Law*, pp. 322-323.

<sup>21</sup> Basil Markesinis, Jörg Fedtke, *op. cit.*, pp. 65-66.

<sup>22</sup> Amil Kumar Thakur, Nageshwar Sharma (ed. ), *WTO and India*, New Delhi, Deep and deep publications, 2007.

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<sup>23</sup> Gunther Teubner (ed. ), *Global Law without a State*, Aldershot, Dartmouth, 1997 ; Alec Stone Sweet, “The new Lex Mercatoria and transnational Governance”, *Journal of European Public Policy*, August 2006, p. 627-646.

<sup>24</sup> Loïc Cadiet, Emmanuel Jeuland, *Droit judiciaire privé*, Paris, Litec, 2006, p. 676.

<sup>25</sup> Ugo Mattei, “A Theory of Imperial Law : A Study of U.S. Hegemony and the latin Resistance”, *Indiana Journal of Global Legal Studies*, 2003, p. 383-448.

<sup>26</sup> Supreme Court of India, P. T. Munichikkanna Reddy and Others v. Revamma and Others, 24<sup>th</sup> of April 2007.

<sup>27</sup> The reaction of French academics has been centred upon the defence of the civil law tradition against the common law (that is not perhaps the core question) : Frédéric Rouvillois (dir. ), *Le modèle juridique français : un obstacle au développement économique?* Paris, Dalloz, 2006 et Association Henri Capitant, *Les droits de tradition civiliste en question : à propos des rapports “Doing Business” de la Banque mondiale*, Paris, Société de législation comparée, 2006.

<sup>28</sup> Ranabir Samaddar, *The Materiality of Politics, vol. I, The Technologies of Rule*, London-New York-Delhi, Anthem Press, 2007, p. 24.

<sup>29</sup> Supreme Court of India, P. T. Munichikkanna Reddy and Others v. Revamma and Others, 24<sup>th</sup> of April 2007.

<sup>30</sup> Supreme Court of India, Nair Service v. State of Kerala, 24 February 2007.