

# Editorial

## ‘THE LAW OF LAWS’ – OVERCOMING PLURALISM

Editorials in this journal are meant not to comment on acts or events, even if these take the form of judicial rulings or legislative acts. They are meant to point at the events’ potential for constitutional scholarship; to indicate and propose new lines of research. The *Kadi* judgments of the Court of Justice’s two instances, discussed in this issue by Stefan Griller, offer such an occasion. They point at the problem of relationships between legal orders. Can these best be understood under the now familiar palliative terms of ‘dialogue’ and ‘accommodation’? There is both reason and reward in looking for a keener articulation of the relationships. That is the contention of this editorial.

Many recent rulings and other events testify to the awkward nature of relationships between heterogeneous legal orders, between their primary guardians, the courts, and other participants, such as executives, legislatures and private individuals. Basic familiar qualities of law inside a legal order, such as logic, system, coherence, hierarchy, are lacking in such relationships. This is what makes them uncomfortable in practice.

What is uncomfortable in practice may be interesting for theory. A field of debate has opened under the name of ‘constitutional pluralism’, of which a number of varieties can now be distinguished. See the report by Avbelj and Komárek on a conference on constitutional pluralism in Florence, in this issue. ‘Constitutional pluralism’ is concerned with coexistence of legal rules, regimes, orders, in a non-hierarchical setting. The legal orders are seen to communicate amongst themselves through judicial rulings and other legal acts such as legislation. They are understood to form and entertain relationships amongst themselves.

The subject of relations between legal orders is fascinating. As with any subject, there are two sides on this. First, the subject covers the living variety of devices and practices governing these relations, running from factual to normative. Second, the subject covers attempts at conceptual understanding of the relationships in view of articulation, coherence, discipline, singularity.

To begin with the living side: actual relationships between legal orders simply thrive on variety. The partners in those relationships (the courts and the other public authorities) use all the expedients that come to hand to create an atmo-

sphere of accommodation, co-operation, even involving elements of conditionality, reciprocity, but also occasionally abrasiveness or edginess, just like other reasonable beings do.

There are many halfway normative qualities springing from relationships between laws, in the form of implicit reciprocity, trade offs or package deals, all falling short of being law. The famous *Solange* theme introduced by the *Bundesverfassungsgericht* is a shining example of the motifs arising from these relationships. It combines the haughtiness of supremacy with the relativism of accommodation and dialogue. What is the nature of this theme? Is it an occurrence of law between legal orders? That is a question to which we shall turn below.

The other side of the subject of relations between legal orders is that of legal scholarship. Legal scholarship may be concerned with suggesting distinctions and qualifications useful in the development of law. In this vein, scholarship is now looking for *qualification* of supremacy which each legal order normally claims for itself. Supremacy may be qualified thus, for example, by telling 'pragmatic' from 'existential' supremacy. It also may be qualified by distinguishing substantive from formal supremacy. To devise and develop such distinctions is eminently a task for scholarship.

A more ambitious department of scholarship is concerned with the question: how can these relationships between heterogeneous legal orders be understood and even conceptually organised?

The first wave of conceptual concern hit upon the problem of 'fragmentation' of the law. That problem now seems to have been a self-induced diagnosis: anyone concerned with order will tend to see disorder. Recently some more positive images such as 'contra-punctual law', 'accommodation', 'judicial dialogue', 'constitutional pluralism' have become fashionable, although the image of a 'battle of the courts' has also been used. The pieces by Stefan Griller and Avbelj/Komárek provide ample references to the discussion.

Such poetry is effective, however, in the first stages of discovery of the problem; less so in that of justification or organisation.

We contend that this scholarship should now leave its poetic inclination and pass on to the phase of analysis. In the actual relationships between legal orders and their servants, the wealth of approaches, terms, qualifications and normative claims needs to be organised. This could be done along a spectrum of relational constraints as appearing between legal orders, ranging from the crudely factual to the normative and even the legal.

The crucial question is, indeed, this: apart from all the other relational stuff, is there *law* between the heterogeneous legal orders? The servants of the legal orders themselves will not easily accept such law, as it puts extra constraints on them. Scholarship, however, is both justified and best served in assuming that there is,

indeed, some law between the legal orders. It should even try to provide a foundation for and an articulation of it.

What is the merit of this approach for scholarship? The first and simplest advantage concerns teaching. It will help the study and the students of law towards an understanding of the situation in terms of law. Currently they are confronted with conflicting viewpoints from different orders, without being promised an understanding which is agreed between the participants and others involved.

We argue that it is useful to look beyond coexistence of legal orders and beyond the poetry of scholarship concerned with it, and to claim a field of law, the 'law between legal orders', as an object of study. This field of law will be an unconventional one, as it lacks both a single original authority, legal or political, and a single final authority, judicial or otherwise. That, however, is no final objection to postulation. It may not be familiar to modern legal scholarship, but much of the evolution of law before the age of modernity has taken place between jurisdictions and legal orders, outside of a single established hierarchy with its own rule of recognition.

The law between legal orders will be a modest field of law, in both substance and scope. As between reasonable living beings generally, there will always be so much more between legal systems than just law. There will always be deference and accommodation; there will also be antinomy, acrimony and abrasiveness. To have some law, however modest, is to bring in a common field of discussion, to bring in some discipline, some reasonability, articulation and coherence. As long as this law is not created by the acknowledged channels, it is up to scholarship to provide this common ground, even if this will have a virtual character.

What a common platform and focus of discussion can do is best demonstrated by proposing a maxim.

Let there be a Rule One:

A judge or another public authority may qualify the validity, in his own jurisdiction, of a rule of more general circumscription than his own and binding on him. He shall do so not by mere reference to the autonomy or the supremacy of his own legal order, nor by reference to a legal hierarchy. He shall do so by reference to fundamental substantive norms valid in the wider circumscription also, or by putting forward such substantive norms that he holds to be applicable also there.

This formula certainly is primitive and unpolished; it is a beginning. It raises questions but also provides a focus. To understand its conceptual force, let us now return to the famous '*Solange*' figure.

In the current understanding of relations between legal orders, *Solange* is a statement of ultimate supremacy of the asserting jurisdiction, even if the exercise of supremacy is increasingly conditioned. If looked at through the prism of the maxim

above, the *Solange* technique takes on a new normative appearance. It turns into a formula qualifying supremacy in the perspective of reciprocity and agreement between legal orders as to substance.

The maxim also directs discussion at vital points. For example: does an obligation to refer to wider norms tolerate respect for a legal order's constitutional particularity or identity, and if so, how? The answer can produce some sophistication of the maxim.

We contend that it is good to try and subject such questions to the discipline of legal thinking, even if the legal orders have not accepted among themselves that such law exists.

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