1. Introduction

Imagine a dispute between two German citizens, living in Germany, over an accident that happened in Berlin. The facts call for a given analysis under traditional German law. Should however the analysis be amended in order to take into account legal methods and solutions applied in other contexts, namely the European or even perhaps the international contexts? Imagine a case presented before an international court, be it public (an administration or an international judge) or private (an international arbitrator): should the way a given rule has been applied by national or European courts be taken into account? Imagine a dispute in front of a European Court, the European Court of Justice or the European Court of Human Rights: do the methods and solutions that have been developed over the last 60 years replace or supplement the older legal constructions defined at national or international level?

The domestic, European and international contexts create a complex legal game: far from coexisting in isolation, like Leibnizian monads, rules and legal culture characteristic of each level, intersect, rub against and influence one another. As a consequence, lawyers have to adapt their reasoning to the increasingly global nature of the situations with which they deal. They are confronted more and more frequently by a globalised context such that rules formulated in a national, international, or European environment may all have to be applied to a given case. In any given situation, the laws of several different jurisdictions sometimes come into play, either alternatively or cumulatively, at the same time or at different moments, in or on one or several spaces or levels, by one or by multiple actors. Thus, for example, a case presented before a national judge can sometimes give rise to proceedings before a European court (such as a preliminary ruling on the interpretation or validity of European

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1 Domestic or foreign.
3 EU, ECHR.
Union law brought before the Court of Justice of the European Union or an application made to the European Court of Human Rights after the exhaustion of all national remedies) or, more rarely, an international court (for example, a national conflict that has become an interstate conflict brought before the International Court of Justice). In the same manner, a situation addressed by a public or private international court may have consequences for European and/or national courts (for example, a sanction announced by the United Nations and executed at European and national level or an international arbitration sentence presented to a national judge who decides to apply European Union law and to consult, in that capacity, the Court of Justice of the European Union).

This book seeks to make explicit the analysis lawyers engage in every time they are confronted by the operation of several laws in the following different contexts: national, international or European. It clarifies and classifies the main global occurrences. It provides thereby an intellectual road map to operate law in a global context. It also provides a vade-mecum for practising lawyers, who nowadays find themselves advising in what is almost inevitably a multi-jurisdictional context. They may legitimately wonder whether they should adapt their approach to legal environments other than the one in which they principally operate, or whether they should instead adhere strictly to the approach adopted by their home jurisdiction, with which they are most familiar.

The subject matter of the present book is not the definition or description of a so-called ‘global’ law.\(^4\) The book focuses on the needs of lawyers who need to reach a conclusion in a context that can be described as ‘global’\(^5\) in the sense that it is no longer characterised by the Westphalian order in which each nation state has sovereignty over its domestic affairs to the exclusion of all external power or interference.\(^6\) The worldwide movement toward economic, financial, trade and communication integration also influences the way in which the law is


operated. It has impacted the sources of law: some autonomous transnational law such as the *lex mercatoria*, international and regional treaties have developed; rules and terms promulgated by international organisations are being increasingly incorporated into agreements. In addition to the development of these sources of transnational law, a judicial and legislative cross-influence can also be observed. Parallelism can even develop in an unconscious manner. The globalised context has meanwhile also heightened the perception of remaining differences. Because of these changes derived from the globalisation of the context, legal reasoning has to adapt and to become global as well. Lawyers are expected to take into account more than one legal rule and different levels of geographic integration. This book brings to light the core elements of such a global legal reasoning and stresses its invariant *modus operandi*: comparing, combining and prioritising.

**OPERATING THE LAW IN THE NATIONAL, EUROPEAN AND INTERNATIONAL CONTEXT**

Conceived by Santi Romano as an instrument for defining legal orders, legal pluralism has been extensively studied by the disciplines of legal theory and sociology or anthropology of law. It allows us to describe

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7 About the conceptualisation of these developments (globalisation, fragmentation, transnationalisation), see below p. 6 and notes.
8 On these developments, see, Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law, Text, Cases and Materials* (Oxford University Press, 2007), pp. 25 et seq.
9 For instance, the doctrine of state immunity used to give absolute immunity but has progressively not been applied for commercial transactions in which states are involved and has been narrowed to the acts of states in the exercise of their sovereign power.
10 Restatements of contract law have demonstrated that there is high degree of similarity in solutions even if the technicalities are different.
11 For these various traits in the US context, see for instance Jeremy Waldron, *Partly Laws Common to All Mankind*: *Foreign Law in American Courts* (New Haven: Yale University Press, 2012).
‘the existence, in a given society, of different legal mechanisms applying to identical situations’. Lawyers happily refer to it when they study, on the one hand, the different ways in which the law is liable to develop outside the state processes of deliberation or decision and, on the other hand, the diverse modes of interaction that result from the coexistence of a plurality of legal systems or legal orders.

In a globalised environment, legal pluralism has its own particular meaning. The expression ‘global legal pluralism’ refers to a particular form of legal pluralism brought about by the phenomenon of the globalisation of law and its different forms (globalisation, transnationalisation).


16 Considerable literature has developed on this subject. For different approaches to the phenomenon in different legal disciplines: G. Teubner (ed.), Global Law without a State (Dartmouth: Aldershot, 1997); J. Basedow and T. Kono (eds), Legal Aspects of Globalization (Kluwer Law International, 2000); J.-B. Auby, La globalisation, le droit et l’État (2nd edn, Montchrestien, 2010); M. Faure and A. van de Walt, Globalization and Private Law (Edward Elgar, 2010); J.-Y. Chérot and B. Frydman (eds), La science du droit dans la globalisation (Bruylant, 2012).

17 Works on the emergence of transnational law are historical. We will mention here two outstanding contemporary publications which reconsider the phenomenon in constitutional law and private law: Ch. Joerges, I.-J. Sand, and G. Teubner (eds), Transnational Governance and Constitutionalism (Hart, 2004);
fragmentation, etc.). Although this pluralism has not escaped from forms of standardisation and domination, it describes the multiplication of the sites of the creation and the application of law, which appear outside or transcend the strict state model. Law is not only constructed within national spheres. It results from the particular activity of international and regional organisations, notably European, whether they have a state origin (United Nations, World Trade Organization, International Labour Organization, etc.) or even a private origin (non-governmental organisations such as the International Chamber of Commerce or Human Rights Watch for example, multinationals, professional associations, etc. that can provide for model contracts, recommendations and more generally ‘soft law’ that has an impact in practice). The national context, which also features forms of legal pluralism, has not disappeared. But it coexists with the legal methods and solutions developed in an international or European context. Most factual situations create a collision between norms stemming from these different levels.

There are ever more cases in which several laws drafted in a national, international or European environment must sometimes be mobilised, alternatively, cumulatively, at the same time or at different moments, in or on one or more spaces or levels, by one actor or by multiple actors. They require the operation of the law in a context of global legal pluralism. The legal rules applied develop, in a variety of global legal situations, their own trajectory. This dynamic cannot result from the mere operation of a method or a legal solution at a given moment, in a predetermined space and on a predetermined level, by a duly identified actor.

A PRACTICAL RATHER THAN A THEORETICAL APPROACH

When questioning how to apply relevant legal rules in the national, international and European context, lawyers may adopt a theoretical and
abstract perspective to try to develop legal constructs that may allow them to face the difficulties raised by global legal pluralism.

Such analysis may rely on different methods, such as defining the law, identifying legal systems and their relationships, resolving conflicts of law and, finally, the quest for a global law. We will briefly present these different methods while explaining why none of them underpins the present work.

The first method – *defining the law* – is not the most apt for describing a process of applying the law. If we take the position of normative positivism, which proposes, in simple terms, to define law through law, one could even say that it is the worst method one could adopt. Defining the law by reference to ‘norms’ makes it impossible to consider the ‘applied law’ as a separate object of study. It amounts, effectively, to holding that the application of the law is inseparable from the definition of the law itself. As the father of this doctrine wrote:

> application of law is at the same time creation of law. These two concepts are not in absolute opposition to each other as assumed by traditional theory. It is not quite correct to distinguish between law-creating and law-applying acts. Because apart from the borderline cases – the presupposition of the basic norm and the execution of the coercive act – between which the legal process takes place, every legal act is at the same times the application of a higher norm and the creation of a lower norm.19

Naturally, other approaches to law exist.20 But today, none of these have really emerged as making the application of law a truly distinct field of study from the operation of defining law. References to ‘the application of law’ are most frequently missing from those works (textbooks, handbooks or even treatises) that aim to define law. When it is mentioned, it is in relationship with the procedural, penal and, potentially, contractual tools that accompany the operation of the majority of legal rules. As for the study of case law that, in the civil law tradition, ‘applies’ the law, this has long been considered, explicitly or implicitly, as a primary source of interpretation, inseparable from the definition of the law itself. In the common law tradition, case law defines the legal rules.

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20 We refer the reader to general works presenting the main theories of law. See notably: J.W. Harris, *Legal Philosophies* (2nd edn, Oxford University Press, 2011); Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell, 2010).
Returning to our subject matter, applied global legal pluralism, the approach of defining the law at best leads us to distinguish between those phenomena that participate in a legal process and those which are foreign to it. For example, when lawyers borrow a legal method or solution that is common in another legal system, sometimes at another level of application of law (national, international or European), this can give rise to discussions on the validity of this loan. But these discussions are often misleading: whatever lawyers conclude, more or less confidently, about the legal or non-legal character of the loan, they are no better acquainted, as we shall see, with its status in a dynamic approach to the application of law on a potentially global level.21

A second traditional approach relates to identifying legal systems and the relationships between them. Santi Romano first introduced this method22 in a work considered to have given birth to the concept of legal pluralism. Let us recall briefly that the author’s ambition was to ‘bring into the legal order this fact of the social order which has generally been held to be the antecedent of law’.23 He proposes a definition of legal order capable of rising above the mere state model. He proposes a criterion of ‘relevance’ capable of governing relations between two distinct legal orders.

A work on applied global legal pluralism could certainly not have been written if it were not for the legacy of Santi Romano. The existence of a plurality of legal systems and the difficulties arising from defining the relations between them are, in effect, pervasive in any research of this kind.

That said, it is not certain that reflections on the definition of ‘legal order’ will allow us today to overcome all the difficulties inherent in applying the law in a global context. That it is possible here and there to reconsider the relations between different legal systems through the notion of ‘legal order’ is one thing. To derive from this a general lesson on the relations between those systems in the triple national, international

21 On discussions of this type, notably on the subject of the place of national law in international and European law and on the extensive borrowing of solutions of international and European law in the national context, see infra, p. 71.
and European context is another. The ‘fact of social order’ considered by Santi Romano in the first half of the twentieth century through the prism of the ‘institution’ that the author borrowed from Maurice Hauriou, no longer corresponds to our contemporary environment. The multiplication of public and private ‘institutions’ of a national, international and European dimension, the extraordinarily diverse ways in which these institutions interact with each other, and in which situations move from one to the other, etc., justifies the proposition that the starting point of a study whose object is to explain global legal pluralism should be different from that which was considered almost 100 years ago. The only stable anchor for this work is the description and explanation of the phenomenon, and this is preliminary to any theoretical or abstract approach.

The same justification can be given for our refusal to carry out this research under the title of any given monism, dualism or pluralism. The explanatory power of these traditional intellectual frameworks has been tempered.24 An analysis of the relations between legal systems misses the essence of a pluralist approach to legal systems.25 The variety of situations means that no interpretation – monist, dualist or even pluralist – of the relations between legal systems is to be favoured over the others. The situations we encounter cannot be immutably reduced to one or other of these algebraic figures. According to the context in which they have evolved, according to the result sought by lawyers, the approach can vary dramatically from one state to another. Rather than applying one or other of these theories, it is necessary to consider the factual situations with a fresh eye and to determine in what measure underlying mechanisms that we may not yet be fully aware of animate them.

The third method is that of resolving conflicts of laws. The expression ‘conflicts of laws’ refers, in a global approach, to cases of discrepancies between legal solutions of a national, international and European dimension. It may relate to laws (Italian law conflicting with international or European law, etc.) or rights defined in these different contexts (for

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25 See on this point, the demonstration of D. Boden, ‘Le pluralisme juridique en droit international privé’ (2006) 49 Arch. de Philo du droit (Le pluralisme) 275.
Introduction

example, a conflict between a right to industrial action enshrined in national law and a freedom of economic circulation or competition established by European or international law).

In an environment of applied global legal pluralism, the figure of conflict may seem ubiquitous. The application of law in a triple national, international and European context gives rise to all sorts of formal or material contradictions between the norms that lawyers may want to categorise (for example, by distinguishing true and false conflicts) in order to find solutions to every conflict. We know also that the figure of conflict serves as a real matrix for certain subjects or great legal questions: the law of ‘conflict of conventions’ in public international law, the rule of ‘conflict of laws’ in private international law or, the law of ‘conflict of norms’ in a broader systemic approach. Conflicts refers to the rules applied by a court of a particular national jurisdiction to determine which system of law it should apply in a given situation. It is thus a body of law in its own right.

Without seeking to minimise the importance of ‘conflicts’, the fact is that no ‘general rule of conflict of norms’ exists today that can be deployed in all situations. A rule of conflict of laws can be deployed in all situations of private international law or, a rule of conflict of conventions can be deployed in all situations of international public law. In an environment of global legal pluralism, lawyers do not have at their disposal a single tool for resolving conflicts between national, international and European laws. They are obliged to rank the different conflicts by distinguishing situations according to whether they relate to a national, international or even European legal environment. Each of these contexts offers, in effect, legal methods and solutions that can govern potentially conflicting applications of these different laws.

Faced with this situation, the temptation may be to decompartmentalise these legal specialisms ‘top-down’. If we follow the methods of private lawyers,26 we observe an already historical tendency consisting of using and enriching the prism of conflict of international conventions as a tool for resolving the conflicts between international treaties and accords that can arise in situations of private international law. Newer rules have been added to the classical principles for resolving conflicts (lex posterior, lex

26 Public lawyers also use techniques from private law, if not in resolving conflicts of norms, at least in dealing with them. For example, the expressions ‘forum shopping’ or ‘law shopping’ have a growing place in works of international public law even though these terms were first popular amongst private international lawyers. See, on this subject, the cross-reflections in Forteau et al. (n. 18).
specialis, res inter alios acta) such as, for example, the theory of maximum efficiency.\footnote{On the relationships of conflict between conventional sources, see the work of S.A. Sadat Akhavi, Methods of Resolving Conflicts between Treaties (Brill, 2003).}

More recently, the expressions and mechanisms of the conflicts of law rules \textit{(lato sensu)} have been used to describe the process of applying law, not only state or national law, but also non-state, international and, sometimes, European law.\footnote{On this subject, see H. Muir Watt and D.F. Arroyo (eds), Private International Law and Global Governance (Oxford University Press, 2015) and W. van Gerven, ‘Plaidoirie pour une nouvelle branche du droit : le “droit des conflits d’ordres juridiques” dans le prolongement du “droit des conflits de règles”’ (2011) 350 Collected Courses of the Hague Academy of International Law 11.} The ambition of these different initiatives is to resolve conflicts of law which arise in a national, international and European context by specifying, \textit{a priori}, remodelled rules of conflict and drawing upon the innumerable resources of private international law. Rules of this type have notably developed in all situations, which involve an overlap of the constructions of international public law, private international law and European law. Such overlaps result from the fact that these three legal subjects do not have clear limits. Effectively, international public law and European law are defined by the origins of their rules whereas private international law is constructed through reference to the international private situations to which it applies. It is therefore perfectly feasible for a rule of international public law (an international treaty) or of European law (a secondary legislation) to apply in a situation of private international law, concurrently with one or several national laws. Rules of conflicts of law are also in place regarding transnational law, which develops in certain domains in which private law subjects attempt to govern their relations without having recourse to state mechanisms.

This type of construction, based on conflict of law rules, pursues various objectives. Specialists in a legal discipline may reconsider the foundations of their subject taking into account, to put it briefly, global developments. A more ambitious objective consists of imagining that the concepts developed by one discipline, in this case international private law, are capable of dealing with questions of world or global governance.

Neither of these objectives will be pursued by our work. Other than the fact, already indicated, that we do not believe in the emergence of a global legal science capable of applying, like economics, to all actors in
the world, an analysis in terms of ‘legal pluralism’ should not, without destroying its own foundations, result in the domination of one legal discipline over all the others.

Dealing with a situation at national level is, historically, the proper domain of private international law: national laws and national judges. This endeavour differs from dealing with a situation in a truly international legal context, of European or *a fortiori* of transnational law. Lawyers who work in these different contexts did not train in the same schools. They do not use the same institutional or substantive tools. They simply do not respond to the same legal questions. This observation is valid for a whole series of subjects that will be tackled in this work (for example: the attribution of nationality to an individual, the recognition of a state’s jurisdictional or executional immunity, the exercise of a subjective right, the operation of a rule of public order, etc.). It is also pertinent to the search for law applying in space.29

As a consequence, the present work does not adopt the methodological framework of one specialism to the detriment of all the others. In a pluralistic environment, lawyers must learn to consider questions in a pluralistic manner.

A final observation will provide further evidence that the resolution of these conflicts will not resolve, *a priori*, all the inherent difficulties of applied global legal pluralism.

As we have already indicated above, applied global legal pluralism designates the hypotheses in which several laws of a national, international and European dimension apply to a given situation. These hypotheses necessarily exclude cases in which a rule of conflict (conflict of laws, conflict of conventions, etc.) intervenes *a priori* to designate the one and only law applicable. Happily, such cases exist. A permanent environment of pluralism does not surround lawyers. But such cases are beyond our field of study. By definition, we are only interested in those

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29 The same sort of analysis could be pursued in European law. How many decisions of the Court of Justice of the European Union, not ruling on a question of international private law, have been read as containing a lesson in international private law even though, despite the fact international private law handles the ‘national’/‘foreign’ distinction with great dexterity, it has the greatest difficulty in integrating a ‘European’ dimension into its constructions? We sometimes observe a veritable ‘extrapolation’ of European law, which, although it may find resonance in international private law, has none at all in European law. This is why it is necessary to dissociate the reasoning according to whether we place ourselves in one territory or another, in avoiding confusing law and the discourse one can have on it through another law.
cases in which several laws, which have developed in different contexts – national, international and European – apply to a given situation.

The diversity of the situations and the examples that will be considered in this work demonstrates that the a priori resolution of these so-called ‘conflicts of law’ cannot be the only, or even the principal, preoccupation of lawyers. The reason for this is not the absence of ‘rules of conflict’, but the absence of ‘true conflict’ between laws of a national, international and European dimension, which, very often, cannot be substituted one for the other. They apply together to a given case because very often they do not concern the same object. The idea that such situations may be treated a priori, by choosing one applicable law, is an illusion. We abandon here the prism of a conflict to be resolved, understood as the indispensable prelude to any analysis.

The fourth method lawyers may be tempted to use to grapple with the question of how to apply the law in the national, international or European context using an a priori construct is the quest for global law or global governance. This method does not differ much from the first three methods we have outlined above. But it is part of a dominant trend: a movement notably engaged in by a myriad of national, international and European research programmes which transcends the small world of lawyers, but in which the latter have rightly taken part.\textsuperscript{30}

The quest for global law has in recent years become the new holy grail of a global legal expertise. Various perspectives have developed. Our work has no ambition to take part in the definition of global law.

The quest for global law can, first, turn to the figure of a ‘law constructed without the state’ which aims to respond to global problems (the environment, finance, energy, social responsibility, etc.).\textsuperscript{31} It could also take a dialectical approach to law: a ‘network of law’, putting a multitude of sites of the production of law into contact, an approach which is thus in opposition to the figure of monolithic law, constructed on pyramidal model.\textsuperscript{32} Finally, the search for global law can give itself the objective of gathering under one label, that of ‘ordered pluralism’, all

\textsuperscript{30} As illustrations, consult, for example, the French ANR programmes (http://www.agence-nationale-recherche.fr/) and the European ERC (http://erc.europa.eu/) proposed on these themes.


\textsuperscript{32} F. Ost and M. van de Kerchove, De la pyramide au réseau? Pour une théorie dialectique du droit (Brussels, 2002).
the tensions that characterise a contemporary dynamic of the creation of law by all legal actors: international and regional organisations, states and private entities.33

Beyond the difficulties raised by theoretical and abstract approaches, the principal reason why we have prioritised a practical analysis relates to the phenomenon studied itself. Instances of applied global legal pluralism, which designates situations in which several laws formulated in a national (domestic or foreign), international34 or European35 environment may be applied together to a given case, have developed considerably over the last 30 years. To fully grasp the importance of this evolution, it is enough to remember, for example, what the work of lawyers consisted of at the end of the Second War and what it has become today with the proliferation of international and regional sources of law that may be applied and invoked in different territories. Without being entirely novel, this phenomenon has incontestably attained a previously unequalled scale. Have we, as lawyers, fully grasped the importance of this development? Do we know, if not all, at least the principal situations that give rise to applied global legal pluralism? Though minds broaden, apart from a few specialists, experts and pioneers in these issues,36 the majority of the community of lawyers appears to largely ignore the phenomenon. It seems that not sufficient attention has been given before now to the great variety of situations of state or non-state, public or private, national, international or European law that participate in the phenomenon of applied global legal pluralism. An effort of description of global legal pluralism through some of its occurrences is, in our view, an indispensable prelude to any conceptual analysis of the phenomenon.

None of the three approaches described, defining the law (identifying legal systems and their relationships, resolving conflicts of law or the quest for a global law) will be pursued by this work. Rather than considering the operation of the law in different national, international and European contexts a priori, through the construction of the methods and solutions capable of approaching global legal pluralism, it is possible

34 UN, WTO, WIPO, ILO, WHO, ICI, PCA, ICSID, ICC, HRW.
35 EU, ECHR.
36 See in particular, the oldest texts cited in the selective bibliography at the end of this work, p. 221.
to reverse the perspective and pay attention to the operation of law in a global context. This is what we focus on.

APPLIED GLOBAL LEGAL PLURALISM: A NEW FIELD OF STUDY

The suggested shift towards a practical approach to global law requires us to focus on facts.37 Some legal issues deriving from the facts can be captured without passing through the preliminary definitions of the laws and the legal orders.

More specifically, we propose to adopt the perspective of lawyers who operate the law in different national, international and European contexts. How do they use the law when they are confronted with these different contexts? How does the plurality of contexts affect their manner of applying the law?

Applied global pluralism focuses on how laws with different objects and domains apply to a given situation and how lawyers from different legal cultures deal with it. Applied global pluralism requires a referential shift that can be evidenced with two examples, see Figure 1.1 below. First, the legal context takes precedence over substantive law (treaty, statute or case law) that will govern the solution. Second, the perspective of the lawyers that are involved at the various geographic levels and their legal culture are of greater importance than theoretical hypotheses about the definition of norms and of the legal order.

The operation of the law by lawyers is largely conditioned by the context – national, international or European – in which the law is applied.

National law may permeate this environment. The vast majority of lawyers work in a purely domestic context. But it is also the lot of the international private lawyers when they apply a national law or refer to a state judge designated by a connecting rule. This internal law applied by lawyers is not only composed of laws formulated in writing (e.g., mainly statutes, but also soft written laws such as recommendations of independent agencies). We can also find in it the trace of revelatory law, spontaneous law or soft law, for example.

37 The Perelman Centre of Legal Philosophy (Free University of Brussels) directed by B. Frydman. For a presentation and justification of this method, see by this author: ‘Comment penser le droit global?’, in J.-Y. Chérot and B. Frydman (eds), La science du droit dans la globalisation (Bruliant, 2012), p. 17.
The international context concerns the lawyers’ application of legal methods and solutions of an international dimension. This is the lot of international lawyers, public or private, when they operate legal mechanisms adapted to international situations. These mechanisms can have a formal international dimension: an international treaty, an international custom, a procedure before an international court. They can also have a material international dimension, as, for example, a national law destined to apply specifically to international situations: rules of conflicts of law or of jurisdictions, substantially international material rules (such as, for example, a German legal rule of international public order, etc.). This applied international law sometimes has a transnational dimension. It is not the fruit of the labour of states but results from the practice of non-state actors in resolving specific situations.

The European context concerns the application of a law formulated in a legal environment with a European dimension. Two large European organisations aim to create law in this way: the European Union and the Council of Europe (with, under the auspices of the second organisation, the unique position occupied by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its court, the European Court of Human Rights (ECtHR)). The European judge who applies European law every day (which can take the shape of any of

### Scheme: a double movement

Sources of law → Contexts of operating law

1 → 1

1 → 1

1 → 1

Norms/Legal orders → Lawyers/Legal cultures

Comment: in a global context, the most important element is not the law lawyers have to apply but the context in which they have to apply it. Several contexts and several lawyers mean a pluralistic operation of the law in a global context.

**Introduction**

Figure 1.1  A double movement

The international context concerns the lawyers’ application of legal methods and solutions of an international dimension. This is the lot of international lawyers, public or private, when they operate legal mechanisms adapted to international situations. These mechanisms can have a formal international dimension: an international treaty, an international custom, a procedure before an international court. They can also have a material international dimension, as, for example, a national law destined to apply specifically to international situations: rules of conflicts of law or of jurisdictions, substantially international material rules (such as, for example, a German legal rule of international public order, etc.). This applied international law sometimes has a transnational dimension. It is not the fruit of the labour of states but results from the practice of non-state actors in resolving specific situations.

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the forms of law indicated further above) is thus immersed in the jurisdiction of a law which often asserts itself through its (relative) originality compared to the constructs defined in the national and international context.

These three contexts are evidently not isolated from one another. Lawyers can, through a simple trick of the mind, pass from one context to another. Some actors occupy ambivalent positions. This is very common, for example, for the national judge who presents himself as a European common law judge. This is also the case of the European judge charged with applying national law to a contract concluded by the European Union under the terms of an arbitration clause (art. 272 TFEU). The ICSID Judge is also ambivalent, simultaneously a national and international judge. But each context has its own legal language, its rationality, its institutional or material tools. As a field of study, applied global legal pluralism allows us to pose the question of how lawyers can apply the law, not only in the context that forms their usual sphere of activity, but in other contexts. What tools do lawyers use when they consider how to apply the law in a legal environment other than their own?

In order to distinguish between these three contexts, national, international and European, it is sometimes useful to speak of the ‘level of application of law’. This expression does not have a strong theoretical value. It is not meant, notably, to designate a global legal order in which one level of application of law is placed immutably and definitively under the authority of another. But it is sometimes enlightening. It allows us to envisage the hypotheses in which it is possible to approach a case successively at different stages – national, international or European – of law.

This superposition of levels (to which one could add others: local, regional, federated, federal, inter-regional and, perhaps one day, inter-planetary, etc.) takes into account the differences that characterise the manner in which the law is applied in distinct contexts. The legal methods and solutions deployed on a national level to tackle legal cases are not the same as those deployed on an international or European level. It matters little that a legal rule drawn from national law (a piece of internal legislation), international law (an international treaty) or European law (a piece of European secondary legislation) can sometimes apply on these different levels. What matters is the legal environment in which lawyers consider that application. If there are several of them, lawyers must show themselves capable of renewing their analysis every time it develops in a new environment.
Introduction

We propose to focus on the work of lawyers when they apply the law in different national, international and European contexts. How do they use the law when they are confronted with these different contexts? How does this plurality of contexts affect their manner of applying the law?

As understood in this book, lawyers all have in common the pursuit of a practical result: the formulation of a rule, a decision, an argument, an analysis or a theory. In other words, we contemplate lawyers who are either independent (as barrister, consultant, magistrate, solicitor, or professor) or under the authority of a public institution (administration), or subordinate to a private body (such as non-governmental organisation, company, union, association). People referred to as lawyers in this work encompass therefore judges, legal academics, solicitors and barristers from any jurisdiction, legal experts involved in the European institution and, finally, any lawyers who operate within global structures.

A THREE-STEP PRESENTATION: COMPARING, COMBINING, AND PRIORITISING THE APPLICATION OF THE LAW IN THE NATIONAL, INTERNATIONAL AND EUROPEAN CONTEXT

How can lawyers take into account the multiplicity of contexts, national, international and European, when applying the law? They have to take this feature into account. Where should they start? What steps should they take in order to achieve this analysis?

A tempting route might therefore consist in beginning by comparing the application of the law in the different contexts (comparison), to then perhaps (the approach is not inflexible) combine these applications, notably if they allow the attainment of a different result than that obtained in each of the contexts individually (combination), knowing that he potentially has the option of deciding, at any moment, to choose the application of the law in one context, rather than another (prioritisation).

In a general sense, comparison is thus the first step that lawyers must undertake in order to attempt to apply the law in the national, international and European context. Generally confined to the mere study of national laws and a mostly economic exercise, ‘comparative law’ deserves to be given a broader meaning in a perspective of applied global legal pluralism. The comparison of national, international and European law involves an investigation of the law that may be applied in a national, international or European environment, and how it would be applied (methods, rule of evidence, …) and with what results. This examination
is a necessary first step. It allows lawyers to fully grasp the similarities and differences that characterise the application of the law in contexts that are national and international as well as European.

The step of combining national, international and European law, for its part, requires the lawyers to assemble the methods and solutions identified by the operation of comparison in order to construct their legal reasoning. It may be undertaken in two main situations: that in which the laws considered are complementary and have an operational relationship; and that in which the circulation of situations from one level of law to another can be observed.

The process of the prioritisation of laws enables, finally, every legal system present at national, international or European level to specify which rules have a place in its legal order. This process does not merely have a static value in that it should be considered in an enclosed manner in a national, international or European context. It also has a dynamic dimension in which the application of the methods and solutions derived from national, international or European law leads to interactions. On this point, two scenarios must therefore be carefully distinguished. In the first, lawyers appeal to an application of law on one level, which potentially involves the operation of a hierarchy of legal norms. In the second, lawyers aspire to apply the law at another level, which leads to look for evidence of the materialisation of hierarchical applied law.

THE CHOICE OF A METHOD OF DEMONSTRATION: SITUATIONS, EXAMPLES

Any study on applied global legal pluralism must be articulated around cases. Even though our research does not incorporate any authentic-empirical dimension, it does present situations and examples.

The term ‘situation’ refers to typical theoretical or practical questions. Pursuant to the method presented in this book, we suggest that situations should be analysed and resolved by reference to legal methods and solutions that can be applied in different contexts. Situations are usually illustrated through one or more examples drawn from the practice of law; results from scenarios are sometimes invented.

In total, almost 89 situations and 142 examples are reviewed in this work. They are presented in boxes.

This method of presentation using situations and examples has three objectives. By describing different scenarios, we hope that the reader, interested by one case in particular, will be able to identify, by means of
the summary, tables and index, the instances of comparison, of combination and/or prioritisation that are envisaged. Thus the reader will observe that the case can be dealt with in different ways depending on which method is employed by lawyers. Some cases lend themselves more easily to a multiple treatment than others. But as far as possible, we have tried to proceed so that the same situations and the same examples are presented in the triple light of comparison, combination and prioritisation.

By articulating our demonstration around situations and examples, our second objective is to limit the field of study opened by applied global legal pluralism. Renouncing from the outset any claim to making an exhaustive presentation, we decided to use examples in order to outline the multiple facets of legal pluralism. Our own academic interests have guided the choice of situations and examples, although we have often had to venture out of our specialisms to embrace the different contexts. These situations and examples have not been developed as such. Their treatment and the demonstrations they summon are entirely focused on the purpose of this study.

In short, this work is conducted around situations and examples in response to a scientific need, which is to determine how the law manifests itself. In order to answer this essential question, several routes could have been taken. In the context of this study of applied global legal pluralism, it appeared to us clear that the responses had to be found other than at the end of a general and abstract explication. This is why our comments and the few elements of demonstration it attempts to present and organise are systematically grounded in situations and examples.

38 Two methods, not related to this research, immediately come to mind: the realisation of subjective rights and judicial reasoning.