

Cambridge University Press

0521812313 - Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism

Mireille Delmas-Marty

Excerpt

[More information](#)

## Introduction

Today's profusion of norms has scrambled our image of legal order and made clear our need for a law that is common, in every sense of the word: accessible to everyone, built from the bottom up as a shared truth, and therefore relative and changing, rather than handed down from on high like gospel, revealed only to official interpreters; common to the various legal sectors, to ensure each system's cohesiveness despite increasingly specialised rules; and common to the different states, in a move toward harmony that will not require them to renounce their cultural and legal identities.

This need is certainly not new. From the twelfth to the sixteenth century, the call in Europe for a *jus commune*, made up of local customs and feudal, Roman, canon and commercial law, accompanied the emergence of national laws. The *common law* of the English royal courts, Roman law and the great continental codifications all stem from this need, and bear witness to the diversity of the legal means for satisfying it.

What is new, perhaps, is that we find ourselves very poor in social organisation. Return of the law or return to the law, it is as if law has become, or is supposed to become, a substitute for religions and ideologies and, as such, the sole founder of its subjects – law to 'institute' people, to 'make them stand upright' as Pierre Legendre said<sup>1</sup> – and the sole bearer of democracy: law as the opposite of totalitarianism. Hence the two-fold danger of reinforcing professional monopolies, and thereby moving further away from non-jurists, and of 'over-ideologising' law, the rule of law and human rights, along with over-ideologising the economy and the market.<sup>2</sup>

<sup>1</sup> *Filiation, fondement généalogique de la psychoanalyse* (with Alexandra Papageorgiou-Legendre) (Fayard, 1990), p. 194.

<sup>2</sup> E. McKay, *Economic analysis of law* (Themis, 2000); M. Delmas-Marty, 'Commerce mondial et protection des droits de l'homme', in J.-F. Flauss et al. (eds.), *World trade and the protection*

But we must set human rights apart, because these rights have always come from the bottom. Taken from states rather than given by them, they stand, as the case may be, in opposition to official law. The big change – the other historical change – is that they have become legally ‘enforceable’ against the states. Born as declarations of principles, and thus subject to the goodwill of the states, human rights suddenly became, after the shock of World War II, true legal principles according to which a law may be censured or state action condemned.

The initial effect was, in fact, to blur the image a bit more. This is because legal thinking adapts poorly to a plurality of norms, especially when the norms are (a) imprecise, as are most of the principles inscribed in the French *Déclaration des droits de l’homme* of 1789 and applied today as rules of law by the French Conseil constitutionnel or (b) weakly hierarchical, like the principles of the European Convention on Human Rights, for which the Strasbourg Court grants a ‘national margin of appreciation’ or, worse, (c) non-hierarchical yet simultaneously applicable, without either system having priority in a conflict, as we will see when norms coming from European Community and Union treaties meet up with the European Convention on Human Rights adopted by the Council of Europe. This imprecision of norms revives the old fear of a government of judges, which would be merely arbitrariness under another name, while the lack or weakening of hierarchy seriously disturbs the representation and functioning of a legal order conceived of as unified and hierarchical, unified because hierarchical (because the content of the inferior norms must comply with the prescriptions of the superior norm, unity of the system is guaranteed).

But the idea of granting human rights the role of a ‘law of laws’ is growing. The expression indicates both their new place in the theory and practice of legal systems and their new vocation: not just to protest, but also to harmonise the various systems.

Going beyond the ‘common standard of achievement’ proclaimed in the Universal Declaration of 1948 or the ‘common language of humanity’ evoked by the UN Secretary-General at the World Conference on Human Rights in Vienna, the document adopted at the end of this Conference

*of human rights: human rights in the face of global economic exchanges* (Bruylant, 2001), pp. 1–17 and J.-F. Flauss, ‘Le Droit international des droits de l’homme face à la globalisation économique’, in *ibid.*, pp. 217–56.

Cambridge University Press

0521812313 - Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism

Mireille Delmas-Marty

Excerpt

[More information](#)

in June 1993 emphasises that the Universal Declaration now constitutes a ‘common model to follow’.

More than the quantitative evolution – from fewer than 60 states in 1948 to 189 in 2000 – it is the change in terminology, from ‘common ideal’ to ‘common model’, that shows how far we have come. But this has been at the price of numerous misunderstandings and the danger of giving in to many temptations, beginning with that of a slightly naive universality (in fact strongly denounced in Vienna) that, rather than confronting problems, prefers to deny differences or smooth them over by choosing a ‘model’ so homogeneous and unified that it strangely resembles the hegemony of one culture over the others.

This is why a long detour seemed necessary to me. First, I size up the transformations that national laws have undergone, by describing the *reconstruction of the landscape* (Part I) where, despite the profusion of norms, or perhaps because of it, the major landmarks seem to have disappeared. But the secret of a common law that respects the plurality of norms is its consideration of legal logics, as the rational formalism of the law presents the danger, like the magical formalism of ancient rites, of favouring ‘the symbolic efficacy of each action when, its arbitrariness misunderstood, it is taken for legitimate’.<sup>3</sup>

It is precisely to avoid this ‘symbolic violence’, founded on logical necessity in order better to hide the arbitrary, that it is absolutely necessary to show how, and under what conditions, combining classical logic with contemporary logics allows us to *build on multiplicity* (Part II) without having to choose between excluding and imposing identity. Only then can one attempt the approach that is this book’s *raison d’être* and ambition: using and building on pluralism and the complexity of legal systems to *reinvent common law* (Part III).

<sup>3</sup> P. Bourdieu, ‘La Force du droit’, *Actes de la recherche en sciences sociales* 64 (1986).

Cambridge University Press

0521812313 - Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism

Mireille Delmas-Marty

Excerpt

[More information](#)

## PART I

---

### Reconstructing the landscape

Cambridge University Press

0521812313 - Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism

Mireille Delmas-Marty

Excerpt

[More information](#)

An orderly landscape. That is what we want. We ask the law for a little order, to protect us from disorder.

We ask first that it set limits, trace boundaries – and that it stay within its own boundaries, ‘so that the sea isn’t without a shore’, as Jean-Etienne-Marie Portalis said in his celebrated *Discours préliminaire au projet de Code civil* (1804), wanting to avoid ‘regulating everything with laws’ and so reassure society in the face of the uncertainties of science. Science, he said, ‘left to dispute, offers only a sea without a shore’, even if it is also true that by refusing all limits, science (like art) works to overcome disorder through scrutiny.

The law remains remote, however, so we ask it for landmarks to indicate those boundaries not to be crossed, thereby establishing the major, fundamental taboos, such as those that define criminal guilt or civil wrong.

We also ask the law for landmarks to separate the various different kinds of laws, because they express ‘different kinds of relationships between people living in the same society’ (Portalis again). We ask for landmarks to separate civil laws – laws that bind individuals to one another – from laws governing profit-generating trade, because not everything is ‘within lawful trade’,<sup>1</sup> and also to separate laws that relate to the administrative and governing authority from those that belong to the sovereign power, which prohibits and punishes transgressions: the administrative and criminal laws that bind the individual to the state. But administration and repression should not be confused.

We ask for landmarks rather than for sources, because we want to be able to delimit the sources of law. The state and, in the Roman-Germanic

<sup>1</sup> P. A. Fenet (ed.), *Naissance du Code Civil* (preface by François Ewald) (Flammarion, 1989), p. 107.

Cambridge University Press

0521812313 - Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism

Mireille Delmas-Marty

Excerpt

[More information](#)

tradition, statute are historically our reference points here in the west where the law, in separating itself from morality and religion, identified itself with the state. In the late eighteenth century, statute – the state source *par excellence* – became, in its majesty, almost the only source and instituted the legal order to which we are now accustomed.

This order is a guiding or directing order, because it also directs our way of thinking about the law: along lines forming a highly visible and explicit map where norms are developed hierarchically and applied linearly in a single direction – from legislator to judge. It is a relief map where the pyramid of norms dominates the landscape, providing visibility and stability to the instituted legal order.

Imagine the surprise of the observer, eyes agog, seeing that the landscape still inscribed in our memories has not disappeared, but its components have dispersed. We can attribute this dispersion to a triple phenomenon: *disappearing landmarks*, *emerging sources* that would relegate state and statute to the rank of accessories, and *lines redrawn* such that the pyramids, as yet incomplete, are surrounded by strange loops that make a mockery of the old principle of hierarchy.

We are thus faced with both impending disorder and the possibility, by moving closer to disorder, of finding there the means to break with ‘learned common sense’, which Pierre Bourdieu calls ‘the Diafoirus effect’ because in the name of science, he simply transcribes ‘the discourse of common sense’.<sup>2</sup>

The possibility presents itself, then, of breaking with set legal knowledge, without a grasp on this constantly shifting reality that leaves its assigned territories to invent itself in other, infra- or supra-state spaces.

Deconstruction without hope, or reconstruction of a landscape the maps of which we cannot yet read? We are eager to find out.

<sup>2</sup> P. Bourdieu, with Loïc J. D. Wacquant, *Réponses* (Seuil, 1992), p. 217. (Diafoirus is the doctor in Molière’s *La Malade imaginaire*, who uses complex language to say simple things.)

## 1

## Disappearing landmarks

Using a few examples from the French landscape (which are not intended to be exhaustive), let us take a journey through the highly symbolic – and historically well marked – areas of criminal and civil law.

Landmarks start to disappear when clearly defined legal concepts, such as criminal guilt or civil liability, recede in favour of concepts with much less precise boundaries – dangerousness and solidarity. This is not, as some say, the end of taboos, but the beginning of the ‘fantasy of the absence of limits’, or at least the weakening of taboos.

But we must not fool ourselves: what is at stake is the contents of the norms, not their existence. Far from realising the libertarian Utopia of which Proudhon dreamed – a peaceful world where ‘order freely organised is an order one respects and against which one has no valid reason to rebel’<sup>1</sup> – the weakening of taboos seems to go hand in hand, on the contrary, with an increase in normalisation processes: processes that impose no ‘must-be’ (legal normativity), but tend more to model behaviours in relation to what is ‘normal’ – that is, the observable average, ‘the is’ (social normality).

The transformation is strongly felt in criminal law, where taboos are hidden by the ever more opaque veil of surplus normalisation texts and procedures (neutralisation, adjustment, rehabilitation, socialisation and even regulation) that refer less to guilt than to a vague dangerousness. It can also be seen in civil law, under the pressure of a ‘social law’ that tends to shape behaviours, independently of any ‘must-be’, solely through the game of social, and sometimes economic, normality, which tends to replace the principle of liability with a solidarity of unlimited twists and turns.

<sup>1</sup> R. Manevy and P. Diolle, *Sous les plis du drapeau noir, le drame de l'anarchie* (Domat, 1949), p. 13, citing the statement of the anarchists in the Lyon trial; see also Proudhon in D. Guerin, *L'Anarchisme* (Gallimard, 1981).

But the norms' contents are not all that is at stake, because the phenomenon also affects their organisation: the landmarks separating the major areas (or disciplines) of law disappear or are ploughed under. It is when this imprecision in legal disciplines affects the right to punish on the one hand and moral rights (*droits de la personnalité*<sup>2</sup>) on the other that it may become a threat to order.

This is precisely where disappearing landmarks can signify something other than an adjustment of legal techniques that could pass for a simple adaptation to the complexity of the 'post-industrial' world, because it calls into question the law of reason that says that law is not only a means of organising life in society, but of founding society and shaping humanity.

When the outlines of the right to punish become blurred between a highly weakened *légalité pénale* (lawfulness: no punishment without law) and an administrative repression in full swing, or when moral rights, which traditionally protect integrity and make the human body not for sale, start to resemble the law governing goods to the point of taking on pecuniary value, we may well, in fact, lose sight of the law of reason: the very reference point that showed us the way.

### From guilt to dangerousness

Officially – all the manuals say so – guilt is at the heart of criminal law: it is because he or she is guilty of transgressing a taboo that the criminal must be punished, and it is the tying of guilt to punishment that gives criminal interdiction its symbolic strength. Taboos thus create order. But this link has been stretched with the development of practices so visibly contradictory that they result more from disorder than from the penal order: a disorder due, perhaps, to the multiple functions assigned to criminal law.

The first such function, at once pedagogical and symbolic, is of a legal–moral type. This 'expressive' function, which first appeared in the early nineteenth century in the codification debates, was still being emphasised in 1988 by Robert Badinter in his commentary on the draft *Code pénal* sent to parliament: 'All societies are built upon certain *values* recognised by the collective consciousness; these values are expressed in

<sup>2</sup> Set of rights (to life and bodily integrity, to honour and reputation, etc.) granted in French law to every person.



*taboos*; and these taboos in turn give rise to punishments for those unfamiliar with them.<sup>3</sup> This function has its corresponding guilt/punishment dyad in the Code, organised according to a double scale of severity: the severity of the punishment, quantifiable by the amount of the fine or the length of imprisonment, for example, must correspond to the severity of the fault (transgression of a taboo).

To this is added the utilitarian, 'repressive' function of protecting society, with which appears, in the 1810 *Code pénal's exposé des motifs*, a second severity scale that ties punishment to the offender's 'state of degradation'. 'Even though the word is not used, a person's dangerousness almost becomes a criterion here for the first time. A criterion that, in the following century, takes an increasingly central position in the appraisal of the penalty.'<sup>4</sup> Thus we slide from a criminal law that is supposed to punish the transgression of a taboo (transgression of the legal normativity) to a criminal law that must protect society by eliminating, separating or normalising those whose state is abnormal: a state of 'degradation', as the writers of the 1810 Code put it, then of 'dangerousness' for the scientifically inspired positivist school, and, finally, of 'social maladjustment' for the social defence humanist tide that called for measures to rehabilitate or reinstate the offender.

Better yet, the idea is dawning today that the function of criminal law should be to correct malfunctions that affect 'situations' more than individuals: such would be the function of criminal law in areas such as the environment, labour relations or economic law, for example. Here again, the goal becomes standardising behaviours by reference to a social or economic normality largely independent of the transgressed legal norm.

From transgression of a must-be to deviation from the social norm (individual state or situation that can involve several persons), the shift in emphasis of the goal should logically have brought with it either the disappearance of 'criminal' law (that is, the right to punish) – disappearance advised, by the way, in perfectly good logic by the abolitionists, who replace offence with 'situation-problem' – or, at the very least, the calling into question of the guilt/punishment dyad in favour of the dangerous-state/safety-measure dyad, as was suggested by the positivist school in the late nineteenth century.

<sup>3</sup> R. Badinter, *Projet de nouveau Code pénal* (Daloz, 1988), p. 10 (emphasis in original).

<sup>4</sup> P. Lascoumes, P. Lenoël and P. Poncela, *Au nom de l'ordre, une histoire politique du Code pénal* (Hachette, 1989), p. 207.

Cambridge University Press

0521812313 - Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism

Mireille Delmas-Marty

Excerpt

[More information](#)

In fact, nothing of the kind happened, and penal practices developed simultaneously along different lines with the approval of legal scholars.

As Michel Van de Kerchove emphasised, 'We cannot but be surprised by the speed and ease with which the contemporary authors were able to reconcile the points of view and eclecticism between poles apparently so contradictory.'<sup>5</sup> This reconciliation and eclecticism would constitute the entire art of the new social defence movement in its progressive detachment from the more radical positions of social defence, and of the legislature which, after all the reforms, would allow the incorporation of dangerousness into the criminal system's structure without, however, taking guilt out of the equation.

The dangerous state is the basis for certain extra-criminal administrative measures, such as deportation of aliens who constitute 'a threat to the public order', internment of mental patients who 'compromise the public order and the safety of persons', or even, by slipping from the idea of a dangerous state to that of a person in danger, adoption of educational assistance measures 'if the health, safety or morality of a minor is in danger' (*Code civil*, article 375).

But dangerousness is also at the heart of certain criminal reforms, as can be seen in the recent rise in denials of residency permits following passage of the law of 9 September 1986 on terrorism and, with the law of 31 December 1991 and article 131-30 of the new *Code pénal*, consequent banishment from French territory, which includes the right to deport aliens convicted of certain offences.

Moreover, at the intersection of general and specific intent criminal law, there remain ideas such as *attentat* (criminal attempt, usually an attack on state security), which seem to correspond well to the desire to extend repression (*attentat* includes attempt and attempted *attentat* includes the preparatory act) in the face of offences considered more dangerous (poisoning or interference with national interests, for example). Not only does the notion of dangerousness account for the particularity of the legal regime organised around certain offences such as drug trafficking, offences committed in an 'organised group' or, again, terrorism, it is the basis, in such cases, for a different procedural regime (namely, it affects length of custody, search and seizure conditions,

<sup>5</sup> M. Van de Kerchove, 'Culpabilité et dangerosité, réflexions sur la clôture des théories relatives à la criminalité', *Dangerosité et justice pénale* (Masson, 1981), pp. 291ff.