I-1.11 : REGULATION AND SUPREME COURTS, Transatlantic perspectives

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The present Law Review was launched on January 25, 2010 at a symposium held at the Economic and Social Council, entitled "*The Role of supreme courts in economics*".

The present article is a continuation of this event.

It is not intended to be conceptual: notions of *regulation*[1] and *jurisdictional supremacy* [2] are controversial. Our approach will be a pragmatic one, in line with the practical use of these terms, notwithstanding the risk of approximation.

Both notions are complex; both of them are also presently "under the spotlights".

The successive waves of the current economic crisis trigger growing calls for increased regulation.

Supreme Courts currently raise renewed interest: expressions and guardians of the rule of law, they invite us to contemplate it in the light of fundamental rights.

The link between Supreme Courts and regulation appears clearly in the wake of globalization.

In some sectors - such as financial markets - issues are primarily global. In others, such as water or renewable energy - regional interests are central: North America's, Europe's, ASEAN's ... Hence, it may seem useful to compare the United States' experience to France's in a basic overview of the relevant issues.

In addition to a judicial supervision of regulators, supreme courts often examine the potential economic implications of their decisions: they apprehend regulation. They also constitute, by essence, regulatory courts for lower tribunals. Finally, they are involved in a dialogue with other supreme courts. Thus, supreme courts regulate Rule of law mechanisms.

We will first consider regulation as it is **captured** by supreme courts (I) and then focus on the regulation **conducted** by supreme courts (II).

I. - REGULATION AS CAPTURED BY SUPREME COURTS

[1] R. HADAS-LEBEL, « La régulation : un objet juridique en quête d'identité », *Justice et cassation, Le temps dans le procès*, 2007, p. 173.

[2] A. TUNC, « La Cour suprême idéale », *Rev. Intern. Dr. comparé*, 1978, p. 433.

The courts generally described as supreme are the ones controlling a jurisdictional order while not submitted to any form of domestic review[3]. Supreme courts' review mechanisms focus on fundamental norms (law or constitution). Through constitutional (A) and legal (B) review, supreme courts capture regulation.

A. CONSTITUTIONAL REVIEW

Supreme courts, around the world, share the common task of ensuring a uniform interpretation of the law. At the core of their mandate, they are generally the custodians of the fundamental norm: the Constitution. The recent French reform introducing the priority constitutional challenge highlights the topicality of this question. The United States, on the other hand, appear as a rather unique case with a comparatively long experience in constitutional review.

The U.S. Supreme Court's case law on regulatory authorities is characterized by two features that make its historical review relevant.

First, the United States were pioneers in the establishment of regulatory authorities (e.g. Office of the Controller of the currency created in 1863, the Interstate Commerce Commission established in 1887, Federal Trade Commission 1914).

Second, this country stands among the first to have adopted a Constitutional Court, with extensive powers. The United States Supreme Court's famous case of *Marbury v. Madison*[4] granted judges the power to review, not only acts of the executive, but also of the legislative and their conformity to the Constitution. This ruling gave the Supreme Court the power to interpret laws and even to invalidate unconstitutional provisions.

This broad constitutional control allows the Supreme Court to examine all issues related to regulatory authorities. Hence, the U.S. Supreme Court stands alone among constitutional courts: throughout the 20th century, it has developed a rich constitutional doctrine on regulatory authorities.

The emergence of regulatory authorities in the constitutional arena has raised numerous issues. They can be grouped around two responsibilities of the Supreme Court :

- To guarantee that regulatory authorities' operations comply with the separation of powers, in order to ensure that the constitutional balance of power is respected (1);
- To review delegations of power to regulatory authorities, in order to ensure that such delegations comply with the constitutional provisions governing the activities concerned (2).

[3] See *L'application de la constitution par les Cours suprêmes*, Dalloz, 2007.
[4] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

1. Enforcing the separation of powers

Ensuring the separation of powers is central responsibility of constitutional courts and particularly of the U.S. Supreme Court. It requires a constitutional review of regulatory authorities' operations.

Hence, the Supreme Court exercises its control over the procedural rules regulatory authorities implement. It also monitors potential infringements on powers in the appointment and dismissal of members of regulatory authorities by the executive or the legislative.

a. Separation of powers and the creation of regulatory agencies

The U.S. Supreme Court was asked to determine if Congress could establish regulatory authorities subject to procedures that would limit their discretion. In *Chadha*[5], it has, for example, invalidated a law that allowed veto by a single house of congress. It required a bicameral process to invalidate a decision taken by a regulatory agency.

b. Appointment and dismissal of regulators

Many of the decision issued by the Supreme Court of the United States on regulatory authorities have focused on the appointment and dismissal of members of such authorities[6]. It is, indeed, the main test of the respective influences of the legislative and executive on these authorities; and the balance here needs to be preserved.

2. The constitutionality of delegations of authority

This issue encompasses both the act of delegation and the exercise of delegated powers. It derives from balance of powers concerns, but focuses more specifically on the activities conducted by regulatory authorities: normative (a) or judicial (b).

a. Regulatory authorities' legislative activities

In order for them to implement their executive prerogatives, the American judiciary let regulatory authorities interpret legislation.

This interpretation may ultimately be reviewed by the Supreme Court, as the latter is in charge of unifying the interpretation of texts.

[5] Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).
[6] Myers v. United States, 272 U.S. 52 (1926), Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958) ; Bowsher v. Synar, 478 U.S. 714 (1986) ; Morrison v. Olson, 487 U.S. 654 (1988).

In addition, as early as 1935, in the *Schechter Poultry* Case[7], the U.S. Supreme Court allowed Congress to delegate vast areas of its legislative power to regulatory authorities.

However, the Court expressed its desire to avoid overly broad delegations of legislative power, as illustrated by the case *National Cable Television Association*[8].

The constitutional review therefore covers both the interpretation of legislation and the enactment of normative texts – sometimes of legislative value - by regulatory authorities.

b. Judicial powers of regulators

Regulators, through many modalities, have been assigned judicial functions.

Constitutional reviews frame the exercise of that power.

In the context of a delegation of legislative power to regulatory authorities, the U.S. Supreme Court, in *Mistretta v. United States*[9], has recognized that Congress assign the responsibility for drafting sentencing guidelines to an agency.

Moreover, constitutional courts control the exercise, by regulatory authorities, of their jurisdictional powers.

As an illustration, the French Constitutional Council ruled delegation of judicial functions to the Competition Council. In its decision *Conseil de la Concurrence* dated 23 January 1987, the Constitutional Council censored the non-suspensive nature of appeals against the decisions of the Competition Council. The Constitutional Council denounced a violation of fundamental rules of due process.

Guardians of the Constitution, supreme courts also operate a control of legality.

B. THE CONTROL OF LEGALITY

Examining this control as conducted by supreme courts on regulatory authorities, we will focus on French and European solutions. In the United States, pursuant to Article 3 of the U.S. Constitution, the Supreme Court's mission is to ensure an accurate application of federal law. This mission therefore entails a review of the compliance of lower courts decisions with federal laws and treaties as well as the constitution. In the 1980s, a rise in the number of federal laws increased the Supreme Court's caseload. The current trend is towards a concentration of the Court's activity on the constitutional review of fundamental

[7] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[8] 415 US 336 National Cable Television Association Inc v. United States (1974).
[9] Mistretta v. United States, 488 U.S. 361 (1989)

rights (in particular the ones expressed in the "*Bill of Rights*") and on certain legal subjects such as criminal law.

In France, the judicial review exercised by the supreme courts is characterized by a control of legal qualifications. Hence, the State Council (Conseil d'Etat, the supreme court in charge of administrative matters) and the Court of Cassation (Cour de Cassation, the supreme court in charge of private litigation) control the qualifications used in regulatory law.

Recent examples illustrate this to varying degrees.

Sometimes the concepts pertaining to the regulation are the subject of control (1).

Sometimes data provided by regulation, including impact studies, are part of the objectives of the control (2).

1. Concepts of regulatory law, the object of control

We will examine, as an illustration, three decisions by the Court of Cassation (a) and one by the State Council (b).

a. Court of Cassation's decisions

• In the case known as *Mobile phones*, the Court of Cassation expressed its position in two landmark decisions on 29 June 2007[10], and -after a rejection of the first appeal and a second appeal- on April 7th, 2010[11].

- In the first decision, the Court of Cassation overturned the first ruling by the Court of Appeal of Paris due to a lack of legal basis: gaps in the appellate court's reasoning had not allowed the Court of Cassation to exercise its control. The Court of Cassation thus highlighted the elements over which it intended to exercise its control. The decision made this point clear :

> "*By ruling so, without verifying - as was it was request from it- whether the regular exchange of information, from 1997 to 2003, between the three companies operating in the market, as it concerned data unpublished by ART or intervened prior to such publication, had the purpose, effect or potential, given the characteristics of the market, its functioning, the nature and level of aggregation of data exchanged - which did not distinguish between packages and prepaid cards- and the frequency of exchange, to allow each operator to adapt to the predictable behavior of its competitors and thus distort or substantially restrict competition in the market concerned, the Court of Appeal did not justify its decision.* "

[10] Cass. com., 29 juin 2007, pourvois n°07-10303, 07-10354, 07-10397, *Bull. civ*. IV, n° 181 ; *Gaz. Pal.*, 9 janvier 2008, n° 9, p. 29, note J. PHILIPPE et T. JANSSENS ; *Rev. trim. dr. com.*, n° 4-2007, p. 707, chron. E. CLAUDEL ; *JCP G*, 2007, Jur. II, 10153, note C. PRIETO.

[11] Cass. com., 7 avril 2010, pourvois n° 09-12984, 09-13163, n°09-65940 *; La Lettre Omnidroit*, 14 avril 2010, n° 94, p. 6 : « Affaire de la téléphonie mobile : suite, mais pas (encore) fin ».

- The Court of Appeal of Paris, heard the case a second time after the Supreme court's decision. The Court of Appeal upheld the sanctions issued in its initial decision. This second decision was partially overruled; the Supreme Court used the following reasoning :

> "*With regards to Article L. 464-2 of the Commercial Code ;*
> *To rule as it did, the court held that elements allowing to measure the extent of the damage to the economy are sufficient, the Council having particularly highlighted that the market size was very important and that all Operators in this market had participated in the exchange;*
> *By deciding so, without also taking into account the sensitivity of demand to price, the appellate court has deprived its decision of legal basis*. "

This decision[12], widely published at the Court's request, adopted a "Law and Economics" approach, included it in the scope of its review and required the Competition Council and the appellate court to do the same. The characteristics of the market can help isolate the offense of unlawful agreement; the judge must logically control these elements. However, this logic was not predictable, as the Court of Cassation regularly gives priority to the discretion recognized to lower court when they assess or evaluate facts and quantifiable data.

The second *mobile phones*[13] decision illustrates a new form of review by the Court of Cassation: no longer a thorough and detailed one, but rather a succinct control over an economic factor: the sensitivity of demand to price. Practitioners were surprised to see the Supreme Court's exercise its control over a concept which, prima facie, could have been left to the discretion of lower courts.

• We may also mention a case on the regulation of financial markets.

The Commercial section of the French Supreme court had the opportunity, in its decision *Gecina* October 27, 2009[14], to clarify the concept of "*acting in concert*", and more specifically the concept of common policy, a constituent of such action.

There were two possible approaches, one financial, the other entrepreneurial and industrial, the Supreme Court chose the former over the latter. Here again, we see how the control of the qualifications of regulatory law places it under the supervision of the Supreme Court.

b. Council of State's decision

[12] Cass. com., 29 juin 2007, loc. cit.

[13] Cass. com., 7 avril 2010, loc. cit.

[14] Cass. com., 27 octobre 2009, pourvoi n°08-18819, *Bull. civ.* IV, n° 136 ; *D.* 2009, p. 2836, note D. SCHMIDT ; H. LE NABASQUE, « Précisions sur la notion d'action de concert… », *Rev. dr. bancaire et fin.* 2010, n° 1, p. 55 ; N. RONTCHEVSKY, « Affaire Gecina : la Cour de cassation précise les contours de l'action de concert », *Rev. Lamy dr. aff.* 2010, n° 45, p. 10.

At the above mentioned conference, organized by Regulatory law review on "*Supreme Courts and economic sciences*", January 5, 2010, legal security emerged as a leitmotiv.

It guides the relationship between judicial and economic activities. In regulated sectors, we expect the judge, and especially the supreme judge, to guarantee that legal certainty.

Therefore, the KPMG decision[15], delivered by the Council of State March 24, 2006, has sometimes been called the *legal security* decision.

• It ruled on an appeal criticizing the immediate effect of a newly adopted code of ethics for auditors and stated:

> "*In the absence of any transitional provisions in the decree attacked, requirements and prohibitions stated in the code would cause to the contractual relationship -established legally before its adoption- disturbances which would exceed the objective pursued and hence violate the principle of legal security*".

Today, international regulatory instruments are presented as part of the solution to the global crisis; for example the work of the Basel Committee on Banking Regulations or the Solvency initiatives on the regulation of insurance.

These instruments require professionals to improve their risk management systems, yet at the same time, these professionals face an increasing –yet uncontrollable- risk: the uncertainty of the rule of law.

The ruling in *KPMG* addresses this paradox.

- In this case, the court determined that large public and private companies, whose accounting records require thousands of hours of auditing, could only use the services of four firms that had a sufficient number of employees to run these audits. However, using their services, the companies would violate the incompatibility rules established by the new code of ethics, the object of the appeal. Hence, applying this code upon its entry into force would prevent many operators from having their accounts audited within the statutory period, thereby causing a systemic disorder.

The State Council has been very sensitive to this consideration, *i.e*. the impact of its decision on economic life. The Court of Cassation, as we shall see, also reacts in this way.

2. The impacts of regulation, the objective of control

[15] CE-Ass., 24 mars 2006, n° 288460 ; *Defrénois*, 2006, n° 23, p. 1868, chron. R. LIBCHABER ; *Rev. des contrats* 2006, n° 4, p. 1038, chron. C. PERES ; JCP G 2006, n° 27, p. 1343, comm. J.-M. BELORGEY ; P. CASSIA, "La sécurité juridique, un nouveau principe général du droit aux multiples facettes », *D.* 2006, n° 18, p. 1190.

The Darrois report[16] recommended that some cases be supplemented with an economic impact study.

This practice would help underline the systemic effects that might result from a supreme court's decision. Such an approach is consistent with positions taken by the French supreme courts on questions of regulatory law.

A topical decision in this respect is *Credit Agricole of Anjou and French Banking Federation vs. Le Brasseur*, of December 20, 2007[17]. In this case, the Supreme Court was moving towards a decision, the impact of which it had not initially measured. The Court would have required banks to inform borrowers on the impact of each reassessment of floating interest rates on the annual percentage rate.

The Federation of French Banks intervened in the proceeding and presented an economic study and comparative law study. Both highlighted how the proposed solution would create a systemic disorder; its singularity among European laws would create an imbalance with the situations subject to the laws of neighboring countries.

These elements led the Court of Cassation to condemn this approach in light of its consequences.

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When they control constitutionality or legality, supreme courts contemplate the requirements of regulatory law, either by defining and detailing the components thereof, or by integrating its contribution to their doctrine. But if supreme courts are judges of economic regulation, their mandate also makes them regulators of the Rule of Law.

II. – THE REGULATION CONDUCTED BY SUPREME COURTS

When they harmonize the solutions adopted by lower courts, supreme courts act as regulatory institutions (A). They also do through the dialogue they develop among themselves (B).

A. SUPREME COURTS AS REGULATORY COURTS

The terminology is accredited by practitioners: the French Court of Cassation Court is frequently described as a regulatory court.

[16] www.justice.gouv.fr/art_pix/rap_com_darrois_20090408.pdf
[17] Cass. civ. 1re, 20 décembre 2007, pourvoi n° 06-14690, *Bull. civ. I*, n° 396 ; *Rev. trim. dr. com*. 2008, n° 3, p. 614, note B. BOULOC ; *JCP E* 2008, n° 24, p. 17, note C. LASSALAS-LANGLAIS ; *Rev. des contrats* 2008, p. 365, chron. D. FENOUILLET ; *Gaz. Pal.* 2008, n° 69, p. 15, note S. PIEDELIEVRE ; *Banque et dr.* 2008, n° 118, p. 14, note T. BONNEAU.

When did this term appear in the legal language? By successive steps even though this term, as we shall see, encompasses diverse functions.

It would be adventurous to seek greater precision here, and we may lose ourselves in the maze of erudition.

We will hold on to the observation that supreme courts are perceived as regulatory bodies.

The term, through its etymology, suggests at least two distinct meanings: either that the Court regulates decisions under its control (1), or that it sets rules (2).

1. The Supreme Court regulates a flow of decisions

a. In the U.S., the progress of the legal publishing raised lawyers' awareness of the multiplicity of solutions adopted by US courts, on identical legal issues.

Previously, legal textbooks were based on the decision, sometimes by the Supreme Court, that they considered the most significant on each issue.

The works of Oliver Holmes, Roscoe Pound and Karl Llewllyn, made possible by the publication a much wider range of decisions than in the past, have highlighted the fiction of a uniform American law.

Thus, they have questioned the Supreme Court in its unifying role, the role of a regulator.

b. In France, this role was, from the beginning, of the essence of the Court of Cassation.

If revolutionary constituents challenged the very idea of case law, the courts of appeal developed their own and diverged among themselves. It was therefore necessary to establish a Court of Cassation. The regulatory function duplicated the unifying function.

- For the practitioner, it remains a daily reality.

Faced with a new problem of legal interpretation, the Supreme Court used to let lower courts explore the issues. Appellate courts worked as scouts and uncovered the challenges that the law may raise.

Only when this preliminary exploration seemed sufficient would the Court begin to take a stand[18].

[18] One example: a law adopted on May 12 1980 legalized the clause allowing the seller to remain the owner until full payment. A debate arose on the possibility for the banker to benefit from this clause through subrogation. The court of Cassation let Appelate courts survey the possible configurations and stakes and only took a stand 8 years later: Cass. Com., 15 mars 1988, *Bull. civ.* IV, n° 106.

- The Court only did so gradually, in a real dialogue with its colleagues: through a disciplinary control[19] conducted on lower courts first, inviting them to a more complete reasoning on issues of law that it deemed relevant; second, through a normative control when the solution seemed mature enough to justify such intervention[20].

• And the process does not stop there.

The Court of Cassation, when it overrules a lower court's decision[21], may –and this is actually the general rule- refer the case back to another lower court for reexamination. This allows lower courts to participate iteratively in the debate and helps the Court of Cassation refine or alter its position[22].

The regulatory function, consubstantial with the development of case law, here refers to the phenomenon of judge-made law[23].

Judges slowly construct the law, in order to avoid setbacks and reversals of precedents, as the latter are sources of legal uncertainty[24].

This approach is still very relevant. Driven by core values, it itself bears values. They come down to the ontological difference between the law regulated by judges and the law established by the legislature. Many Court of Cassation Justices are still attached to this approach.

The need for more rapid interpretations of laws that are issued in growing numbers is enough to explain the demand for an expedited judicial output.

2. The Supreme Court produces norms

The Supreme Court of the United States and the French State Council have long adopted this solution which now requires no discussion.

For the Court of Cassation, this goes back to an academic question: is case law a source of law?

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[19] Disciplinary control before the Court of Cassation sanctions the lower court's lack of response to the litigants arguments ; the normative control focuses on violations of the law, a lack of legal basis may also be sanctioned, this last type of control lies between the disciplinary and the normative, see J & L. BORÉ, *La cassation en matière civile*, Dalloz, passim.

[20] Often, the supreme court begins to rule on the law applicable to new questions once appellate courts have considered the main issues.

[21] The principle is that when the Court of Cassation's decision overrules a decision issued by a lower court, the case is referred to a different lower court. The legislation allows, in some situations, the Court to terminate the case itself. This possibility is seldom used due to the desire to maintain dialogue between Supreme Court and lower courts.

[22] Ch. MOULY, « Les revirements de jurisprudence », *in L'image doctrinale de la Cour de cassation, Actes du colloque des 10 et 11 décembre 1993*, La Documentation française, 1994, p. 123.

[23] M. SALUDEN LAMBLIN, *Le phénomène de jurisprudence. Etude sociologique*, Thèse Paris II Panthéon Assas, 1983.

[24] See supra I. B.1.

The literature on this point is endless, the interrogation seems worn-out, and yet it is constantly renewed.

In a spirit of openness and swiftness[25], it has been revived by the debate on reversals of precedents and their retroactivity[26] and more recently by a growing fear of the Rule of judges.

The latter concern, referring to the revolutionary constituents and legislators' hostility towards French Parliaments –the ancestors of Appellate Courts that operated as regional supreme courts-, would have seemed anachronistic a few years ago.

Recent developments revived the controversy between powers. Affirming the reality of a judicial power, the Head of State and Prime Minister[27] have however expressed the primacy of their authority over the judges'; this is partly how the recent project to reform criminal procedure was perceived. The postponement of the act's examination fueled this debate[28].

Every debate calls for a moderator, who is a form of regulator. This regulation among powers invites to another one: a regulation among supreme courts themselves.

B. THE REGULATION AMONG SUPREME COURTS

- It is one of the key missions of the U.S. Supreme Court. Its jurisdiction, established in Title 28 of the *U.S. Code*, has two components:

[25] See the request for a preliminary ruling by the Court of Cassation, see Articles L. 441-1 to L. 441-4 code de l'organisation judiciaire ; the advisory opinion on a legal issue before the Council of State, see. Article L. Articles 113-1 and R. 113-1 to R. 113-4 of the code de l'organisation judiciaire, the request for a preliminary ruling by the European Court of Justice concerning the interpretation of treaties, or the validity and interpretation of acts adopted by the institutions, bodies or agencies of the Union, see Section 267 EU Treaty.

[26] Ch. MOULY, « Les revirements de jurisprudence », *loc. cit.* ; N. MOLFESSIS, *Les revirements de jurisprudence, Rapport remis à Monsieur Le Premier Président G. CANIVET*, LexisNexis, 2005.
- Conseil d'Etat : CE-Ass., 11 mai 2004, *Association* AC, Dr. adm. 2004, n° 115 ; Dr. soc., 2004, p. 766, note X. PRETOT ; RFDA, 2004, p. 437, concl. C. DEVYS, note J.h. STAHL, A. COURREGES ; CE, 16 juillet 2007, Société Tropic Travaux Signalisation, *JCP*, éd. G, 2007, II, 10156, note M. UBAUD-BERGERON ; *Ibid.*, 10160, note B. SEILLER ; *Dr. adm.*, 2007, comm. 142, note Ph. COSSALTER ; J. ARRIGHI DE CASANOVA, « La jurisprudence ''AC !'' », *Justice et cassation, Le temps dans le procès*, 2007, p. 15.
- Cour de cassation : Cass. civ. 2e, 8 juillet 2004, n°01-10426 , *Bull. civ*. II, n° 387 ; *D*., 2004, p. 2956, note J. BIGOT ; *RTD Civ.*, 2005, p. 159, obs. P.-Y. GAUTIER et p. 625, obs. Ph. THÉRY ; Cass. Ass. Plén., 21 décembre 2006, n°00-20493, *Bull. ass. plén*., n° 15 ; *D.*, 2007, Jur. p. 835, note P. MORVAN ; Cass. com., 13 novembre 2007, n° 05-13248, *Bull. civ*., n° 243.

[27] N. SARKOZY, « Discours du Président de la République, audience solennelle de début d'année judiciaire, le 7 janvier 2009 », in *Rapport annuel 2008 de la Cour de cassation*, La Documentation française, 2009, p. 39 et s., spéc. p. 40 ; F. FILLON, « Discours du Premier Ministre, audience solennelle de début d'année judiciaire, le 14 janvier 2010 », in *Rapport annuel 2009 de la Cour de cassation*, La Documentation française, 2010, p. 47 et s.

[28] *Le Monde*, 14 mai 2010, « Procédure pénale : histoire d'une réforme avortée », www.lemonde.fr

- First, the Supreme Court rules on appeals against decisions of federal appellate courts ordering injunctions;

- Second, and most importantly, the Supreme Court decides on appeals against decisions of the supreme courts of states.

One factor guiding this control lies in the controversiality of the legal issue, in particular the existence or possibility of a conflict between different state supreme courts on the matter. This component of the Federal Supreme Court's jurisdiction illustrates the Court's role as a regulator of the activity of state supreme courts.

- A whole array of supreme courts potentially have jurisdiction to examine the prerogatives of a French litigant. He or she can contemplate a half-dozen: the Council of State, the Court of Cassation, the Constitutional Council, the "*Tribunal des conflits*", the Court of Justice of the European Union, the European Court of Human Rights.

Diversity does not contradict supremacy – Brazil and Germany have experienced a multiplicity of internal supreme courts - but this shared supremacy needs to be regulated.

This can be achieved by rules (1) and practice (2).

1. Regulation by rules

- In France, the "*Tribunal des conflits*", first took that role.

By sorting conflicts between the two French jurisdictional orders (private and administrative), it establishes an effective and well received harmonization among them, and the two supreme courts that overlook them.

- Rules, again, established institutional relations between state courts and European Supreme Courts: Article 267 of the Treaty instituted requests, by state courts, for preliminary rulings by the European Court of Justice.

- An appeal against a state, following actions taken by its supreme court, may be brought to the Strasbourg Court (ECHR) on the basis of Article 6 ECHR. The ECHR may sanction the domestic court's implementation of procedural rules [29]or its interpretation of the law[30].

- More recently in France, a constitutional reform (Articles 61-1 and 62 of the Constitution; Organic Law of 10 December 2009) reorganized relationships with the Constitutional Council; this court became accessible to litigants.

[29] For example, ECHR, 21 mars 2000, *Dulaurans c/ France*, *D.*, 2000, Jur. p. 883, note T. CLAY ; JCP, 2000, II, 10344, note A. PERDRIAU ; *RTD Civ.*, 2000, p. 439, obs. J.-P. MARGUENAUD ; *Ibid.*, p. 635, obs. R. PERROT.

[30] For example, ECHR, 25 mars 1992, *JCP*, 1992, II, 21955, note GARE ; *D.*, 1993, Jur. p. 101, note J.-P. MARGUENAUD.

This gave a priority to the constitutional challenge.

How does this last feature coexist with the primacy of European Union law?

The question had been perceived during the examination of the law[31]. In a notable decision of April 16, 2010, the Supreme Court asked European Court of Justice to issue a preliminary ruling on the issue[32].

On May 12[33], the Constitutional Council provided what may appear as the first elements of a response. This illustrates how the relationship between domestic supreme courts and European supreme courts generate their own regulation.

- The same can be said about the ECHR. Its relationship with the Court of Cassation has evolved. An Act of June 15, 2000 (amendment Lang) led to the insertion of Article 626-1 in the Code of Criminal Procedure[34]. Its procedural consequence is that the condemnation of the French government regarding a dispute may lead to a reconsideration of the merits of case. It may be conducted by the Court of Cassation itself or by the court of appeal the Court of Cassation may designate.

France was also, on one occasion, sanctioned in Strasbourg based on a decision by the Constitutional Council[35].

The development of its activity, as it just opened up to all litigants[36], can only intensify efforts to regulate the interactions between two institutions that share the mandate of assessing fundamental rights. The same is true with respect to supreme courts of all member countries.

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[31] Conseil d'Etat, *Rapport public 2010*, EDCE n°61, Doc. Fr., 2010, pp.101-104 ; AN, *Rapport de M. Jean-Luc Warsmann, au nom de la commission des lois*, n°1898, 2009 (auditions des 23 et 30 juin 2009) ; Sénat, *Rapport de M. Hugues Portelli, au nom de la commission des lois*, n°637, 2008-2009 (auditions du 23 septembre 2009) ; L. BURGOGUE-LARSEN, "Question préjudicielle de constitutionnalité et contrôle de conventionnalité, Etat des lieux de leurs liaisons (éventuellement dangereuses) dans le projet de loi organique relatif à l'application de l'article 61 § 1 de la Constitution", *RFDA* 2009, pp.787-799 ; D. SIMON, "Le projet de loi organique relatif à l'application de l'article 61-1 de la Constitution : un risque d'incompatibilité avec le droit communautaire ?", *Europe* 2009, repère n°5.

[32] Cass. Question prioritaire, 16 avril 2010, *Gaz. pal.*, 2010, n° 115, p. 12 ; *JCP E*, 10 mai 2010, comm. 2162, note S. PLATON ; *JCP G*, 26 avril 2010, 464, « La Cour de cassation tente de faire invalider la question prioritaire de constitutionnalité par la Cour de Strasbourg », Libres propos par B. MATHIEU ; A. LEVADE, « Renvoi préjudiciel *versus* Question prioritaire de constitutionnalité : la Cour de cassation cherche le conflit ! », *D.*, 2010, Note, p. 1254.

[33] Cons. Constit., 12 mai 2010, n° 2010-605 DC, Loi relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne. See P. FOMBEUR, « Question prioritaire de constitutionnalité, droit constitutionnel et droit de l'Union européenne », *D.*, 2010, Etudes et commentaires, Chroniques, p. 1229 ; P. CASSIA, E. SAULNIER-CASSIA, « Imbroglio autour de la question prioritaire de constitutionnalité (QPC) », *Ibid.*, p. 1234.

[34] E. DREYER, "A quoi sert le réexamen des décisions pénales après condamnation à Strasbourg ?, *D.* 2008, p. 1705 ; Ch. PETTITI, « Le réexamen d'une décision pénale française après un arrêt de la Cour européenne des droits de l'homme : la loi française du 15 juin 2000 », *Rev. trim. dr. h.*, 2001, p. 3.

[35] ECHR, 28 octobre 1999, *Zielinski, Pradal, Gonzalez et autres c/ France*, req. n°24846/94 et 34165/96 à 34173/96.

[36] See. *supra*.

- Among these entities, we must now consider the case of the European Union itself.

The Lisbon Treaty[37] provides that the Union adheres to the ECHR, and that its Charter of Fundamental Rights receives the status of primary law[38].

The questions raised deserve rich developments that go beyond the scope of this study. Suffice it to say that, here again, the texts themselves call, establish or even organize a regulation among supreme courts.

But this is, of course, a matter of practice.

2. Regulation by practice

Regulating supremacy: the expression is somewhat provocative. What one expects from the supreme judge is for him or her to have the authority to set the norm[39].

Competition in this area may affect the substance of the rule.

Evidently, consultation, in this context plays a crucial role.

- Between the State Council and Court of Cassation, forums exist; commissions and authorities consist of members belonging to both courts. The "*Tribunal des Conflits*" operates, as we saw, a form of harmonization.

The Bar Association for specialized State Council and Court of Cassation attorneys also materializes - through its members' knowledge of case law, procedure and experience of each of the two superior courts- a valuable mode of transmission: hence, it contributes to the regulation between these two supreme courts[40].

- Another bridge was built through networks of supreme courts justices: the European Supreme Courts Network[41], the Network of Supreme Administrative Courts[42], more recently a network of public attorneys at European supreme courts[43].

[37] Article 6§ 2 EU Treaty ; A. BAILLEUX, « Le salut dans l'adhésion ? Entre Luxembourg et Strasbourg, actualité du respect des droits fondamentaux dans la mise en œuvre du droit de la concurrence », *RTD Eur.*, 2010, p. 31.
[38] Article 6§ 1 EU Treaty ; A. BAILLEUX, *Ibid*.
[39] See. *supra* I, B.
[40] See. Colloque « Les avocats au Conseil d'Etat et à la Cour de cassation », Faculté Jean Monnet de Sceaux, 2002.
[41] The Network of the Presidents of the Supreme Judicial Courts of the European Union: http://www.network-presidents.eu.
[42] International Association of Supreme Administrative Juridictions (IASAJ) : http://www.aihja.org ; Association of the Councils of State and Supreme adminsitrative Jurisdictions of the European Union (inpa) : http://193.191.217.21/fr/colloquiums/colloq_fr.html
[43] D. BOCCON-GIBOD, « Vers la [recon]naissance d'un parquet européen », in *Justice et cassation, Actualités de droit communautaire*, 2009, p. 263.

- These networks have grown beyond Europe.

To the references cited by Ms. Burgorgne-Larsen [44], one can add the AHJUCAF[45].

At the inception the Union for the Mediterranean, proposals were voiced to create a network of supreme courts of this Union[46].

This forum, flexible and non-binding, could fulfill an advisory function, particularly appeasing in a space that aims to shift, with the help of the rule of law, from an alleged clash of civilizations to a dialogue of cultures.

Here stands an opportunity for legal renewal, adapted to new forms of international relations and through a modernized perception of Law.

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On both sides of the Atlantic, harmonizing the market law and fundamental rights is both a core object of regulatory law and of the activity of supreme courts.

[44] L. BURGORGNE-LARSEN, « De l'internationalisation du dialogue des juges », Mélanges en l'honneur de B. GENEVOIS, Dalloz, 2009 p. 95 et s.
[45] www.ahjucaf.org
[46] The Declaration of Alexandria on January 21st 2008 recommended « the creation of a network for exchange and dialogue between domestic supreme courts » among members of the Mediterranean Union ; Etats généraux culturels de Marseille, 4/ 5 novembre 2008.