Metaphor in Legal Discourse

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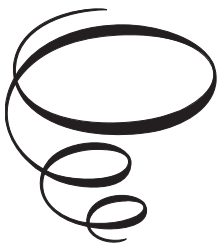
Edited by

Inesa Šeškauskienė

Cambridge Scholars Publishing



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This book first published 2022

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN (10): 1-5275-7849-6
ISBN (13): 978-1-5275-7849-4

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CHAPTER 8

ORDRE PUBLIC: A RESEARCH INTO THE ORIGIN AND EVOLUTION OF A LEGAL METAPHOR

LUCIA MORRA AND BARBARA PASA[1]

Abstract

The chapter analyses the origin and evolution of the legal metaphor *ordre public* through a two-pronged approach that combines a comparative perspective of the legal context of discourse with a cognitive–linguistic perspective of metaphors. After a methodological *caveat*, the first sections of the paper trace the origin of the locution back to an early speech by Montesquieu, and then consider the metaphorical function the expression *ordre public* was meant to serve, and the legal meaning it shaped, through a reconstruction of the semantic fields surrounding the words *ordre* and *public* at that time. The middle sections analyse the locution in the *Déclaration des Droits de l'Homme et du Citoyen* (1789), in the *Code civil* (1804), and finally in the *Code pénal* (1810) and how these documents polarised the concept, by bringing to the fore different facets of it. The final sections look at how the concept *ordre public* has evolved in Continental Europe during the Age of Nation States, leading to its present-day use.

Keywords: ordre, public, ordre public, Montesquieu, legal metaphor, public policy, bonnes mœurs, Civil Law systems.

[1] The essay has been jointly conceived and discussed (conceptualisation, resources, reviewing and editing): Lucia Morra is responsible for sections 2–3, Barbara Pasa for sections 4–5; both authors share Abstract, Introduction and Conclusion. The usual disclaimer applies.

1. Introduction

This paper explores the origin and evolution of the legal metaphor *ordre public*, found in the legal codes of civil law countries, through a two-pronged approach that combines a comparative perspective of the legal context of discourse with a cognitive–linguistic perspective of metaphors.

On the one hand, the analysis combines functionalism, which emphasises law-as-rules, with hermeneutics, in which rules are the signifiers of concepts and of a *mentalité* (cognitive structures that support and anchor positive law); on the other, it weaves jurilinguistic insights into legal metaphors with etymological and historical research, to study the resulting data set using the pragmatic tools coined for textual analysis. Section 2 traces the first occurrence of the locution *ordre public* [public policy] back to an early speech by Montesquieu, and explains the way in which he created a metaphor by it. Section 3 analyses the occurrences of *ordre public* in the *Déclaration des Droits de l'Homme et du Citoyen* (1789), in the *Code civil* (1804) and in the *Code pénal* (1810), focusing on the different facets of public policy emphasised by the use of the expression in these documents and how it was coupled with the notion of *bonnes mœurs* [good morals]. Section 4 examines both the function of the locution *contraire à l'ordre public* throughout the Age of Nation States, and further evolution of the concept *ordre public* through its coupling with the concept *bonnes mœurs* in private law matters, influenced by the refinement of the concept *public* within public law discourse. Finally, section 5 looks at the emergence of a new supranational order in Continental Europe in the mid-20th century, and the autonomous and substantial concept European *ordre public* [public policy] shaped by the European Court of Justice's rulings on a case-by-case basis vis-à-vis the resistance of national *ordre public* exceptions.

2. Montesquieu's metaphor: l'*ordre* in human affairs

The first occurrence of the locution *ordre public* can be traced back to Montesquieu's *Discours sur l'équité qui doit régler les jugements et l'exécution des lois*[2]:

[2] Cf. https://www.cnrtl.fr/etymologie/ordre. Set up by the CNRS, the Centre National de Ressources Textuelles et Lexicales (CNRTL) relies on the Analyse et Traitement Informatique de la Langue Française laboratory (ATILF/ CNRS—Nancy Université).

> La Justice la plus exaéte ne sauve jamais que d'une partie des malheurs; & tel est l'état des choses, que les formalités introduites pour conserver *l'ordre public*, sont aujourd'hui le fléau des particuliers. (Montesquieu [1725] 2003, 465, our emphasis)

Here, *conserver l'ordre public* is a variant of *maintenir l'ordre*, a phrase which surfaced in the French lexicon in mid-17th century[3], in parallel with the locution *lois publiques*.

Maintaining order in the kingdom was indeed one of the purposes of public legislation, but Montesquieu's qualification of *ordre* as *public* did more than just establish a linguistic link between two conceptual domains that were already interconnected. A further and conflictual projection between the concepts conveyed by *ordre* and *public* is suggested by the meanings each of these words had at that time (sections 2.1, 2.2), by the role that the concept *ordre* was to play in Montesquieu's thought (Casabianca 2013), and finally by the binary distinction he put forth in *L'Esprit des lois* between *les lois civiles* and *les lois politiques* (sometimes *publiques*), namely between rules governing relations between individuals, and those governing relations between public authorities and individuals (Montesquieu [1748] 1977, I, 3; see Bart 2013; Millns 2014, 283–300)[4].

As the following sections will show by reconstructing the meanings of *ordre* and *public* at that time, in his 1725 speech Montesquieu coined in fact a metaphor, namely a cognitive-linguistic construction that, calling into question the established understanding of each of the concepts, shaped a legal concept whose seeds, planted in the Roman age and germinated in Mediaeval times, had finally grown under the *Ancien Régime*.

2.1. *Ordre*

In Old French *ordre* (in its oldest version *ordene*), from Latin *ōrdo* meaning 'row, line, rank, class of citizens, series, pattern, arrangement, routine', meant the rank conferred by the sacrament of priesthood (*antrer en ordre*), a religious or military congregation following specific rules (*ordre de Saint-*

[3] Cf. https://www.cnrtl.fr/etymologie/public.

[4] The difference between private and public law, lying within a classification of law that the Common Law tradition has never known (Dicey 1953, 217; Oliver 2001, 327) and designed for the purpose of protecting private interests v. public interests, and of securing property v. freedom, only began to be addressed and determined in Continental Europe during the 18th century; public law and private law are still separate fields of law within the civil-law tradition (Mattei, Ruskola, and Gidi 2009, 381).

Benoît, *ordre de la Jarrectière*), or a group of people forming, due to its condition or capacity, a specific class of society (*la concorde des ordres*).

Through such use, the word lost its synonymity with 'row' and 'series', coming to express the idea of a rational arrangement not only following a rule, but in which each thing is where it ought to be by reason of its relationships with the other things; namely, the idea of a logical arrangement following an organic, logical and reasoned plan organised by an authority. In this sense, *ordre* was used to refer to the system of laws of the universe, initially in its religious dimension (*ordenes des angeles*, dating back to the beginning of the 13th century), and later also in its natural dimension, with the appearance of the locutions *l'universel ordre des choses*, *l'ordre naturel*, which date back to the end of the 16th century[5], shortly after the word *ordre* was adopted in architecture to refer to the way in which, in each of the different species of columns inherited from antiquity, the elements were arranged to make up an organic style, consisting in the specific proportion and composition of the elements (i.e. *ordre dorique*)[6].

In addition, *ordre* began to be used in the early 13th century also to refer to the acts by which a divine authority imposed its will on someone to do something. In this specific sense of 'command,' the term was used more frequently as of the late 16th century, when the locutions *donner ordre que, avoir ordre de*, *recevoir l'ordre de* progressively emerged in the lexicon. But it was only a century later that the link this sense of *ordre* had with the divine nature of the authority commanding the act lost its necessity; until then, a command could be considered an *ordre* only by virtue of its source, an authority acting as an agent of God's will, thus a pope or a monarch[7].

The first occurrence of *ordre* in political discourse dates back to the very beginning of the 16th century, when Philippe de Commynes, regarded as a major primary source for the 15th century European history, used the words *ordre et justice* in his *Mémoires* to refer respectively to the laws enacted by

[5] In 1580, Montaigne used the expression *l'universel ordre des choses*, Palissy *l'ordre naturel*; Malebranche used *l'ordre de la nature* in 1674 (https://www.cnrtl.fr/etymologie/ordre).

[6] In France the first occurrence of *ordre* in this architectural sense dates back to 1556 (ibid.), but it was Giacomo Barozzi da Vignola's rule book, published in Rome in 1562 with the title *Regola delli cinque ordini d'architettura*, that established its systematic adoption to define each of the five different species of columns inherited from antiquity. Vignola's book "was to have an astonishing publishing history of over 500 editions in 400 years in ten languages, Italian, Dutch, English, Flemish, French, German, Portuguese, Russian, Spanish, Swedish, during which it became perhaps the most influential book of all times" (Watkin 2011, vi).

[7] The 1737 locution *il y aura toujours un carosse à vos ordres* is emblematic here, see https://www.cnrtl.fr/etymologie/ordre.

Charles VIII and the activity of the *parlements* under his reign: "le mauvais ordre et justice qu'il faisoit en son royalme" (de Commynes [ca 1500], I, 10). While the extension of *ordre* to include the statutes enacted by the monarch was consistent with the supposed purpose of the monarch in transferring God's rational arrangement to human society through the statutes he enacted, the novelty in de Commynes' words lay in their encompassing the statutes enacted by the monarch and the decisions of the *parlements* into a perspective in which they could both be seen as parts of a whole, and then as instances of the emerging concept of the 'legal reality of the kingdom', which subsumed them both.

The phrase *maintenir l'ordre* surfaced in the lexicon more than a century later[8], around the time when the frequency of the locution *lois publiques* in scholarly texts marked the rise of 'public law' as an autonomous notion in the domain of knowledge and discourse. Such a notion, at that time, subsumed the arrangements that sustained "the modern immanent concept of sovereignty" (Loughlin 2010, 51–52), and was conceptually refined only in the mid-19th century (section 4). Today we could express the meaning that *ordre* acquired through its occurrences in the phrase *maintenir l'ordre* as 'social stability deriving from abidance by the laws' (section 4), but when the phrase was coined, the word was used with its core meaning of the necessary and rational order that God inscribed in human society through the agency of the monarch, and which it was the monarch's duty to preserve and protect from disruption.

2.2. *Public*

In Old French *public*, from *publicus*, a contraction of *populicus*, meaning both 'belonging to/concerning the people as a whole/the state' and 'of common/general use', originally meant 'concerning the people as a whole' (*paix et utilité publique*). Later, in Medieval times, it acquired the further acceptations of 'known by everybody' (*renummee populaire et publique*), 'belonging to the collectivity' (*bien publique/publicq*), 'performing an activity in favour of all' (*notaire public*), and 'available for everybody to use' (*place publicque*)[9].

During the *Ancien Régime*, a new use of the adjective gained currency to serve a notion that had emerged as a product of the early-modern territorial state and the Reformation, possibly prompted by Humanist

[8] Cf. https://www.cnrtl.fr/etymologie/ordre. On the first uses of the locution, see Plantey (1996, 27), Lemont (2013, 34).
[9] Cf. https://www.cnrtl.fr/etymologie/public, also Grossi 2010.

studies of the theorisation of Roman law sources[10]. In France, as in other European states, early modern doctrines crafted on neo-Aristotelian politics, natural law theories and literature on the art and science of government, which borrowed their terminology from Roman law (Gross 1973; Portemer 1959), extended the meaning of *public* as a qualifier for offices and functions serving the community (*charges et fonctions publiques*), for people invested with some authority or performing some official function (*personne publique*), for deeds officially sealed and recorded in a register (*acte public*)[11], and, finally, for the body of laws governing relations between individuals (as distinct from both the monarch and its officials)[12] and those who, by performing the official functions of the state, govern them (*lois publiques*). Such further extension of the meaning of *public*, as was said at the end of section 2.1, linguistically marked the emergence in French discourse of the notion of 'public law'—it is no coincidence that Jean Domat's *Le droit public* was published in 1697[13].

[10] In Ancient Rome, the Jurist Ulpian identified two kinds of matters: *quod ad statum rei Romanae spectat* (what belongs to the Roman state) and *quod ad singulorum utilitatem* (what is of utility for individuals, including both private and public interests). According to Ulpian, the *ius publicum* expressly covered religious affairs, priesthood, and magistracy, the major interests of the Roman State. This definition enjoyed a 'second life' when it entered the Justinian *Corpus iuris civilis* in the Digest: "[p]ublic law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests, some matters being of public and others of private interest" (Dig. 1.1.1.2; see Coing 1973; Szladits 1974; Kaser 1986). Another excerpt from the Digest—*privatorum conventio juri publico non derogat* (Dig. 50,17,45: the private agreement cannot derogate public law)—placed the emphasis on the imperative nature of certain rules that affected society more directly than they affected the individuals themselves. However, Roman legal theory never developed a public law doctrine that separated it from private law: the focus of Roman jurists was entirely centred on private law, and public law issues were only discussed where appropriate, within the framework of private law analysis (Mattei, Ruskola, and Gidi 2009, 381–383).

[11] Cf. https://www.cnrtl.fr/etymologie/public.

[12] "In the medieval world, king and people were perceived as being bound together in an objectively formed right order in which both had duties to perform under God and the law" (Loughlin 2010, 94).

[13] In the English lexicon, the locution 'public law' had already emerged a century earlier (but with the different sense of a legislative act affecting the community at large), in the two acts of Parliament (1531 and 1536) that developed the first comprehensive English system of poor relief (Quigley 1996).

2.3. *Ordre public*

In his 1725 speech, Montesquieu coined a variation of the phrase *maintenir l'ordre*. He used *conserver* instead of *maintenir*, and, more significantly, he modified the noun *ordre* by adding the adjective *public*. This section analyses the meaning of such a qualification of *ordre*, which was unprecedented in the French lexicon.

As said in section 2.1, the phrase *maintenir l'ordre* belonged to the emerging discourse of public law, where the purpose of the *lois publiques* was to preserve the *ordre* the monarch was called to impose and maintain. As such, the meaning *public* had acquired in *lois publiques* and *droit public* (section 2.2) was prominent for the interpreters of Montesquieu's unprecedented coinage *ordre public* (with the discourse of public law acting as a primer, activating a particular memory to bring it to the fore so that it can be engaged in communication). Still, notwithstanding its cognitive salience[14], such a meaning of the adjective *public* was only one of the acceptations relevant for understanding the conceptual match proposed by Montesquieu's novel linguistic construction.

Such an interpretation of the term *public* in this specific sense would make the locution *ordre public* allude only to a stability deriving from and preserved by the *lois publiques* (or *politiques*)—an undue restriction on the scope of the concept the locution was coined to express, in which *lois civiles* (private laws) and *le droit des gens* (customary law) also played a substantial role, as *L'Esprit des lois* made clear (Montesquieu 1748, I, III). This was already suggested by the very words Montesquieu employed to introduce the locution *ordre public* in his 1725 speech. Not only did the expression *les formalités introduites* [the formalities introduced] allude to something more than legislative enactments; further meanings of *public* besides the one acquired in *lois publiques* were suggested by Montesquieu's second variant of the phrase that was coined during the *Ancien Régime* to denote the necessity of guaranteeing the stability of the early-modern state through abidance by enacted laws. As opposed to *maintenir*, which evokes the image of a hand holding in place a reality it had contributed to affirming, Montesquieu used the verb *conserver*, which alludes to the preservation of

[14] Developed in disciplines concerned with language and communication, the notion of salience refers to the degree to which a sign is prominent, important or more readily available—one that for contingent reasons most captures the interpreters' attention. Salience helps interpreters to rank information quickly, so as to focus attention on what appears most important. Here, it refers to the prominence or greater accessibility, in the context of interpretation, of one of the meanings of a word in relation to the others.

an arrangement in which the role of authority is less intrusive, and more observant, as it were, of the body of sources of law of which such a stability is the outcome[15].

Thus, Montesquieu's linguistic coinage built on other relevant understandings of the adjective *public*, which went beyond the acceptation shaped by the recent discourse of public law to encompass meanings that revolved around the idea of community: 'concerning the people as a whole', 'belonging to/for the general use of the community', 'serving the community' (section 2.2). Understanding *public* in this sense, however, can only give a consistent interpretation of *ordre public* if the concept *ordre* is stripped of the necessity it implies for a divine source in commanding a rational arrangement. Modifying *ordre* with the adjective *public,* considered in the sense of 'belonging to/serving the community' does just that, both as a requirement and a consequence, leaving us with a new and consistent acceptation of *ordre* as 'concerning, serving or belonging to the community'. By stripping *ordre* of its divine implications, *public*, in the sense of 'concerning, serving or belonging to the community', could thus consistently be used to qualify *ordre,* intended not only as the stability deriving from abidance by enacted laws (the sense of *ordre* in *maintenir l'ordre*), but also *ordre* as used by de Commynes in his *Mémoires* (of which Montesquieu had three different editions)[16] to denote the laws of the kingdom considered both as a whole and as a part of the emerging legal notion of state. Applied to this latter concept, the adjective *public* not only severed the link with the divine source that de Commynes had projected onto it by naming it an *ordre*, but reshaped it into the new concept 'the laws of the community', which maintained other meanings of *ordre*, in particular as a 'rational arrangement whose necessity derives from an authority commanding it'.

Montesquieu's unprecedented application of the adjective *public* to the noun *ordre* sketched out a solution to a theoretical puzzle of the time, which was, in what sense could human legislation instantiate an *ordre*, given its contingent nature? Detailed in his later writings and mainly in *L'Esprit des lois*, such a solution was different from Domat's attempts to systemise existing, highly disordered legal sources into a rational framework by justifying the foundation of law upon religious principles, but it also rejected the assumption by natural law theories that rationality was synonymous with necessity, constancy, and universality. For Montesquieu, human laws and institutions were rational but not necessary, immutable or universal, as they

[15] Cf. https://www.cnrtl.fr/etymologie/maintenir and https://www.cnrtl.fr/etymologie/conserver.

[16] Cf. Montesquieu 2013, *pensées* 1302 to 1306, No. 27. De Commynes is also implicitly quoted (ibid., n. 46).

belonged to a conceptual framework that was independent from both the divine and natural realms.

This solution lay *in nuce* in the locution *ordre public*, coined in 1725. From a cognitive point of view, the locution was a metaphor similar to Darwin's 'natural selection', but was characterised by an opposite direction of transfer. Whereas Darwin projected the human-derived concept of selection onto the natural domain (Prandi 2017, 199–201), Montesquieu projected the model of a rational arrangement of elements which until then was considered exclusive to the divine and natural domains onto human legislation, thus opening up the possibility of both systematic enquiry into and a rational management of human cultural norms and institutions, notwithstanding their constant evolution[17].

Considered as a metaphor, *ordre public* called into question the conceptual identity of both the concepts *ordre* and *lois positives* (positive law) (see Montesquieu 1748, I, III), by reshaping the conception of positive law to include rationality amongst its characteristics, and by recasting *ordre* to include human legislation among its instances, thus breaking the links which saw rationality, necessity and constancy as inseparable properties.

Not only unprecedented but also conflictual, Montesquieu's linguistic construction triggered projections between the concepts of *public* and *ordre,* in an effort to construct a consistent interpretation of their combination. Inducing a search in their semantic fields to individuate possible metaphorical transfers, the task meant tapping into meanings the words had acquired that were beyond those salient for the interpreters—meanings that were also functional from Montesquieu's perspective. The metaphor superimposed onto the meaning of *ordre* as given by the phrase *maintenir l'ordre* and modified by the qualifier *public* ('stability concerning the community and deriving from abidance by the law'), the meaning *ordre* had in de Commynes' *Mémoires*, as recast in turn by the addition of *public*, which cancelled the reference to the kingdom to indicate the whole of the laws and institutions of a society.

Onto the complex meaning thus resulting ('legislation of a society and collective stability deriving from abidance by it'), the metaphor projected the core meaning of *ordre* untouched by the application of *public*, namely the meaning remaining after the deletion of two of its essential traits, necessity and constancy. In this way, the metaphor recast the whole of the

[17] Constant change was a characteristic of human legislation, underpinning sceptic views (such as Montaigne's) which held it to be uncertain and arbitrary. Montesquieu acknowledged constant evolution to be a characteristic feature of human laws (Capra and Mattei 2015, 103), but, in contrast with the sceptics, did not consider it an impediment to rationality.

laws and institutions of a society as a rational arrangement, or, to use a term that appeared in late 16th century, as a *système*[18].

This projection also encompassed the meaning *ordre* had acquired in architecture, namely as 'elements arranged in such a way to make up an organic style, consisting in the specific proportion and composition of the elements'. Thus, *ordre public* also came to allude to 'the specific pattern characterising each system of law'. In *L'Esprit des lois*, Montesquieu was to describe a system of law as specifically determined by its necessary link with the political, economic, and religious profile of the society it serves, together with its customs and temperament, all of which was also influenced by 'la physique du pays': time, space, climate, etc. As he wrote, although the specific positive laws of each country are particular applications of the same general human reason, they are so rooted in the cultures that created them, and so fitting to the particular people for which they were enacted, that they rarely would be suitable in another context (ibid.; and see section 4).

Finally, tapping into another of the meanings the adjective *public* had at that time, the application of *public* to the concept 'specific system of laws and institutions of a society and the stability deriving from abidance by it' attributed to it the further quality of being 'open to general enquiry', which was equally functional for Montesquieu's perspective.

The metaphor *ordre public* does not occur in *L'Esprit des lois.* Its cognitive potential was superfluous in that work, in which Montesquieu detailed his idea of the rationality of human legislation. There the effectiveness and depth of the projection the metaphor was meant to prompt was rendered by the locutions *ordre judiciaire*, *ordre politique*, *ordre civil*, *ordre établi*, *ordre de citoyens*, *ordre législatif*, *ordre naturel des lois*, *ordre naturel des lois civiles*, etc., all disseminated throughout the work. Thus, order was definitely brought to human affairs, and not only from Montesquieu's legal perspective: in 1746 Condillac wrote about *l'ordre des mots* (Condillac 1746, 98) and in 1761 Rousseau would refer to *l'ordre social* (Rousseau 1761, 113, 306).

3. The French Revolution and the early age of codification: three polarisations of *ordre public*

After his use of *ordre public* in a 1725 speech delivered at the opening session of the Bordeaux *parlement* (a provincial appellate court, one of thirteen existing during the *Ancien Régime*), Montesquieu never used the locution again in his writings. The expression only surfaced again in the

[18] Cf. https://www.cnrtl.fr/etymologie/syst%C3%A8me.

political lexicon in 1771, when the *Discours sur l'équité qui doit régler les jugements et l'exécution des lois* was published for the first time. With the *parlements* protesting against Maupeou's reform of the magistrature, which suppressed them, Montesquieu's name rose to prominence in the *parlements* struggle against royal authority, creating the perfect publishing opportunity for the *Discours sur l'équité*. Soon other editions followed, before the text was included in the *Œuvres posthumes* of 1783, and then in subsequent editions of the *Œuvres* (Rétat 2013).

3.1. *Ordre public* in the 1789 Déclaration

In 1789, the locution *ordre public* was used in the *Déclaration des Droits de l'Homme et du Citoyen*:

> Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi [No one may be disquieted for his opinions, even religious ones, provided that their manifestation does not trouble the *ordre public* established by the law]. (*Déclaration des Droits de l'Homme et du Citoyen*, Art. 10)

The wording *ordre public* was inserted in the text of the *Déclaration* only a few days before its enactment on August 26.

After Lafayette's formal motion on July 11, several drafts were proposed to the National Constituent Assembly (hereinafter NCA), none of them featuring the words *ordre public*. In progressive versions of Article 10, limits to freedom of opinion, religion and press (when present) were mainly referred to as *autant qu'elle nuit droits d'autrui* (*à personne*), and although other articles mentioned *l'ordre social*, *le bon ordre de la société*, *l'ordre civil et politique*, *la tranquillité publique*[19], they never used the words *ordre*

[19] Art. 19 of August 12 draft stated: "La libre communication des pensées […] ne doit être restreinte qu'autant qu'elle nuit droits d'autrui" (Archives Parlementaires, 1, VIII, 432); in the drafts presented on July 27 "sous l'unique condition de ne nuire à personne" and "nuire aux droits d'autrui" (ibid., p. 288 and 290, respectively). Art. 8 of Mirabeau's draft (August 17) stated: "le citoyen a le droit de rependre [ses pensées] sous la réserve expresse de ne pas donner atteinte aux droits d'autrui" (ibid., 439); similar wording had been used in two earlier drafts presented by Sieyès (ibid., 422) and Gouges-Cartou (ibid., 428), respectively. *L'ordre social* occurred in the draft Lafayette presented to the NCA on July 11 1789 (cf. Buchez and Roux-Lavergne 1834, 93–95); *le bon ordre de la société* in Art. 16 of August 12 draft ("Il est […] essentiel, pour le bon ordre même de la société, que [la religion] et [la morale] soient respectées", ibid., 432); *l'ordre civil et politique* in a draft presented

public. The locution found its way into the draft Declaration through the progressive merger of the articles addressing freedom of opinion and freedom of religion, as can be seen in a comparison of Article 10 as enacted and both Article 14 of the draft, presented on July 28, stating "Aucun homme ne peut être inquiété pour ses opinions religieuses, pourvu qu'il se conforme aux lois, et ne trouble pas le culte public" (*Archive Parlementaires*, 290), and Article 18 of the draft debated on August 12, namely "Tout citoyen qui ne trouble pas le culte établi, ne doit point être inquiété" (ibid., 432; in the respective drafts, both articles appeared next to an article addressing freedom of press). *Ordre public* finally appeared in the draft proposed on August 21 by Louis de Boislandry, which stated in Article 16:

> Tout homme est libre de professer telle religion qu'il lui plaît; de rendre à l'Être suprême tel culte qu'il juge convenable, pourvu qu'il ne trouble point la tranquillité des autres, ni l'ordre public. (*Archives Parlementaires*, 468)

On August 23, Boniface Louis de Castellane suggested merging the proposed articles on freedom of press and freedom of religion into a single article stating "Tout homme est libre dans ses opinions; tout citoyen a le droit de professer librement son culte, et nul ne doit être inquiété à cause de sa religion". Jean-Baptiste Gobel (Bishop of Lydda) requested the addition of the provision "pourvue quel leur manifestation ne trouble point l'ordre public", and after a heated debate the final version of Article 10 was adopted (ibid., 480). The qualification *établi par la loi* was added to *ordre public* to further explain that freedom of press, opinion and religion could be limited only by enacted laws, thus excluding religion and *bonnes mœurs* (section 4), two reservoirs of ethical limits alluded to by a member of the NCA while expressing his relief about the limits to freedom of press set out in Article 10[20].

De Boislandry was close to both Lafayette and Thomas Jefferson, so the draft he presented (the first to adopt the locution *ordre public*) had possibly absorbed suggestions from them both. Since Jefferson was an admirer of Montesquieu and was closely acquainted with his works, it is likely that the

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on July 27 (ibid., 288); *la tranquillité publique* in Art. 67 of August 12 draft (ibid., 431).

[20] M. de Machault said: "Je satisfais à ma conscience qui me presse, ainsi qu'au mandat que j'ai reçu: il y a du danger pour la religion et les bonnes mœurs dans la liberté indéfinie de la presse." http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/histoire/grands-discours-parlementaires/rabaut-saint-etienne-robespierre-et-de-machault-24-aout-1789

addition of *ordre public* was suggested by Jefferson[21], as the locution was not yet part of current French political discourse; Condillac, for instance, in an essay advocating a free market economy in contrast to the prevailing contemporary policy of state control in France, made extensive use of the locution *le maintien de l'ordre*, but never with the adjective *public* (cf. Condillac 1776)[22], and on August 24, 1789, in his defence of the wording adopted for Article 10 at the NCA, Rabaut Saint-Etienne spoke of *troubler l'ordre* without mentioning the word *public*, notwithstanding the fact that the article contained the expression *ordre public*[23].

In any case, the time was ripe for the locution *ordre public* to enter a normative text as a technical term. By then, the expression had in fact lost the conflictual effect it was meant to have when it had been coined, because *ordre* was no longer considered inconsistent with human legislation.

By entering the text of the *Déclaration*, the concept first sketched out by Montesquieu was not only translated into a normative context of use, but also reshaped. First, by the addition of the qualifier *établi par la loi*, as we saw, to exclude both customary law and case law, and the stability they assured from possible limits to freedom of expression (which in Montesquieu's view similarly contributed to the systematicity of a legal system). Secondly, by the polarisation of the concept *ordre public* in Article 10.

For Montesquieu, *ordre public* was instantiated by both legislation (the system of laws and institutions of a given society) and its outcome (the collective stability deriving from abidance by such a system), where the inextricable intertwining of cause and effect made the two facets of the concept equally prominent. Article 10, on the contrary, turned the stability

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[21] Jefferson, at that time Minister to France, studied Montesquieu intensively between 1764 and 1774 (Chinard 1925), and arrived in Paris the year in which the *Oeuvres posthumes*, containing also the *Discours sur l'équité*, was published; *ordre public* therefore may have been added to Art. 16 of the draft presented by de Boislandry at his suggestion.

[22] In Condillac's essay, *ordre* occurs several times, e.g. in ch. 10: "[la] puissance […] souveraine […] protège, parce qu'elle maintient l'ordre audedans […] par les lois qu'elle porte et qu'elle fait observer" (Condillac 1776, 29). For Condillac, "l'ordre se maintenait en quelque sorte de lui-même chez un peuple qui avait peu de besoins" (ibid., 86); "maintenir l'ordre" (later in the text also "la liberté") was the only protection the sovereignty was required to guarantee, otherwise it could trouble the *ordre* ("qu'elle le troublerait si elle avait des préférences", ibid., 29).

[23] Rabaut Saint-Etienne said: "Si l'on s'élève contre un homme en place, il s'écrie que l'ordre est troublé, que les lois sont violées, que le gouvernement est attaqué, parce qu'il s'identifie avec l'ordre, avec les lois et avec le gouvernement." http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/histoire/grands-discours-parlementaires/rabaut-saint-etienne-robespierre-et-de-machault-24-aout-1789

deriving from abidance by the system of laws and institutions into the prominent facet of the concept, a polarisation linguistically marked by the verb *troubler*, whose applicability is more straightforward to 'stability' than to 'system'. Derived via *turbulare* from *turbidare*, to disturb, make cloudy or turbid, stir up, mix (from *turba* 'crowd', but also 'confusion, tumult, commotion'), *troubler* had been used to speak of actions disturbing either the peace between humans, family included (*trobler la paiz*), or normal courses of events; emotions like joy could also be troubled. Then, in the 17th century, as witnessed by the works of Racine and Molière, *troubler* acquired the further meaning of 'action making someone insecure of himself, perplexed or bewildered'[24].

Given the proximity between the semantic fields of 'peace' and 'stability', the application of *troubler* to the stability afforded by abidance by the system of laws and institutions of a society sounded acceptable enough: wars of religion, for instance, had shown how the expression of opinions could even destroy stability, and twenty years earlier, for instance, Condillac had written that sovereign power could *troubler l'ordre* (Condillac 1776). But how a system of laws and institutions could be troubled, also by the expression of opinions, was not straightforward. The consistent application of *troubler* to this facet of the concept built by the metaphor *ordre public* required a further figurative shift, requiring the system of laws and institutions to be considered either as a configuration whose necessary outcome—stability—can, like a normal course of events, be troubled, and then impeded or altered by a particular action (here, the expression of a particular opinion), or as something that can be made cloudy/turbid. By choosing the first option, expressions of opinions that troubled the *ordre public établi par la loi* become those altering the 'normal course' of the legal system and its outcome, an interpretation that converges towards the facet of the concept that was already consistent with the meaning of *troubler*—collective stability. Exploring the second option available might thus seem cognitively useless; nevertheless, it uncovers a third facet of Montesquieu's concept, one that still lay in the background in Article 10, but was to emerge shortly after in the *Code civil* (section 3.2) and would come to the fore in the Age of Nation States (section 4), namely a facet for which both the consistency of the system and the principles holding its elements together are prominent.

In order to see the legal system of the *République* as something that can be made cloudy or turbid by manifestations of opinions that trouble *l'ordre public établi par la loi,* these manifestations must be interpreted as the

[24] Cf. https://www.cnrtl.fr/etymologie/troubler.

presentation of opinions on the stage of the ideas which differ from those opinions that hold together the laws and institutions of the *République;* they must be seen as manifestations calling into question the apparent consistency of the legal system by expressing wills that depart from the general will displayed in enacted legislation and institutions (see Article 6 of the *Déclaration*)[25]. Such an interpretation builds on the idea of a set of principles holding together the elements of the system to revive both the semantic root of *ōrdo*, which captures the concepts 'to fit together' and 'way to proceed'[26], and a nuance in the meaning of *ordre* which Montesquieu's metaphor had not captured, but which proved essential for the Revolutionary perspective; while Montesquieu considered the unity resulting from the whole of the laws and institutions of a society to be non-intentional (Casabianca 2013)[27], the idea of an intentionality lying behind the rational arrangement of enacted laws served the ideal of a collective (and consistent) agency enacting them.

Finally, the verb *troubler* served the reactive stance conveyed by the statement in which *ordre public* now occurred (*ne trouble pas l'ordre public établi par la loi*), whereas Montesquieu's statement (*pour conserver l'ordre public*) conveyed a proactive stance. The purpose that the locution was now called on to serve in the normative context was that of safeguarding principles deemed essential to society, through a formulation that made it clear that only enacted laws could perform such a function.

[25] *Déclaration des Droits de l'Homme et du Citoyen* de 1789, Article 6 : "La loi est l'expression de la volonté générale. Tous les citoyens ont droit de concourir personnellement, ou par leurs représentants, à sa formation. […]".

[26] Originally 'a row of threads in a loom', cf. https://www.etymonline.com/search?q=order.

[27] Casabianca 2013: "It is by exposing the outline of the work that the spirit of law is defined as an ensemble of relations and that their order is evoked (EL, I, 3). If 'all these relations' (*tous ces rapports*) can appear as an order, that is because the spirit allows us to pass from the diversity of factors, the list of which Montesquieu establishes, to the non-intentional unity that results from them. The spirit of law is Montesquieu's object of study: he intends to explain positive laws by exposing the ensemble of relations that determine them. The spirit also appears as the faculty of order, insofar as to have the spirit of law is to be capable of grasping the relations 'all together' (ibid.), to be capable of 'judging the whole together' (*juger du tout ensemble*, EL: preface)."

3.2. *Ordre public* in the *Code civil* (1804) and in the *Code pénal* (1810)

Fifteen years later, at the suggestion of the politician and magistrate Boulay de la Meurthe, the locution *ordre public* was used in three articles of the Civil Code with a similar function[28]:

> On ne peut pas déroger par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs. (Art. 6 *Code civil 1804*)
>
> Il est permis aux propriétaires d'établir sur leurs propriétés […] telles servitudes que bon leur semble, pourvu néanmoins [...] que ces services n'aient d'ailleurs rien de contraire à l'ordre public. (Art. 686 *Code civil 1804*)
>
> La cause est illicite quand elle est prohibée par la loi, quand elle est contraire aux bonnes mœurs ou à l'ordre public. (Art. 1133 *Code civil 1804*)

None of these Articles use the adjunct *établi par la loi*, which had qualified *ordre public* [public policy] in the *Déclaration*. Instead, it was replaced by another limit on personal liberty, *bonnes mœurs* [good morals]. This locution drew on the rules of social behaviour commonly accepted by the community, which *établi par la loi* had effectively excluded in the *Déclaration*. As of that moment, the locution *ordre public* would appear more often than not coupled with *bonnes mœurs* (section 4.3).

The coupling of *ordre public* with *bonnes mœurs* appears as early as Article 6 CC (which holds that private agreements may not derogate from statutes relating to public policy and good morals), where the expression 'legislation concerning either the *ordre public* and/or the *bonnes mœurs*' implies that *public policy* and *good morals* refer to distinct sets of rules. The expression also suggests the existence of general principles: the reference to good morals aims to capture the set of ethical principles governing social cohabitation in a certain society at a particular time, while the reference to public policy refers to the fundamental rights and freedoms of a society (section 4). If the contrary were true, the textual implicature suggesting the existence of laws not concerning the *ordre public* or the *bonnes mœurs* would prove inconsistent. In short, Article 6 CC hints to principles of the

[28] A code of civil law common to the whole kingdom had been announced by the NCA; amongst the projects advanced, one in the IV year used the locution *ordre social*, one in the VIII year featured the phrase "laws which affect the public", while one proposed in the XII year mentioned the *droit public*, and prohibited "to derogate from the laws which form part of public law" (Terlizzi 2012, 11).

system, which are what prohibit private agreements from derogating from legislation concerning either the *ordre public* and/or the *bonnes mœurs*.

In addition, Article 686 CC ('owners are permitted to establish over their property […] such servitudes as they deem proper, provided however that [those servitudes] are not in any way contrary to public policy') and Article 1133 CC ('the cause is unlawful when it is prohibited by law, when it is contrary to good morals or to public policy), introduced a new construction, *contraire à l'ordre public* (in Article 1133 *contraire aux bonnes mœurs ou à l'ordre public*), which would spread into the different branches of law, in parallel with the evolution of loan translations in the civil law countries influenced by the *Code civil*.

Contraire, deriving from *contrarius* (from *contra*, against) and meaning 'adverse', 'opposite', 'opposed', 'conflicting', had by that time lost its medieval sense of a hostile action, and was used as an adjective indicating the quality of being 'opposed', as in the case of the wind, but also of being 'radically opposite' to something (*tot le contreire*)[29].

The aims and purposes of private law explain why in the French *Code civil* enacted in 1804, the term *être contraire* was chosen instead of *troubler*. The choice linguistically rarefied the concreteness of the owner's conduct, or of the cause of a contract, prohibited by virtue of its being contrary to good morals or to public policy, by eliminating the presumption of agency implied by *troubler*—by denoting a *status,* and not an action, *être contraire* presupposes no agency. In addition, the lexical choice marks a polarisation of *ordre public* that is different from the polarisation effected in Article 10 of the *Déclaration*, as *être contraire* signals a focus on the other facet of the concept pictured by Montesquieu's metaphor (the system of laws and institutions), which would come back to the fore once the ideal of a complete and self-sufficient 'codification' of different sectors of substantial and procedural law, in which judges had no role other than to apply the rules, lost credibility (section 4).

As said in section 3.1, to understand how expressions of opinions can trouble a system of laws and institutions, a figurative extension of the meaning of 'system' is required. Similarly, to imagine how the owner's conduct or the cause of a contract may be against the system, a virtual extension of the system must be conceived. In prohibiting certain conducts by owners and causes of contracts, such conducts and causes must be seen as actions giving rise to arrangements (between properties in the case of servitudes and between private individuals in the case of contracts) opposed to those created by conducts and causes the legislation would admit as

[29] https://www.cnrtl.fr/etymologie/contraire.

lawful had it contemplated them in a statutory provision. To be considered one with the legal system, such virtual provisions must be consistent with it, namely they should share its principles. Therefore, by using the wording *ordre public*, Articles 686 and 1133 of the *Code civil* capitalised not only on the concept 'the system of laws and institutions of a society' (one of the facets of the concept enshrined in Montesquieu's metaphor), but also on a further meaning of the metaphor, already suggested by Article 10 of the *Déclaration* and implied by Article 6 of the *Code civil*; namely, those principles that, by holding together the laws and institutions of the state, give systematicity and consistency to their whole, while at the same time sketching out an ideal framework for any legislative developments.

Before examining how the function of the locution *contraire à l'ordre public* evolved over the Age of Nation States (section 4), the use of *ordre public* in the Penal Code enacted in 1810 remains to be considered.

Consistently with the aims and purposes of penal law, the Penal Code could not build on an open-ended clause such as *contraire à l'ordre public*, nor on the notion of *ordre public*, due to their intrinsic vagueness, given that penal law was (and still is) based on the legality principle, which entails that state legislation is to protect individuals against arbitrary measures by the state itself[30]. Nevertheless, the locution *ordre public* appeared in the title of Section III, Chapter IV, Title I, Book III of the Penal Code.

At that time, Title I of Book III dealt with crimes and offences *contre la chose publique*. Chapter IV specifically addressed crimes and offences *contre la paix publique*; including forgery (Section I), forfeiture and crimes and offences by public officials in the exercise of their office (Section II), and finally troubles brought to *ordre public* by ministers of religion in the exercise of their ministry [*troubles apportés à l'ordre public par les ministres des cultes dans l'exercice de leur ministère*] (Section 3). This last section was in turn divided in subsections: the first, on offences against the civil status of persons, punished ministers of religion who celebrated a marriage without the prior issue of a marriage licence by a public official; the second and third subsections dealt with criticism, censorship or provocations contained in public religious speeches or writings directed against public authority; and the fourth dealt with the correspondence of ministers of religion with foreign courts or institutions on religious matters. To complete the context for understanding the meaning of *ordre public* in penal law at that time, it is also significant that the following and final

[30] *Nullum crimen, nulla poena sine lege*. Such measures included not being prosecuted or sentenced without sufficient evidence and not being sentenced without due process.

section of Chapter IV dealt with the offences of resistance, disobedience, and other infringements of public authority.

Section 3 concretely exemplified what at that time was considered trouble for the *ordre public*; namely, altering the marital status of individuals by creating a legal relationship between them without the prior authorisation of the state, and expressing critical or even contrary opinions to those allowed by the state in religious speeches or writings, and in correspondence about religious matters with other countries. By classifying these actions as specific crimes and offences against la *paix publique*, and resorting to the verb *troubler*, the title of Section III stressed one facet of Montesquieu'sconcept of *ordre public*, namely the stability afforded by the system, as Article 10 of the *Déclaration* had already done; however, just like Article 10, the title of Section III also hinted at other facets of the concept *ordre public*. In section 3.1 it was seen how the choice of the verb *troubler* effected a figurative shift that justified the interpretation of Article 10 of the *Déclaration* as prohibiting the manifestation of opinions on the stage of the ideas different from those which hold together the enacted laws and institutions of the *République,* thus from those which call into question the consistency of the system by expressing wills that depart from the general will displayed in enacted legislation and institutions. The provisions of Section III of the 1810 Penal Code were consistent with such a meaning: celebrating a marriage without the prior issue of a marriage licence by a public state official expressed the idea of the supremacy of the Church over the State, which was *de facto* contrary to *ordre public*; written and spoken criticism, censorship or provocation against the public authority, for an audience either inside or outside the borders of the state, could express ideas that not only differed from those holding together and sustaining enacted legislation, but were *de facto* contrary to them.

To sum up, the occurrences of *ordre public* in the *Déclaration* and the French Civil and Penal Codes polarised in their different ways the meaning Montesquieu attached to his original locution. In both the *Déclaration* and the Penal Code, the concept stressed the stability deriving from abidance by a system of laws and institutions, leaving both the system and its principles in the background, where they could be drawn on to determine, as required, which opinions it was unlawful to express. The Civil Code, on the contrary, spoke of *ordre public* from the perspective of the system, leaving the stability it afforded in the background, where it could be drawn on to determine the principles offended by the owner's conduct or causes of contract not expressly prohibited by enacted laws. Hence, by focusing on different facets of *ordre public*, the different branches of law that used the

locution worked (and still work, section 4) as a "prism" refracting the whole concept (see also Picheral 2001, 10).

4. The Age of Nation States and further evolution of *ordre public*

As seen in the previous sections, the concept *ordre public* entered the French normative discourse undergoing three polarisations, which alternatively stressed its meaning as a 'system of laws and institutions of a given society,' the 'stability deriving from abidance by it,' and the 'general principles of the system.' Such polarisations survived not only in the dissemination of the locution in the different branches of law, functional to their specific purposes, but also in loan translations of the term in legal systems influenced by French law. Moreover, the codification of the concept *ordre public* evolved beyond the original intent of the expression, with the wording *contraire à l'ordre public* technically becoming a general clause in private law, where it was coupled with *bonnes mœurs*. Furthermore, during the Age of Nation States, the adjective *public* underwent an extension of meaning in legal discourse that would be of consequence for the concept *ordre public* as well. In practice, although it remained functional to the ideal goal of reducing the sources of law to written statutes only, such an evolution artificially abstracted the concept from the customary meanings of its components, for which it would lose its specificity.

4.1. The evolution into a general clause

In the French Civil Code, the term *contraire à l'ordre public* expressed the safeguarding of principles deemed essential to society. The legal text left these principles unspecified, distinguishing them only from those shaping *les bonnes mœurs* (section 3.2), as the expression *contraire à l'ordre public* served precisely as a guide for identifying them.

At the time of the enactment of the French codes, this function presupposed no creative interpretation on the part of the courts, but rather the contrary, with the ideal being that the set of principles from which judges could draw to rule on a specific situation was sufficiently clear and determined so that the choice was merely a question of individuation. Yet in the years following the enactment of the *Code civil*, socio-economic conditions changed so rapidly, and with them the principles deemed essential to society, that judges were often called to rule on owner's conducts (Article 686 CC) and causes of contracts (Article 1133 CC) not contemplated

by enacted law, and thus not immediately determinable within a framework of 'principles of the system'.

The very idea of a general clause conflicted with both the revolutionaries' intention of limiting the multifaceted interpretations provided by judges of enacted legislation, and the fitting metaphor of the judge as the *bouche de la loi*, enshrined in Articles 4 and 5 of the *Code civil*. However, it proved a contingent necessity, and it was well served by the locution *ordre public,* vague enough to leave judges room to act in the name of the law in cases not expressly contemplated by its provisions, but at the same time sufficiently constrained by the combination of *ordre* and *public* to give judges a guide for closing loopholes in the system. However, after an initial period in which jurists at the *École de l'exégèse* argued that judges' interpretations should aim to convey the will of the legislature in an almost religious respect for the text to be interpreted[31], *contraire à l'ordre public* served the purpose of a formal shell through which judges could impose limits on personal liberty and private autonomy when needed; namely, when no specific enacted legislation prohibited a certain owner's conduct or a contract cause, and yet they proved contrary to the system.

In short, when the Civil Code was enacted, the locution *contraire à l'ordre public* identified, in the drafters' intention, a predetermined (although unspecified) set of principles, which was then used as a metaphor with an intended definite meaning; whereas during the Age of Nation States, the courts turned it into a metaphor open to interpretation. The distinction between closed and open metaphors concerns the interpretive attitude towards metaphors, rather than a characteristic intrinsic to them, and the evolution of the metaphor *ordre public* in the Age of Nation States exemplifies how legal communities "may (re)open to interpretation a metaphor used until then as closed" (Morra 2010, 391). Montesquieu had created a metaphor serving a descriptive function in the context in which it was used (a speech); using *ordre public* in statutes with a directive function, the Republican drafters considered its metaphorical potential as defused, as they conceived the system of enacted legislation as a guide to interpretation sufficient to avoid the creative interpretations they had forbidden. The legal

[31] Demolombe said: "La suprême mission du législateur est précisément de concilier le respect dû à la liberté individuelle des citoyens avec le bon ordre et l'harmonie morale de la société. Et l'on peut dire qu'il emploie en général, pour atteindre ce but, trois moyens principaux : […] Il prive de tous effets légaux les conventions qui blesseraient les principes de la morale […] En dehors et au-delà de ces limites, les préceptes de la morale ne sont plus des lois, ne font plus partie du droit et ne peuvent pas exactement recevoir ces dénominations dans les ouvrages de jurisprudence" (Demolombe 1860).

praxis after the enactment of the codes in the Age of Nation States, however, opened the locution up again to interpretation.

4.2. The evolution of *public* over the 19th century and its impact on the contemporary meaning of *ordre public*

Over the 19th century, the locution *contraire à l'ordre public* underwent a change in function, but also in meaning, as the adjective *public* became more specialised in meaning.

As anticipated in section 2.2, it was only in the mid-19th century that the conceptual refinement of the notion of public law was completed. German professors, such as Carl Friedrich Gerber (Tübingen), Paul Laband (Heidelberg), and Georg Jellinek (Vienna) conceptualised an autonomous public sphere, where the state was institutionalised as a legal entity, de-personalised and sustained by the rule of law, while public law was defined as an autonomous sector in the domain of knowledge and legal discourse (Padoa Schioppa 2007, 566–567). Such a conceptualisation also impacted on the meaning the adjective *public* had in public law discourse and statutes, where it came to mean both 'pertaining/belonging to the state' and 'under the control of the state'– a shift in meaning that in turn affected the meaning of *ordre public* throughout Continental Europe's legal systems.

As regards one of the facets enshrined by the concept *ordre public* coined by Montesquieu, namely 'collective stability deriving from abidance by a system of laws and institutions', it was transformed by the legal discourse of codification into 'stability concerning the community and deriving from abidance by the law'. The further specialisation acquired by *public* during the Age of Nation States made *ordre public* allude to a general stability derived and maintained essentially (and necessarily) by legislative enactments, and notably by abidance by positive law, thus further shifting into the background the customary laws included in the concept expressed by Montesquieu.

As regards the other facet of the concept *ordre public* ('system of laws and institutions of a given society'), the new meaning of *public* severed ties with any legal source other than positive state laws, as accepting something other than 'the system' in the legal and political discourse of Nation States would have undermined the very foundations of the system itself, whereas previously, it would only have tarnished the universalistic *façade* of the system built by Enlightenment thinkers.

Finally, as regards the third facet of the concept ('principles that give systematicity and consistency to the system of laws and institutions'), —a nuance emphasised to varying degrees by all the early normative occurrences

of *ordre public* (section 3.2) and put in further evidence by the re-opening of the metaphor *ordre public* to interpretation in private law—the new meaning of *public* appeared in penal law.

As seen in section 3.2, the *Code pénal* had introduced a specific set of crimes and offences defined by their troubling the *ordre public*, alluding to a basic principle of the system, which was the supremacy of the State over the Church. In accordance with the 1789 Declaration, here to trouble the *ordre public* was considered an offence against the public security and safety of the Nation State. Over the 19th century, what constituted an offence against the *ordre public* would vary greatly, with some offences repealed, while many others were added to the Penal Code. Further examples of the principles implied by the concept *ordre public* were given by the various legal systems influenced by the French codes. In short, any crime and offence against national security (i.e., any breach in the stability and pacific coexistence of the community) that perturbed public safety and public security, or rendered social coexistence impossible, made its way into penal codes by special legislation, satisfying the principle that criminal offences should be clearly and precisely defined. Thus Nation States reserved for themselves the capacity to limit individual rights and civil liberties in order to guarantee public security and safety, and progressively all constitutions would envisage a strict list of restrictions to rights and liberties for reasons of public safety and public security. As a limit on civil liberties, *ordre public* took on the narrow meaning of 'public order', absorbing the concepts of public safety and public security.

Since the 20th century, other kinds of crimes and offences have come to be defined as being against *l'ordre public,* where they undermine the fundamental rights and primary public interests on which an orderly and peaceful coexistence of the Nation (i.e. of a specific society) must be based, and the principles whose existence, and supposed uniqueness, makes such coexistence possible; namely, the physical and psychological integrity of the person, his/her security, and the protection of any human right of fundamental importance for the existence and the functioning of the state.

4.3. Specificity and relativism in *ordre public*

As seen in section 4.1, the new function of the locution *contraire à l'ordre public* in the 19th century as a general clause in private law rendered explicit one of the facets of the concept captured by Montesquieu's metaphor, namely 'principles that give systematicity and consistency to the system of laws and institutions'. At the same time, however, it also revealed an aspect of the concept that had remained veiled in the early days of civil law

codification, for the specificity of any system of laws and institutions serving a given society meant that such laws and institutions were tailored to that society, and so could hardly be suitable for a different society.

In section 3.1, it was seen how through the addition of the qualifier *établi par la loi*, the drafters of the 1789 Declaration had sought to reduce the concept *ordre public* to both the system formed by the written laws enacted by the legislature, and its outcome, the stability of society at large, thus blocking the role not only of customary law, but also of case law. Such a compression of the concept was meant to impede an interpretive practice which, through the recourse to general clauses (as *ordre public* and *bonnes mœurs*), would have paved the way for ethical principles (common decency of average reasonable people included) and fundamental freedoms and rights for governing collective coexistence in a certain society at a particular time. However, the locutions *ordre public* and *bonnes mœurs*, as seen in section 3.2, were both incorporated into the French Civil Code, despite a lively debate in which both judges of Appellate Courts and members of the Tribunate (such as Faure and Andrieux) had criticised the introduction of *bonnes mœurs* for both its vagueness and uselessness, arguing that it was already assumed in the notion of *ordre public* (Fenet 1827, 67).

The coupling of the locutions *contraire à l'ordre public* and *contraire aux bonnes mœurs* (in the other civil law systems *buon costume*, *buenas costumbres*, *guten Sitten*, etc.), aimed to capture the set of ethical principles governing social coexistence in a given community, at a particular time, and was enshrined in codified law as a counterpart to the fundamental principle of contractual freedom, together with the limit of *utilité publique* [public interest].

The formulation *contraire aux bonnes mœurs ou à l'ordre public* (Article 1133 CC), among other things, undermined the idea of universality, typical of the Enlightenment. In particular, *contraire à l'ordre public* tied into one of the facets of the concept conveyed by Montesquieu, namely the specificity of the system of laws and institutions of a society and the specificity of the stability deriving from abidance by it, where the specificity of a legal system, in the 19th century, coincided with the Nation State. Coupled with *ordre public*, the concept of *bonnes mœurs* soon lost its relevance, as the 'system of laws and institutions specific to a society' was no longer shaped by extra-legal elements such as morals and traditions, which belonged to non-legal spheres such as religion and philosophy.

Within the framework of civil codes, statutory prohibitions based on public policy and good morals provided much of the foundation for positive limits to personal freedoms and party autonomy (for instance, in contract law by declaring contracts void or unenforceable). Also in penal law, further

limits to personal freedom and freedom of contract were introduced and certain conduct was prohibited by statute (incitement; fencing; prostitution, as well as gaming and betting), making what was against 'the law' automatically against 'public policy and good morals', with any possible contract or conduct to the contrary being unlawful. Thus, locutions such as 'contrariety to mandatory law,' 'to public policy' or 'to good morals' (in various translations of the notion in the different civil systems) at once became the outer walls of Nation States, limiting the incoming tide of 'external' *ordres*, and the inner perimeter of personal liberty in general, and of freedom of contracts more concretely.

The growing secularisation and pluralism of societies soon made it impossible to refer unequivocally to the notion of the good morals shared by a society, even within the borders of a single Nation State. In the 20th century, this would give rise to the "judicializing of morality in contemporary legal systems" (Terlizzi 2012, 86; Resta 2015). Ultimately, the recognition of a plurality of values, founded on the accepted norms rooted in each system and reflecting the pluralism of societies and cultures, eroded the space for *bonnes mœurs* in favour of *ordre public*.

According to a first scholarly approach, the two locutions are still two separate notions, where *ordre public* [public policy] concerns the mandatory provisions expressed by positive law (such as those contained in penal provisions, or rent restrictions, insurance law, labour law, etc.) and *bonnes mœurs*[good morals] concerns the spontaneous code of conduct, immanent and external to any given state-institution[32].

A more commonly-held view argues that the open-ended clause of public policy absorbed that of good morals in a process of osmosis. Some civil law systems have indeed eliminated the notion of good morals from their civil codes (i.e., France, with the 2016 reform; Québec); others have opted for a less radical break with their legal traditions, circumscribing the meaning of good morals to the set of ethical and moral principles implied by the average perception of decency. Today, public policy and good morals generally constitute a hendiadys (whereas being contrary to mandatory law remains a separate notion), conveying all the principles derived from the legal, moral, political, economic and social spheres shared by a certain community at a given time (Trabucchi 1959, 700–706; Ferri 1970, 270; Guarneri 1988, 121–126).

Still today, Montesquieu's concept *ordre public* has not lost its various facets. Rather, it has become a repository of rules of conduct, based on the sense of duty, dignity, and honesty of the human being, and of public

[32] Different opinions are reported in Terlizzi (2012).

interest, commonly accepted by citizens, no matter what religious or philosophical opinions they hold, with the aim of guaranteeing precisely that collective stability deriving from abidance by the law (Fauvarque-Cosson 2004, 473). Although judges are not allowed to impose their own subjective standards, they must gauge what society, as a whole and within a specific state, believes to be morally unjustifiable and contrary to public policy. However, as *ordre public* (now encompassing good morals) undergoes continuing transformations, it is not surprising if another 'absolute value' has emerged to cope with the relativism of values: that of human dignity (section 5).

5. The new International Order and the European Supranational Order

The facet of the concept conveyed by Montesquieu's metaphor *ordre public* that was considered in the last section—namely the specificity of any system of laws and institutions serving a specific society, making it hardly suitable for a different society—emerged explicitly in the 20th century as a consequence of the new post-war order, and as an equal and opposite force in response to international trade law negotiations under the General Agreement on Tariffs and Trade of 1949 (GATT) for the creation of a new economic world order. In Europe, *ordre public* was absorbed in EU law from the beginning, when the six founding states started the process of unification with the European Coal and Steel Community (ECSC 1950) in order to secure lasting peace on the continent and to foster economic growth through the European Economic Community (EEC, 1957), through to the last enlargement, when 28 States (Croatia was the last to join in 2013) formed the European Union (section 5.1). By then, the general clause *contraire à l'ordre public* was widely found in all branches of EU law and interpreted by judges according to one of the meanings of the concept conveyed by Montesquieu's metaphor, namely a 'system of laws and institutions of a given society'. But the very specificity of the system this definition alludes to, a facet of Montesquieu's concept until then not capitalised on by legal constructions, revealed a contrast between an international notion of *ordre public*, on the one hand, and several national *ordres publics*, on the other (also called 'internal' or 'domestic' *ordres publics*).

In the light of the values widely accepted by the international community, in any international case potentially involving a conflict-of-laws[33], *ordre public* i.e., public policy, sometimes also called 'public order law' to allude to public security policies and to distinguish it from general 'public policy, could not remain a mere domestic notion, vested in a conflict of laws meaning. Since the aftermath of World War II, the notion *ordre public* has fulfilled a function of exclusion, allowing a national court to reject any decision or an act which has been made in conditions which are considered to be intolerable with regard to what are recognised as fundamental rights within the internal *ordre public* (defence rights; arbitration clauses; equality between spouses; etc.). The content of this *ordre public* is both substantial and procedural, in the dual sense that: a) its sources can be procedural or substantial, and b) its application produces substantial as well as procedural rules, as happens in the field of international arbitration (Fauvarque-Cosson and Mazeaud 2008, 112–114).

Even in the European *supranational* legal system, *ordre public* is translated both as 'public policy' and as 'public order law'.

As 'public policy', the European Court of Justice (ECJ) in the *Bouchereau* case of 1977 gave a first interpretation that converged towards the facet of the concept already matching with the meaning of *troubler*, namely the stability concerning the community and deriving from abidance by the law (section 3.1), stating that:

> […] the recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society. (ECJ in the *Bouchereau*, paragraph 35[34])

The Board of Appeal of the European Patent Office, in the decision *Plant cells* of 1995, illustrated, instead, the still lively dialectic between *ordre public* and *bonnes mœurs,* saying:

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[33] They address three principal questions; first, when a legal problem touches on more than one country, it must be determined which court has jurisdiction to adjudicate the matter. Second, once a court has taken jurisdiction, it must decide what the applicable law before it will be. Third, when the court ultimately renders a judgment in favour of the plaintiff, conflicts of laws address the enforcement of the judgment (https://www.britannica.com/topic/conflict-of-laws). These rules are national in origin (except for countries that have entered into treaties concerning them) and are not part of international law.

[34] Case 30/77, judgment of 27.10.1977, 1977, I-999.

> […] the concept of *ordre public* covers the protection of public security and the physical integrity of individuals as part of society. This concept encompasses also the protection of the environment.
> […] the concept of morality is related to the belief that some behaviour is right and acceptable whereas other behaviour is wrong, this belief being founded on the totality of the accepted norms which are deeply rooted in a particular culture. (EPO in the *Plant cells,* paragraphs 5 and 6[35])

Notwithstanding *ordre public* is considered to have absorbed the *bonnes mœurs* in a process of osmosis (section 4.3), *mœurs* continue to represent a useful general clause for the gap-filling function of judges. Since *Plant cells*, any breach of public security or any threat affecting social peace, or any serious prejudice for the environment are to be excluded from patentability on the grounds of being contrary to the *ordre public* and, in particular, any exploitation of inventions not in conformity with the conventionally-accepted standards of conduct pertaining to the "inherent culture of European society" are to be excluded from patentability on the grounds of being contrary to morality[36].

As 'public order law', since the ECJ *Arblade* case of 1999[37] the notion has been crucial for the protection of the political, social, or economic order of the Member State concerned, requiring compliance by all persons present on the national territory of that Member State.

Since then, a 'European public order' has started to contend with the various Member States' public orders, and to take precedence over the materials law of non-Member States, which are designated as 'applicable' by the different conflict of laws rules of Member States (Basedow 2005). This aspect of *ordre public*, already present in the concept when it was first coined, served to reinforce the international or supranational mandatory character of certain rules: those which should be internationally, or supranationally applied, highlighting the 'specific modality' in which they apply (laws of immediate application/*lois d'application necessaire/leggi di*

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[35] EPO, Case T356/93, of 21.2.1995.

[36] In Case C-34/10, judgment of 18.10.2011, 2011, I-09821, the ECJ emphasised that patent law must be applied so as to respect the fundamental principles of *safeguarding the dignity and integrity of the person* [emphasis added].

[37] Joined Cases C-369/96 and C-376/96, judgment of 23.11.1999, 1999, I–8498. In the original language and in the Italian, French, and Spanish versions, the category is not public order law, but 'leggi di polizia e di sicurezza,' 'lois de police et de sûreté,' 'leyes de policía y de seguridad,' expressions that intercept most of the meaning of the civil law concept of *ordre public*; still, there remain different meanings between the civil law and common law systems due to the difference in the legal systems.

applicazione necessaria), and those which place emphasis on the 'content' of such laws and in which *ordre public* is only one of the criteria defining such provisions (*public order law/leggi di ordine pubblico*).

5.1. The emergence of an autonomous European *ordre public*

The emergence of an autonomous and substantial concept of 'European *ordre public'* was furthered by ECJ rulings on a case-by-case basis, as illustrated by a number of examples (Basedow 2005, 65), until the recognition as "a public policy provision" of what is now Article 101 of the TFEU, which prohibits, as incompatible with the internal market, all agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition[38].

The notion of a 'European *ordre public'* was also recognised by the European Commission through its Interpretative Communication on the freedom to provide services[39], in which the Commission considered the "domestic mandatory provisions in the public interest" and the "imperative reasons in the general good" and recognised the following objectives as imperative: the protection of the recipient of services, the protection of workers (including social protection), consumer protection, the preservation of the good reputation of the national financial sector, the prevention of fraud, the protection of intellectual property, the preservation of national, historical, and artistic heritage, the cohesion of the tax system, the protection of creditors, and the protection of the proper administration of justice.

Other provisions explicitly admitted prohibitions or restrictions on the freedom of imports, exports or goods contained in Article 36 TFEU, justified on grounds of "public policy, public security and public morality":

> The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; […] Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. (Article 36 TFEU)

The list of TFEU provisions is in fact open-ended (Mak 2020, 19), and the European Court of Justice can draw on this list to expand the scope of

[38] Cf. for instance in relation to the New York Convention 1985 (recognition and enforcement of foreign arbitral awards), the case ECJ C-126/97, judgment of 1.6.1999, 1999, I-3055.

[39] Commission Interpretative Communication 20.6.1997, Sec (97), 1193.

application of the 'European *ordre public'* as follows: to the free movement of goods (TFEU, Article 36, according to which the restriction on imports, exports or goods in transit can be justified only on the grounds public policy, public security, and public health, subject to compliance with the principle of proportionality)[40]; to the freedom of movement for workers (ibid.: Articles 45 and 22 include limitations justified on grounds of public policy, public security, or public health); to the freedom of establishment (ibid.: Article 52 provides for special treatment for foreign nationals on grounds of public policy, public security, or public health); to the freedom of movement for capital (ibid.: Article 63 sets out the right of Member States to take measures which are justified on grounds of public policy or public security).

Generally speaking, one of the facets of the concept conveyed by Montesquieu's metaphor *ordre public*—the specificity of any system of laws and institutions serving a specific society, making it hardly suitable for a different society—emerged explicitly in the respect that national measures that can hinder or make less attractive the exercise of fundamental freedoms guaranteed by the European Treaties must be justified on grounds of public policy and public security, which in practice means they must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it[41]. Accordingly, from the perspective of European institutions, the concept of internal (or domestic) public policy must be understood in a very restrictive sense. For example, the ECJ has consistently held that economic objectives cannot constitute public-policy grounds[42].

5.2. National '*ordre public* exceptions' in the light of human dignity

More recently, in its *Omega* decision of 2004, the ECJ held that EU law, in principle, does not interfere with national conceptions of public policy, and it took a deferential approach towards the national interpretation of domestic 'public policy exceptions' in the light of human dignity[43]. Competent national authorities must be allowed a margin of discretion within the limits imposed by the European Treaties; the protection of human dignity, as a general

[40] Case C-17/92, judgment of 4.5.1993, 1993, I-2239.
[41] Case C-55/94, judgment of 30.11.1995, 1995, I-4165.
[42] Case 352/85, judgment of 26.4.1998, 1988, I-2085.
[43] Case C-36/02, judgment of 14.10.2004, 2004, I-614, paragraph 31.

principle of EU law, can fill out the concept of public policy, but it is left to the Member States to determine the consequences and sanctions for any specific cases (Fauvarque-Cosson and Mazeaud 2008, 118).

Other European public policy rules have been acknowledged by the European Court of Human Rights (ECHR) and the European Convention, in the process of the 'fundamentalisation' of the sources of private law, either by imposing positive obligations upon the contracting parties, or by settling disputes of a purely private nature, such as those involving a testamentary disposition[44]. The ECHR placed itself alongside national judges as guardians of different possible notions of public policy (Fenouillet 2001)[45], to be used as national public policy exceptions.

In particular, at national level we can observe the emergence of a new facet of *ordre public,* aimed at protecting individuals from both public and private abuses. The criteria which have been put forward by Continental legal scholars include a nuanced range of factors.

French authors have created two new categories of *ordre public*: the 'public policy of direction' (*ordre public de direction*), with reference to fundamental principles in general, and the 'public policy of protection' (*ordre public de protection*), for the protection of consumers, workers, and other categories of vulnerable persons (Ripert 1934; Malaurie 1953; Francescakis 1966; Ferri 1970; Guarneri 1974).

Italian authors have preferred juxtaposing political public policy (*ordine pubblico politico*) and economical public policy (*ordine pubblico economico*), to highlight, on the one hand, an intangible 'core of individual rights' that cannot be measured in terms of money or commodified by the market, where human dignity is a right to be protected, and also a duty that other human beings or the state can oppose to individual rights, thereby prohibiting completely free self-determination and self-disposal; and, on the other hand, the value in itself of 'any socially significant economic operation' showing a generous attitude towards freedom of contract, with

[44] ECHR, Chamber Judgment of 13.7.2004, 69498/01, [2004] ECHR 334, (2006) 42 EHRR 25, [2004] 2 FCR 630. See §§ 59-64.

[45] See in France the pioneer judgments of the Supreme Court: Cass civ 3, 18.12.2002 and Cass civ 3, 12.06.2003 comments by Rochfeld, in Rev des contrats, 2004: 231; Cass civ 3 12.06.2003 comments by Marais, in Rev des contrats, 2004: 465. Cf in Italy Cass civ 1, 8325/2020, comments by Poggi. (https://www.statoechiese.it, 18, 2020), Cass civ Sezioni Unite 12193/2019, comments by Angelini in AIC 2/2020: 185; Cass civ 14878/2017 and 19599/2016, comments by Lorenzetti (https://www.costituzionalismo.it/costituzionalismo/download/Costituzionalismo_201802_676.pdf).

the aim of facilitating commercial dealings in cases in which there is no threat to mandatory law (Bessone 1984; Breccia 1999; Sacco 2004).

These new categories based on juxtaposing elements are often contested, because any distinction is more a matter of degree of the mandatory nature of the laws (Malaurie, Aynes and Stoffel Munck 2009, 650), a binding nature which seems on the decline since less drastic sanctions than nullity have gradually appeared (see the technique of severance of illegality, which involves eliminating the illegal elements; and the principle of *locus poenitentiae,* i.e., a place of repentance, or a right to withdraw, by which restitution is admitted) (Fauvarque-Cosson and Mazeaud 2008, 147–148).

To a large extent, the different notions of *ordre public* more recently adopted by European States have left it to the realm of *bonnes mœurs* (as good morals have been subsumed into public policy, see section 4.3) to phrase a new facet of *ordre public,* based on fundamental rights and human dignity (Resta 2010), in which a 'physical public order' intertwines with a 'philanthropic public order' and encompasses notions such as the right to bodily integrity and human dignity. This facet acquired by *ordre public* aims to protect individuals from abuses, whereas the 'old' *ordre public* aimed to protect society from individuals (see also Fenouillet 2001; Fauvarque-Cosson 2004).

Perceived as a more objective concept, *ordre public*/public policy has taken over the role of good morals[46] and has been given a more philanthropic dimension, to cover values that can be drawn from morality, i.e., values that protect not only a society, but also individual freedoms. Since the notion of good morals draws on pre-juridical values, it cannot be rigidly formalised; thus, good morals as an open-ended clause attached to *ordre public* is valuable in managing legal pluralism, because it appears to be "neutral" and "objective" with respect to human conduct (Sacco 2004:

[46] Remarkably, in common law the term public policy captures a facet of *ordre public* that Lord Mansfield CJ recognised in *Holman v. Johnson* as the principle *ex dolo malo non oritur actio* [No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act]. Immorality, in the context of the public policy doctrine, appears only to concern sexually reprehensible conduct (Mansoor 2020, 61). In the UK, public policy does not seem to be a general principle and the courts treat it carefully. It cannot work as a general clause because common law is attached to the idea of freedom of contract 'on whatever terms', although there are a number of instances where this generous freedom is curtailed. Nevertheless, such exceptions remain small in number and applied restrictively: cf. Twigg-Flesner (2018, 52, 63).

68; Caterina 2014, 1261)[47]. In the end, what used to be seen as "against good morals" (i.e., immoral) is now being recast as "against public policy".

The current occurrences of different expressions in legal texts such as *ordre public*/public policy, mandatory law, statutory provisions of public policy, public order laws, and laws of immediate application, sometimes used interchangeably, testify to how, since its first use in Montesquieu's speech, the metaphor *ordre public* has given rise to several *ordres publics* "which all add up and jostle together" (Favaurque-Cosson 2004, 473).

6. Conclusions

The locution *ordre public* was coined by Montesquieu in his speech to the Bordeaux *parlement* in 1725. In such a context, the utterance functioned as a metaphor, namely as a cognitive-linguistic device that served Montesquieu's conceptual perspective of human legislation by calling into question the received understanding of both the concepts of *ordre* and *public,* and merging them in what was not only an original way, but necessarily perceived as far from linear, given the meanings the two words had acquired. Then, several years later, when its original metaphorical potential was defused by the triumph of the Enlightenment, the locution *ordre public* [public policy] became part of the lexicon of the *Déclaration des Droits de l'Homme et du Citoyen* (1789) and of the French *Code civil* (1804) and *Code pénal* (1810). These brought to prominence different facets of the concept forged by Montesquieu (the system of laws and institutions of a given society; the collective stability deriving from abidance by such a system; the principles of the system). In addition, in the codes the locution served the function of safeguarding principles deemed as essential to society, through a formulation that made it clear that only enacted laws could perform such a function, namely as a metaphorical expression closed to interpretation, at least in the drafters' intention. Very soon, however, during the Age of Nation States, the metaphor was re-opened to interpretation and construed as part of a general clause in conjunction with the locution *bonnes mœurs* [good morals], and as such was used in the legal codes of other civil law countries. During the 19th century, the new function of general clause assumed by the locution *contraire aux bonnes mœurs ou à l'ordre public* in private law revealed a further aspect of the concept crystallised by Montesquieu's metaphor, a facet that had remained veiled in the days of the

[47] Some authors, however, pointed out that the meaning of 'good morals' is not neutral at all (Maffeis 1999, 97): certain sexual behaviours, for instance, are seen as unacceptable in certain societies but not in others.

early French codification: the specificity of any system of laws and institutions serving a given society that may not be suitable for a different society. In the 20th century, an autonomous and substantial concept of European *ordre public* emerged, through the European Court of Justice ruling on a case-by-case basis; simultaneously, several national *ordre public* exceptions were established in the light of the principle of human dignity. The protection of human dignity, as a general principle recognised within EU law, can fill out the concept of *ordre public*, but it is left to the Member States to determine its extension and effects for any specific cases.

Our research into the origin and evolution of *ordre public* prompts us to suggest capitalising on the expanded meanings of this legal metaphor and on the hendiadys *ordre public+bonnes mœurs* jurists are faced with, possibly by abandoning the contrast between a European *ordre public* with different national *ordres publics*, in favour of their full integration within a common European notion. In conclusion, this analysis of the legal metaphor *ordre public* illustrates how the interpretation of a legal metaphor is shaped by habits of adjudication and by conscious and unconscious choices that determine the drafting process of a legal text. The law is not only about the content of detailed legal rules, but also about foundational principles and values, and the assumptions underpinning them. According to this view, law is a socially valuable practice of regulation in a given time and place, a practice that reflects the variability of socio-legal conditions. In such a practice, what counts in defining what is 'legal' are particular social settings, a reflection of social values, educational conditioning, ideology, and economics. Legal interpretative activity, in particular, is a relational and social practice that involves cognitive elements, some related to personal beliefs. Through an open-ended exploration of the multiple sites of normativity and of the multiple forms of legal communication we can understand law better.

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