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Introduction

Situating Inter-Legality

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1 THE INTER-LEGALITY APPROACH

When two (or more) rules come from different jurisdictions, all of them are potentially applicable to the case at hand yet pointing to different substantive solutions, the question inevitably arises: What is the relevant law in such a case? Conflicts originate between rules stemming from different and overlapping legal orders (e.g., international law on the one hand and a particular domestic legal system on the other). An individual or a company may be prohibited from doing something by domestic law while entitled or empowered to do the same thing by international law or EU law – or vice versa.

This volume is inspired by empirical developments, registering the proliferation of such questions and situations, and by a few intuitions. First, interpreters might increasingly be inclined in such cases not to resort to solutions on a purely formal basis (is one of the legal orders concerned hierarchically superior?), but on a more substantive basis, aiming to do justice in the case before them. Second, regulators and lawmaking authorities, in many diverse domains, are becoming aware that inter-legality affects their own spheres of action, and that they shall have to confront the event of complex regulatory matters involving several competing legal rationales.

Notably, and accordingly, our conception of inter-legality differs from the conception as used by others. To us, inter-legality captures and describes the ways through which legal domains end up overlapping due to the interconnection of their substantive, material objects. It looks at law by changing the usual, traditional perspective, a perspective that is limited by the political, legal, and cognitive borders of a single self-contained system. One does not need the ascent to a juridical heaven of ready-made and principled justice – a deracinated, universalist standpoint – to realize that different legal orders may overlap normatively and reach beyond their own limits. On the contrary,

an inter-legality perspective simply happens to be taken as soon as the vantage point of the concrete affair under scrutiny – the case at hand – is taken seriously. Looking at the demands of justice stemming from the case is rather different from "solving" an issue from the unilateral perspective of one of the legal regimes that actually compete in controlling and regulating the same issue. Various chapters in this book will help clarify and elaborate on the possibility and the nature of such a perspective about law.

In such a sense, inter-legality is not to be proposed as a "final" solution for our current legal problems, simply because inter-legality does not on its own represent a substantive set of legal principles from which any good answers can be derived. Nonetheless, inter-legality *recommends* something: it exhorts to approach the legal reality through a larger path, embracing the law as comprehensive and composite, understanding the normative complex as it surfaces through the circumstances and issues under consideration and awaiting (legal) justice.

Accordingly, the shift toward the construction of law from the angle of the case is essential to an inter-legality approach. Nonetheless, one does not have to take a realist and casuistic understanding of law – not necessarily. What is of primary relevance in the inter-legality discourse is that the text of the law is understood as being composed of more than one system-sourced positive law, and that the resulting texture of legality could not be what it is without this interplay. The premise for inter-legality reasoning is that the law of one single legal regime might not have unconditional primacy in given circumstances, not if the issue it regulates is also controlled by the law of another entitled and recognized legal regime. Consequently, inter-legality draws the path on which the search for a legal solution can be started. The point to note is that this solution is embedded within the law and justified by the law.

Inter-Legality does not suggest that legal conflicts should be solved by political means; it does not offer a *political* solution to be taken by legal actors. Among the relevant premises for an inter-legality approach is, in fact, the idea that where legal justice is at stake, solutions are requested of the law, not of politics. Certainly, politics can successfully work in solving disputes between states, or between states and regimes stemming from the work of international organizations, or other global regimes. And certainly, the International Court of Justice might believe that in a dispute related to war crimes, say, between Germany and Italy, the law can give no answers, and that its duty as a court translates into recommending the reopening of political negotiations between the states concerned. But this is not so from an inter-legality approach. Inter-legality stays firmly within the law, within legal thinking, within legal practice. Put differently, the understanding of law in inter-legality does not step outside

the law (as in many versions of legal pluralism), but stays within its limits, although it considers those limits as drawn, if and when appropriate, by a plural concurrence of legalities.

For the purposes of this volume, inter-legality is not a matter of forum-shopping, of discontented individuals and groups being able to seek the jurisdiction most favorable to their claim (although, as will be discussed, the term was probably conceived with this in mind by the sociologist who made it famous). Indeed, in an important sense for us, this is precisely what inter-legality might help avoid: the very point of inter-legality is that the law will possibly indicate the solution to a dispute not by taking the one-jurisdiction-at-a-time perspective – the perspective of mutual alternative or exclusion – but by showing the relevance of – and the caring for – all the relevant normativities actually controlling the case. The choice, at the end, depends on how real circumstances allow for an equilibrium of justice between the positive law(s) competing in regulating the issues.

In a sense, one might call this the search for a "more just" solution, but our conception of inter-legality is not a kind of appeal to natural law or to some grand theory of justice. It is the inter-legal sense of complexity that requires the legal decision-maker to account for as many normativities as those involved in the case and to draw the "just" solution from a composite perspective that is not merely one-sided. And if that is so, then "forum-shopping" becomes a less useful activity for the forum-shopper.

Of course, all of this implies that the focus rests on individual cases, and therefore places judges (and other decision-makers exercising a quasi-judicial capacity) at the forefront. However, inter-legality does not demand that judges forge their verdicts upon their own thick background theories of justice. The ethics of a judge is inevitably a factor when it comes to delivering justice.[1] But the focus on cases only requires that a judge (or college of judges) is able to distinguish between several possible outcomes to find the ones that would better account for the plurality of reasons and claims involved in the issue. Hence, inter-legality is a highly contextualized setting, philosophically hinting at the qualities of practical wisdom in the consideration of the issue from non-unilateral standpoints and available to critical scrutiny from the perspective of "others."

Thus, if needed, the association would be with Aristotle rather than Kant, with Dewey or Sen rather than Rawls. There are, no doubt, outstanding philosophical questions that remain to be answered, but a full-fledged idea

[1] Think of the idea of doing justice in individual cases, the notion of case-by-case justice, and, e.g., the conception endorsed (if not invariably under the label "casuistry") by S. Toulmin, *The Place of Reason in Ethics* (Chicago: University of Chicago Press, 1986 [1950]).

of substantive justice is not essential to the practice of inter-legality. First, it would prove to be far from generally accepted; second, it would prevent the fair way of proceeding that inter-legality recommends (i.e., by considering the reasons and ideas of justice embedded in conflicting legal claims); and finally, it would be inappropriate in the context of a legal order, in which the decision-making does not depend on an autonomous and self-standing conception of morality and substantive justice, but on positive law.

2 CONSTITUTIONAL INSPIRATIONS

About a decade ago, international lawyers – and many domestic lawyers with an interest in public affairs – were in the grip of a seemingly new idea: the idea that the international legal order could be seen as a constitutional order. The idea had many inspirations. For some, constitutionalization was the answer to the fragmentation of international law, widely seen as a threat to the integrity of the system – constitutionalization would be the glue to hold the fragmenting system together. For others, it marked the liberal end of history, with a world finally united on the basis of shared values, typically Western civil and political rights, or even the ordo-liberal rights to trade, own property, and do business. And many embraced constitutionalization as an ideology required to accompany that other great ideology of globalization. For in a globalizing world without overarching political authority something was needed to sell the idea – and that something could be constitutionalization.[2] Indeed, the election of Donald Trump in the United States and the Brexit decision in the United Kingdom may well be signs that the salesmen have stopped their work: globalization meets with resistance because it is not met with a partner discourse to legitimize it beyond the unsubstantiated claim that globalization makes us all better off, that "a rising tide lifts all boats," neglecting the awkward circumstance that some boats are lifted far higher than others. It is appropriate to think that in the present times some counter-constitutionalism has started, and many indices are testament to this: some backlash against the language of constitutionalization has surfaced, even in the EU order, while resorting to the idea that, aside from the EU limits of competence, the notion of states' constitutional identity had to be valued and defended.[3]

[2] See generally J. Klabbers, "Setting the Scene," in J. Klabbers, A. Peters, and G. Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), 1.

[3] M. Arcari and S. Ninatti, *Exploring Counter-Constitutionalism: The Backlash Effect of Constitutional Vocabulary of the European Court of Justice and the European Court of Human Rights*, Workshop Draft Paper, July 2017, on file with the authors.

Indeed, it seems the conversation has calmed down considerably. International lawyers debate all sorts of things these days, but they do not debate constitutionalization with quite the same energy and passion as a decade ago, and when they talk about constitutionalization, it is more often in comparative terms than in terms of overarching principles – comparing judicial review in various states rather than positing a principle of judicial review on the global level, for instance. So, what happened? Why has constitutionalization become a less prominent staple of discussion? Obviously, the different attractions have met with different sorts of disappointment. Die-hard liberals may have started to realize that human rights, even if universal, may be contextual, and may be just a little too open-ended. They may have even started to realize that human rights come with their own bureaucracies that may not always be unequivocally good or human rights–oriented. Those who worried about fragmentation may have stopped worrying a little; they may have been appeased by the invention of the principle of systemic integration laid down in the Vienna Convention, and they may have found that the world does not collapse if trade lawyers and environmentalists talk past each other.[4] It may be inconvenient if regime representatives cannot communicate, but it is hardly cause for hysteria. Those who reimagined a *civitas mundi* may still be working on their reimagining, and if globalization has lost some of its glamour, so has constitutionalization.

But perhaps the main reason for this is that most of the attempts to look for constitutionalization have aimed to posit a thick, monolithic version of constitutionalization, implicitly (and sometimes explicitly) based on global unity, on a worldwide convergence of values.[5] This now has proved fallacious, as various theorists have pointed out. The world is a pluralist place, with pluralism existing on various levels, from the epistemological pluralism identified by someone like Neil Walker[6] and the conceptual pluralism of the

[4] The principle of systemic integration was popularized upon the discovery of article 31(3)(c) of the Vienna Convention on the Law of Treaties, suggesting that in interpreting a treaty, all rules of international law applicable between the parties ought to be taken into consideration. See M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission* (Helsinki: Erik Castrén Institute, 2007).

[5] In addition, its explanatory force remained very limited, which fed the suspicion that constitutionalism was more ideology than theory. See J. Klabbers, "Constitutionalism as Theory," in J. Dunoff and M. Pollack (eds.), *International Legal Theory* (Cambridge: Cambridge University Press, forthcoming).

[6] See N. Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015).

philosophers[7] to more mundane pluralities spotted by Nico Krisch.[8] So, it turned out, much of the debate was based on rather aspirational premises, on the unwarranted presumption of planetary unity, downplaying clashes of civilizations and happily ignoring above all the political economy of (international) law: whatever is done, whatever is proposed, it comes with winners and losers, and the identity of those groups remains remarkably constant over time. Legal and political decisions are rarely "neutral"; they tend to have distributive effects, even if sometimes unintentionally so. The West wins – and would have gained most from constitutionalization, cementing Western values and Western political practices – and the global South loses – and continues to lose.[9]

Still, while constitutionalization did not answer many questions and the entire decade-long debate may have been based on questionable premises, nonetheless it did tap into something real and of significance: the idea that it is no longer clear who exercises international authority, how authority is exercised, and with what justification. Clearly, the old Westphalian state system, built around keywords such as sovereign equality, national democracy, dualism, hierarchy, and state consent, no longer did the trick; sovereignty remains an important ordering principle, often clung to by governments, but it is not particularly accurate as a description of economic, social, and political processes. Authority, so we started to think, could come from all angles and directions, and seemed increasingly problematic to legitimate. If traditionally states could claim legitimate authority based on their internal structures, and international law could claim legitimacy because it was made by those same states and by definition and necessity based on their consent, this story no longer held good. It could not explain why all of a sudden banking standards would be set by the highly selective (and self-selective at that) Basel Committee and in the form of guidelines rather than legal rules. It could not explain the legal significance of "standards" developed by the International Organization for Standardization (ISO), or the Forest Stewardship Council, or the private agreement between workers and employers concerning safety in the garment industry. It could not explain why states would get all worked up whenever the Organisation for Economic Co-Operation and Development (OECD) would publish its annual Programme for International

[7] See, for example, H. Putnam, *Ethics without Ontology* (Cambridge, MA: Harvard University Press, 2004).

[8] See N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

[9] For a forceful critique, see B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd edn. (Cambridge: Cambridge University Press, 2017).

Student Assessment (PISA) rankings – not even recommendations, but mere rankings. It could not explain how athletes convicted of doping use by their own sports' governing bodies could appeal to national or supranational tribunals.[10] And it could not explain why individuals would be bound to respect sanctions imposed on them by the Security Council, all the more so if those sanctions were taken in disregard of fundamental norms prevailing in their own political communities.

In other words, behind the challenges mentioned above lay another, deeper and possibly more fundamental issue: how to come to terms with changing patterns of authority and legitimation in international law. If there was one thing constitutionalization promised, it was the idea of structured order: the wide variety of norms could fall into place in a constitutional global legal order, with some at the apex and others below it, following some hierarchical pattern or other. Obviously, one might quibble (and one might expect there to be quibbles) about which norms would occupy which positions, but such debates notwithstanding, constitutionalization circa 2006 offered a glimpse of a well-arranged international legal order, with a beginning, a middle, and an end – and in that order, too.

This promise, needless to say, has not materialized, but the problematique has not been resolved either. In fact, it has only become more visible. The *Kadi* decision of the Court of Justice of the European Union (CJEU) in 2008 illustrated things nicely, presenting the intricate interdependence between three distinct categories of legal orders (the international, the EU, and the various national orders) and, what is more, suggesting that old solutions would no longer be workable.

The *Kadi* case hit a nerve – in fact, it hit several nerves; few judicial decisions have occupied so many legal minds in recent years as the *Kadi* decision. And yet, for all the hoopla, *Kadi* too has fizzled out, much like the constitutionalization debate. The very circumstance made so visible by *Kadi* (the interdependence between legal orders) has largely been left unexplored. There has been much debate about technicalities and much searching for practical solutions either advocating or opposing *hierarchy*,[11] and some looking further into review procedures and their relative merits and demerits.[12]

[10] On this problematique, see J. Klabbers and T. Piipariinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013).

[11] A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford: Oxford University Press, 2011).

[12] D. Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford: Oxford University Press, 2016).

But little attention has been paid to the circumstance that perhaps *Kadi* was not an incidental case bringing a strange and unusual configuration to the fore, but could rather represent "the new normal." And yet, this is precisely what *Kadi* represents: the interwovenness of legal orders is not unique and special anymore, but rather represents a quite common state of affairs.

More recent cases confirm this state of affairs in various ways. Human rights lawyers may think of the *Al Dulimi* decision of the European Court of Human Rights, first rendered in 2013 and confirming the interdependence between the UN, European, and Swiss legal orders.[13] Investment lawyers may be reminded of the *Yukos* saga, decided by an international arbitral panel but subsequently set aside by a Dutch court – appeal is pending at the time of writing – and involving issues of procedural and substantive international, Russian, and Dutch law (and that is not even counting related proceedings taking place before domestic courts in various other national jurisdictions). Italy's Constitutional Court saw fit not to give effect to a decision of the International Court of Justice upon the defense of supreme constitutional principles concerning access to justice and fundamental rights, thereby spreading the debate about the rationale of international law and whether those very principles should have been interpreted as integral to any international law decision as well.[14] And the US Supreme Court did much the same in *Medellín*, but this time claiming to protect the integrity of US domestic law.[15] Lists of examples make clear that various legal systems can come into uncomfortably close contact with one another, and each of them can claim supremacy over competing legal orders. And these are just examples drawn from legal orders whose legal status no one would deny – the examples do not even involve soft law, or normative systems that not everyone would consider as "law."

3 INTER-LEGALITY IN THOUGHT AND ACTION

Among the first to use the term "inter-legality" was the Portuguese legal sociologist Boaventura de Sousa Santos, who referred to inter-legality during

[13] G. Palombella, "The Principled and Winding Road to *Al Dulimi*: Interpreting the Interpreters," (2014) *Questions of International Law* 16.

[14] On this at more length, see G. Palombella, "German War Crimes and the Rule of International Law," (2016) 14 *Journal of International Criminal Justice* 607, and especially G. Palombella, "*Senza identità*. Dal Diritto Internazionale alla Corte Costituzionale tra Consuetudine, *Jus Cogens* e Principi 'Supremi'," (2015) 35 *Quaderni Costituzionali* 815.

[15] *Medellín* can be, and regularly is, explained as a manifestation of American exceptionalism, but this does not preclude an analysis in terms of inter-legality.

a keynote address presented in the late 1980s. de Sousa Santos noted that inter-legality was a dynamic process due to the circumstance that "different legal spaces are non-synchronic," but his use of the term did not go much further. He observed, three decades ago, that we should start to conceive of law as "different legal spaces superimposed, interpenetrated, and mixed in our minds, as much as in our actions," explaining that we "live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassing." And this was different, he warned, from what legal anthropologists had traditionally referred to as legal pluralism, for legal pluralism suggests much more a side-by-side existence of legal orders coexisting in the same space.[16] For de Sousa Santos, inter-legality posed not so much a challenge as an opportunity: the porosity of legal orders would allow people to pick and choose which legal order to employ, and typically, they would employ the one most attuned to their claims or grievances.

The notion of inter-legality was picked up by William Twining on various occasions, but again without connecting the word to some actual innovation in the descriptive or normative fabric of legal discourse. In his *Globalisation and Legal Theory*, Twining suggests that inter-legality might provide a useful framework for further research, and then presents something of a broad outline before delving into a different debate.[17] And in a later brief article, Twining devotes some attention to classifying inter-legality, observing (among other things) that different orders or spaces can live in conflict but also in harmony with each other.[18] In support, other authors, without utilizing the inter-legality vocabulary, having suggested that, for example, much international law depends on national law for its implementation, and thus that international and domestic law can together build a strong legal argument in favor or against particular practices.[19]

It is necessary to specify wherein the utility of the notion of inter-legality may lie. We take the term as referring mostly to situations where actors are confronted with a variety of norms stemming from a variety of legal orders (or

[16] B. de Sousa Santos, *Toward a New Legal Common Sense*, 2nd edn. (London: Butterworths, 2002), at 437. The chapter was first separately published in 1987. See also A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des Globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006), at 34–40, distinguishing inter-legality from traditional legal pluralism.

[17] W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000), at 230.

[18] W. Twining, "Diffusion and Globalization Discourse," (2006) 47 *Harvard International Law Journal* 507, at 513. The piece is perhaps best known for his wry observation that he aspired to start a self-critical legal studies movement – probably without much success (at 511).

[19] See, e.g., J. King, *The Doctrine of Odious Debt in International Law: A Restatement* (Cambridge: Cambridge University Press, 2016), demonstrating that some international rules require the help of domestic law in order to be enforced.

spaces), and all are valid and applicable in principle. Sometimes rules may point in the same direction, but the more interesting cases are where they do not. Thus, Mr. Kadi enjoyed certain rights under EU law (derived from both EU law and the human rights obligations of its member states), but a different set of rules emanating from the Security Council interfered with his enjoyment of these rights. In Italy, war crimes victims were thought to have certain rights against Germany as valid under Italian law, but as the International Court of Justice held, these were unenforceable against Germany under international law – something Italy's Constitutional Court found difficult to swallow. The defining elements for inter-legality to operate then are threefold: first, it must concern a variety of norms from different systems; second, these must all be valid within their own legal spheres; and third, they must in principle all be applicable to a particular set of facts. Hence, the state of affairs on the basis of which an elaboration of inter-legality has to develop involves a choice for the application of one set of rules over another, equally valid, set of rules.

This is all the more imperative given the difficulties involved in presenting such issues in neutral ways. Above, for instance, we referred to Mr. Kadi as enjoying rights under domestic and EU law, rights that were interfered with by the Security Council. We could just as easily have put it differently: under UN law, Mr. Kadi was obligated not to engage in specific activities; his rights under EU law and domestic law interfered with these obligations. The first rendition sides with human rights, the second with the UN and the maintenance of international peace and security. The point to note is that it is difficult to describe such situations with some precision and yet in neutral language: much of the language at our disposal is already evaluative,[20] and if that is the case, justice can only be served by an awareness of the partisan nature of the way we frame our issues – and therewith by inter-legality.

It is also useful to point out that inter-legality does not, in and of itself, clarify much about what others refer to as transnational law: it may be the case that there is law originating from, say, the Basel Committee, or that what some deem "soft law" is really hard law under a different name, but this is not something inter-legality addresses. It works, so to speak, on existing ontological foundations of law, but does not amend these as such. In other words, it speaks to contacts between legal orders or spaces, but does not itself decide what counts as a legal order. It aims to describe and perhaps explain legal relations,

[20] See generally F. V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).