CENTER FOR INTER-LEGALITY RESEARCH

Working Paper No. 04/2020

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INTERLEGAL BALANCING: REJOINDER TO WEI FENG' COMMENTS

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REPLY TO WEI FENG'S COMMENTS ON "INTERLEGAL BALANCING"

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ABSTRACT: In this rejoinder, I proceed through the three main sections in Wei Feng's comments. In the first section, hierarchy and legal order, I address the following four points: the aims in the first main section of my working paper; the conceptual necessity of hierarchy for a legal order; the compatibility of Kelsen's take on primacy with "rules with significant contents or values"; and the cumulative construction of hierarchy between legal orders.

In a second section, I address the detached sense in which I invoke the ideas of *classifying* and *qualifying* criteria of (inter-)legality.

In the third section, on modes of balancing concerning formal principles, I address the following four points: the limited scope of my argument regarding models for balancing formal principles; the nature of competence rules and their relation to formal principles; the choice among models for balancing formal principles; and whether my qualifying criteria of interlegality should be read inlegal positivist or non-positivist terms in order to be a sound proposal.

KEY WORDS: Interlegal balancing, hierarchic structure of law, formal principles, competence rules; global legal pluralism; inter-legality; balancing competences

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Introduction

I am deeply thankful for Wei Feng's insightful and attentive comments of my working paper on "Inter-legal Balancing". On the one hand, as Feng mentions, there are many points of agreement between our perspectives. On the other hand, I suggest that instead of necessarily divergent opinions, I see the need for further mutual clarification and rapprochement among our takes.

Feng's comments evidence the need to make further explicit and refine a number of the steps in my argument, especially among them my takes on legal order, hierarchy, formal principles, and their relation to competence *rules*.

In this rejoinder, I will proceed through the three main sections in Feng's comments: hierarchy and legal order (§1), qualifying criteria of (inter-)legality and non-positivism (§2), and modes of balancing concerning formal principles (§3).

1. Hierarchy and legal order

I will address the following four points raised in the first section of Wei Feng's comments:

- A preliminary point regards the characterization of the aims in the first main section of my working paper (1.1).
- A first main point regards the conceptual necessity of hierarchy for a legal order (1.2).
- A second main point regards the compatibility of Kelsen's take on primacy with "rules with significant contents or values" (1.3).
- A third main point regards what I will call the cumulative construction of hierarchy between legal orders (1.4).

1.1. A preliminary point on the aims of the "scale"

As Wei Feng mentions, in my working paper, I distinguish four positions: "radical pluralism, moderate pluralism, moderate constitutionalism and radical constitutionalism". These positions (which in the following I will call the "scale") result from crossing two

variables: on the one hand, balancing or syllogistic application (subsumption) regarding the norms at the interfaces, on the other hand, the presence or absence of hierarchy between different legal orders.[1]

However, it is important to clarify that these positions do not regard a static sense of "multi-level legal communities" (Feng: 1) but rather dynamic *constellations* depending on cases where norms from different legal orders are involved (Encinas: 8; 25). In other words, my argument regards constellations of inter-legality as case-dependent legal relations. As a consequence, the criteria (hierarchy or not, subsumption or balancing) is relevant as input for reasoning in cases at hand, not being necessarily linked to the results of a particular decision.

1.2. The conceptual necessity of hierarchy in legal orders

Feng casts his first doubt as "whether a legal order without hierarchy is conceptually possible" (Feng: 1). However, my argument is not meant to oppose hierarchy within a given legal order. On the contrary, when invoking the idea of the hierarchic structure of law, I especially meant to recall the insight that this is compatible with a complex relation of delegation of empowerment to other legal orders, especially with an eye to the delegation of *Hoheitsrechte* from member states to the European Union.[2]

Instead, my argument is directed at cases involving norms from *different* legal orders. This follows from the case-based method of *inter-legality*. My take could therefore be rephrased in the sense that, among legal orders, the question of hierarchy may occur either *ex ante* or *ex post* regarding a given case:

- Multi-level structures (between national, regional, and international legal orders) are paradigmatic of *ex ante* presumptions of hierarchy. This presumption of hierarchy may still be both conditional and of varying "weight" or importance (in what I called "moderate constitutionalism").

[1]

Radical pluralism	Moderate pluralism	Moderate constitutionalism	Radical constitutionalism
Subsumption	Balancing		Subsumption
No hierarchy		Hierarchy	

[2] On this point, I especially drew from the notion of "nearly unconditional supremacy" spelled out in Borowski (2011).

- In contrast, more "horizontal" constellations between legal orders may only strike a hierarchy (qua conditional relation of precedence) *ex post*, as a decision taking all relevant norms into account instead of as an architectonic consideration.

1.3. Kelsenian primacy and its contingency towards "rules with significant contents or values"

Stemming from a passage where I pointed how Kelsen's take could not allow for the salience of popular sovereignty and constitutional (state) principles, Wei Feng calls attention to how Kelsen's account of hierarchy, now between legal orders, "does *not necessarily* implicate the direct disavowal of some rules with significant contents or values" (Feng: 2). This is so as Kelsen's theory must be delimited to a content-independent account of empowerment.

And yet, a monist (what I called "radical constitutionalist") construction is characterized by disavowing the possibility of balancing or defeating the provision of hierarchy. Where hierarchy (primacy) is not a presumption but a definitive rule, the "disavowal of some rules with significant contents of values" seems hard to elude. In this regard, Kelsen could not foresee the development of our current understanding of state sovereignty as conditional to the respect of human rights.[3] Instead, he observed that state sovereignty entailed a *problem*: that "the state is not necessarily bound by the international treaties it has entered into."[4] This conclusion may be what follows from an absolute and content-independent understanding of sovereignty – but this conception is today neither necessary nor attractive.

Feng seems to concede that a formal monist account allows for cases of disavowal (of "significant contents and values") to such an extent that the matter could be addressed by an application of the *Radbruch formula* (Feng: 2 fn 6). The *Radbruch formula* refers to a threshold which would invalidate a duly issued norm as law. This threshold received formulations in terms of intolerability or intentional disavowal of justice but, in any case, it was meant as an extraordinarily stringent criterion of extreme injustice. I may only leave the question open whether well-known paradigm cases on conditional primacy (*Solange I* & *II*,

[3] Grimm (2015: 125-128) relates this condition to both the state and the exercises of international organizations.
[4] Kelsen (1999 [1962]: 533).

takes on the *Kadi* saga, *inter alia*) are better understood as adopting such a highly stringent idea of "extreme injustice" in order to defeat the presumption of hierarchy (as per the *Radbruch formula*), or whether the threshold is plausibly broader: when invoking constitutional/basic rights and principles, *ultra vires* control, or constitutional identity.[5] Such criteria bear fundamental importance as constitutional principles, but they are not suprapositive in the sense the criterion of extreme injustice is.

1.4. The cumulative construction of hierarchy between legal orders

As a last point in this first section, Wei Feng calls attention to what I suggest to call a cumulative construction of hierarchy between legal orders. Feng argues through two main points. First, notwithstanding the relevant constellation, one or the other site will receive primacy or hierarchy by necessity. Second, the results of balancing (in "moderate pluralism") must result in a definitive rule conceding primacy; otherwise, "one may wonder what those procedures of inter-legal balancing are meant to do." (Feng: 3), and this implies that moderate pluralism has a tendency to disappear.

A legal decision will indeed necessarily result in a relation of precedence. However, the key question for my argument precedes this matter. Before the stage of legal reasoning, the "scale" is meant to analytically distinguish the given *inputs* for it.

For instance (leaving beside for now the core issue of sound/rational and fair/reasonable argumentation): a case where a national court overturns the presumption of hierarchy for an international court counts in the "constellation" of *moderate constitutionalism* insofar as the presumption of hierarchy was indeed taken into account in balancing. While this case may usually be referred as paradigmatic of legal or constitutional pluralism (due to its outcome), in contrast, its relevant premises and considerations place it in *moderate constitutionalism* under this conceptualization. Only if the presumption of hierarchy were absent we would find ourselves in either of the varieties of pluralism.

This is not to say that Wei Feng's points on the cumulative construction of hierarchy are without relevance. A very important weight must be given to precedents and legal doctrine developed within each legal order on such questions. As Wei Feng notes, the results of

[5] For instance, although Borowski (2011: 208) formulates the point as "extreme cases where it is apparent that it becomes unacceptable for a Member State to subject itself to certain parts of Community law", it remains open whether this implies extreme injustice in Radbruch's sense.

balancing are definitive rules for the case at hand and, furthermore, it is a formal criterion of legal justice (deciding like cases alike) which creates an expectation for stability. However, meeting this expectation ultimately depends on both accepting as legitimate the normative allocation of primacy struck by precedents or doctrines, as well as accepting the sufficient similarity of circumstances in future cases. Especially in horizontal constellations, a broad spectrum for distinguishing remains open (it is controversial to fix one same set of circumstances as relevant in such cases, especially regarding transnational legal relations).

This way, I would pose that "interlegal balancing" especially in the horizontal constellation of "moderate pluralism" would do no more (but also no less) than order the arguments to solve a case in need of decision. My argument is related to the premises as input for a legal process and decision, and not to its results.

2. Qualifying criteria of inter-legality and non-positivism

In a short section, Wei Feng points that I "apply the distinction between classifying and qualifying connections between law and morality, which has been introduced by Robert Alexy". (Feng: 3). However, nothing in my use of the terms *classifying* and *qualifying* in the paper implies a commitment to the employments of the terms by Alexy or other authors.[6]

Instead, I chose the term "classifying criteria" as a stand in for the various ways of expressing the challenges of identifying law beyond the state. As relevant contributions in this regard, I cited two positivist authors: Klaus Günther and Jan Klabbers.[7] I chose "qualifying criteria" to refer to the need of looking at *rules of thumb* or *heuristics* which could eventually give content to both sides of the norms to be balanced (or their "abstract weights"). I cited two authors: Nicole Roughan (who seems to hold a nuanced variety of inclusive legal positivism)[8] and Matthias Klatt, who is certainly a legal non-positivist but I mainly referred to his "weighting rules" (which systematize from contributions from authors in diverse traditions).

That said, although beyond the scope of the topic of my working paper: I hold sympathies to a necessary but general connection between the nature of law and morality

[6] While I indeed use the terms *classifying* and *qualifying*, I refer with them to criteria of legality generically, and not to connections between law and morality. Although this may be commendable, I have chosen to leave the matter open for other discussions.

[7] See esp. Klabbers (2014) relating the presumptive international law theory to a reconciliation of the constitutionalization of international law with legal positivism.

[8] Roughan (2013: 152-3). But see the discussion in Riesthuis (2019) for the prospects of accepting Roughan's critique of Raz coupled with a Dworkinian argument on behalf of content-dependence.

which mainly impacts more on legal interpretation than legal validity.[9] An argument from the *Radbruch formula* (conditioning legal validity to not surpass a threshold of extreme injustice) is restricted to extraordinary circumstances and in transitional justice.

3. Models for balancing formal principles

I will address the following four points raised in the third section of Wei Feng's comments:

- A preliminary point regards the limited scope of my working paper's argument regarding models for balancing formal principles (3.1).
- A first main question regards the nature of competence rules and their relation to formal principles (3.2).
- A second main question regards Feng's choice for Alexy's epistemic model for balancing formal principles (3.3).
- A third main question regards how my qualifying criteria of interlegality should be read in non-positivist terms in order to be a sound proposal (3.4).

3.1 A preliminary point on the detachment on models for balancing formal principles

The detached character of my working paper regarding models for balancing formal principles is related to some considerations on the scope of the disagreement on the extant models.

I noted the ongoing disputes on models for balancing formal principles as one the considerations to take "a detached stance" (Encinas: 16) towards the "exclusion theorem" (stating that every norm is either a rule or a principle in Alexy's terms). This general detached stance may also account for what Wei Feng regards as an "ambivalent attitude" (Feng: 3) in my paper regarding the diverse models for balancing formal principles.[10]

[9] In this sense, see Borowski (2018: 102 and *ff*).

[10] The literature points towards three or four main models for balancing formal principles. The earliest one is the "combination model" originally held by Alexy, a "separation model" may correspond to the constructions of Sieckmann and Klatt, a more recent one is Alexy's "epistemic model", and a fourth one incorporates the

To account for my limited scope on this point, a necessary and preliminary question is whether: (*1*) the different models to account for legal authority as a formal principle bear substantially in the sphere of possible results of (interlegal) balancing, or whether on the contrary, (*2*) they are different proposals for the formal reconstruction of a same set of paradigm cases and which are still developing in close dialogue with one another.

I am inclined towards option (*2*). Along these lines, the main participants in the debate on models for balancing formal principles have deemphasized their differences.[11] In contrast, Wei Feng seems at one point to embrace possibility (*1*) when he refers that the combination model proposed by Martin Borowski "stands in a sharp conflict with the modes defended by Sieckmann and by Klatt & Schmidt" (Feng: 3). At another point, however, Feng draws Martin Borowski's *combination model* and Robert Alexy's *epistemic model* into a close relation, implying that the latter is a more subtle version differing "mainly on the details of 'combination' of formal and substantial principles" (Feng: 4).

In any case, my reference to *formal principles* indeed remained so far uncommitted among their conceptions, and my citation of Klatt referred mainly to his "weighting rules" which I took more generally as argumentative *"topoi"* (Encinas: 28) in the sense of *heuristics* or *rules of thumb* yet to be cumulated more conclusively.

3.2 Competence rules and formal principles

A first main point in this section regards the nature of legal competence norms. Wei Feng advances two main points. First, he refers to how "competence norms are always definitive requirements, that is to say, they are legal rules, not legal principles" (Feng: 4), although he also relies in Alexy's further distinction between behavioral rules and competences as "meta-rules" (Feng: 4). Second, this rule character would be the reason for the application of maxims in conflict rules: "the classical conflict situation between legal rules or between different levels in the hierarchy of law, e.g. *lex superior derogat legi inferiori."*(Feng: 3).

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authority reasons (the formal principle) within the abstract weight of the substantive principles. See Borowski (2015); *cf*. Alexy (2014).

[11] See esp. Borowski (2015: 106 fn 57): "One hastens to add that the second mode, the model proposed by Sieckmann, and even the third model [developed by Badenhop] may prove to yield the same results, albeit in a less intuitive and more complicated manner"; (*ms*: 19): "I tend to think that this [Jan-Reinard Sieckmann's] is generally a possible reconstruction, if a number of assumptions are understood […] Sieckmann has finally admitted that the weight of substantive principles in the case at hand needs to be considered in attributing weight to the competing formal principles."

My response must first recall how my working paper is in agreement with the first statement on competences as rules (3.2.1), and afterwards introduce some guiding intuitions delimiting the extent to which conflict rules may be brought to bear in inter-legal cases (3.2.2).

3.2.1. The complexity of competences

In a core passage ("anticipated" as the second paragraph in my paper's introduction),[12] I noted challenges that Klatt's conceptualization of competences as principles brings about.[13] I referred to how there is tension among the complex character of competence norms and the exclusion theorem (every norm is either a rule as definitive command or a principle as optimization command, *tertium non datur*). This counted among my reasons to shift focus, from the norm-typological criterion of rules/principles towards the legal reasoning distinction of subsumption and balancing.

In competence norms, an authority is empowered (a rule), but always through procedural conditions and in relation to a certain scope of substantive ends or objects (principles). This is so as competence norms act both as deontic constraints *as well as* constitutive rules.[14] Furthermore, in one of his famed contributions, Alf Ross (1968: 130) included among the necessary conditions of competences (i.e. alongside "personal" and "procedural" competence conditions), "substantial competence" according to "subject, situation and theme". This may temper the content-independent character of competences, delimiting it at least with regards to subjects and given ends. Therefore, the take that competences have a content-independent character (on the one hand) is delimited especially by their *relative* scope (on the other hand).[15]

[12] "[To anticipate: Interlegal balancing is related but distinct from Klatt's model for *balancing competences*. Instead, it depends on an argument I present […] regarding the delicate but core considerations behind the "balance-aptness", or eventual lack thereof, regarding competence *rules*.]" (Encinas: 2).

[13] "[…] the norm-theoretic status of *competences* becomes unsettled. The exclusion theorem (rules or principles) intersects, for example, with the Rawlsian-Searlian distinction of constitutive and regulative rules, or definitions, or other conceptualizations of power-conferring norms. Notably, Klatt's model conceives of *competences as principles* in the sense of optimization commands. Yet, not only are competences usually formulated as rules in positive legislation, most constitutions incorporate a version of the *principle of legality* setting strict limits to the acts of an authority in clearly defined legal positions." (Encinas: 15-6).

[14] See along these lines the take in Villa Rosas (2018).

[15] As put in Guastini (2016 [2011]: 107-8): on the one hand, "norms on the production of law (in the strict sense) have a formal character as they do *not* refer to the *content* of the future regulation […]", on the other hand, it is emphasized that "no competence norm confers a *generic* normative power, i.e. a power to create legal norms which is not made specific in some degree."

Although Feng points that, as legal rules, "competence norms are always definitive requirements" (Feng: 4), he also recognizes that there are formal principles that lie behind each competence norm. In this sense, "the competence norms and the formal principles lying behind them" are to be taken in consideration "only in combination with those substantial principles or, more subtly, function with an eye to the epistemic certainty of the premises of substantial principles" (Feng: 5). This invites consideration on how to move between definitive requirements and underlying principles.

A recent take deserves mention especially since it reaches the same conclusion as Feng, against balancing competence *rules*. Guilherme Azevedo Palu distinguishes "*prima facie* competences" from "definitive competences". The former are formal principles, the latter are rules. Correspondingly, where formal principles are balanced, their result is a definitive rule on competence.[16] The problematic constellation regards competences already determined as rules (i.e. in a statute or the constitution). Azevedo Palu points that such competence rules stand as "the maximization of a determinate formal principle against which no single formal principle is opposed. In this case, they don't result from a formal balancing."[17] He further refers to his conclusion that "no procedure of balancing must be conducted" regarding such competence rules since no principle is opposed to them in their legal order and "no reference is involved on their legal possibilities".[18]

I take Azevedo Palu's (and Feng's) conclusions to be correct inside a self-enclosed legal order.[19] Interlegality challenges this. Rules on competence become indirectly confronted with other norms,[20] in spite of being "sourced" in different legal orders. This obeys the shared or materially interconnected ends and objectives between different legal orders, especially in multilevel structures.[21]

[16] From this, he states that this kind of determination of competences shows a double character which "may possess the structure of a principle as well as of a rule". See Palu (2019: 377). The position that the results of balancing (substantive) principles have the structure of a rule is common in principles theory.
[17] Palu (2019: 377 fn 1529).
[18] Palu (2019: 371).
[19] It bears noting that Guilherme Palu (2019: 377-9) characterizes as paradigmatic of formal balancing the German Constitutional Court's stance: accepting the primacy of the ECJ but calling for its "relativization" regarding constitutional identity, constitutional rights, and *ultra vires* control. Less convincing is whether the reason for this is that the involved are "prima facie competences" instead of competence *rules*.
[20] A conflict of rules may lead to invalidity or defeasibility. The conflict of a rule and a principle may lead to introducing an exemption (defeasibility). Thus Alexy (2018 [1985]: 88).
[21] Among the points of contention in the case German Federal Constitutional Court (*BVerfG*, Case No. 2 BvR 859/15, May 5, 2020) (*PSPP* judgment) stands the consideration that "the principle of proportionality [...] also applies to the division of competences" (at para. 119). For a critical take, see esp. Wendel (2020: 985 and *ff*).

This way, the exercise of the ends referred to in competence rules may require balancing, but these rules themselves must still be duly accounted for. One could favor e.g. a technical reconstruction contextual *specifications* or distinguishing. Even in such models, "interlegal balancing" remains as an explanation of the substantive considerations taken into account.

3.2.2. Competences and conflict rules in the "scale"

It is further illuminating that Feng refers to how, being rules, competence norms correspond to "the classical conflict situation between legal rules or between different levels in the hierarchy of law, e.g. *lex superior derogate legi inferiori*" (Feng: 3). This points to a tentative step in this regard in my working paper.

Accepting the characterization of competences as rules, we may recall that the possible outcomes in conflicts of rules are *either* to declare the invalidity of one *or* to introduce an exemption (*aut-aut*).

The question becomes: do the conflict of norms criteria (*lex posterior, lex superior, lex specialis*) bear equally in either invalidity or defeasibility? Each different "constellation" in the scale should provide a different answer:

- The "invalidation" tack is relevant insofar as there is a hierarchy presumption, as in both varieties of constitutionalism.
    - In *radical constitutionalism* (hierarchy, subsumption), a solution might be more straightforward: settling upon a relevant criterion on the conflict rules will determine which norm to invalidate. Substantive considerations regarding the material principles (e.g. human rights norms) involved in the case at hand can have no bearing.
    - In *moderate constitutionalism* (hierarchy, balancing), the conflict rules may become insufficient for declaring general invalidity (yet, this result is not excluded, it remains possible and desirable for a state to thus adjust its provisions internally). Instead, they may feature as part of the reasons for why a certain presumption or competence rule must be defeated. This is plausible only in combination with substantive reasons or material principles (*e.g.* human rights norms).

- In contrast, for both varieties of pluralism, the conflict rules may have no bearing on validity. Instead, they would still feature as part of the considerations on behalf of defeasibility. Depending on the facts of the case, they may be taken as convenient "rules of thumb" for an adequate contextualization. Further plausible heuristics include not only what Klatt refers to as "weighting rules" but also criteria taken from *conflict of laws* or private international law. To be sure, this complex matter may only be the subject for further investigations.

3.3. The choice among models for balancing formal principles

Regarding the choice among models for balancing formal principles, I agree with Wei Feng's critique of the "two-level" or separation models - although this must be tempered, as both Sieckmann and Klatt introduce considerations from the balancing of substantive principles into their models which thereby cease to act separately.[22]

On the other hand, Feng endorses Alexy's epistemic model for the balancing of formal principles as its correct understanding. However, many doubts have cumulated since Alexy's model seems to focus on the reliability variable of the weight formula instead of in a formal principle.

Alexy has developed his model to account for the relation of deference between the judiciary towards the legislature in terms of certainty: in cases of uncertainty, the legislature must be benefitted due to its democratic legitimation. This presumption in favor of the legislature, however, is a separate issue which stems more from the principle of democracy than from the idea of certainty *per se*.

Such a critique is formulated concisely by Wang (2018):

> "[…] taking account of the epistemic uncertainty in balancing is one thing; why deference should be shown to an authority and who has authority to take decisions in a situation of uncertainty is another. The latter is the focus of formal principles, but the weight formula is silent on this issue. As a formal structure of balancing, it does not tell us who has the decision-taking competence on matters of epistemic uncertainty, nor does it tell us to whose judgment we should defer in the face of epistemic uncertainty (435)".[23]

[22] It is in this sense that I added "note 138" in my paper, which Feng indeed refers to (Feng: 3).

[23] In the same page, Wang continues: "[…] the weight formula is neutral with respect to the division of the decision-taking competences; it is even compatible with non-deference to any authority […] the epistemic variables in the weight formula are not necessarily connected with formal principles." *Cfr*. Borowski (2015: 102): "The variable "R" is neither a formal principle nor does it give rise to discretion."

Furthermore, paradigm cases of interlegal conflict (e.g. between a national court and the ECJ in the *Solange* saga, or between the ECJ and the UNSC in *Kadi*) often fail to display the problem of *certainty* as a determining issue. However, to be fair, matters may well be different regarding the *margin of appreciation* doctrine.

And yet, Feng's mention of the BVerfG on the *PSPP* judgment, and its cited passage ("the principle of proportionality requires that the programme's monetary policy objective and the economic policy effects be identified, weighed and balanced against one another"),[24] while certainly pointing towards procedural standards for the acceptability of proportionality, do not seem to display a clear connection to "the epistemic certainty of the premises of substantial principles". (Feng: 5).

Instead, I would take the other tack implied by Feng and see the case as better explained in terms of a *combination model* where competence norms and their due consideration must become integrated with the balance of substantive principles.

3.4. Qualifying criteria of interlegality and non-positivism

If I understand correctly, Feng's last comments suggest collapsing both moderate positions (i.e. of pluralism and constitutionalism) in the "scale" into one middle ground which also corresponds to a non-positivist conception of law. This way, the most tenable rendition of interlegal balancing "turns out to be a *non-positivistic* picture containing both 'pluralistic' and 'constitutional' elements, since substantial principles are necessarily incorporated into the legal order, even though the formally hierarchical aspect is still reserved." (Feng: 5).

However, the interlegal perspective presents a complex take which does not require a commitment on a legal non-positivist thesis regarding validity.[25] Instead, interlegality separates the order-relative question of legal validity on the one hand from the question of legal reasoning and taking all relevant norms into due account on the other hand, focusing on the latter.[26] This distinction also explains how a deciding authority should go beyond a self-referential stance and regard other *prima facie* competent authorities and legalities in its own judgment.

[24] *PSPP* judgment at paras. 2 and 76-7.
[25] See the balance regarding the distinction of legal positivism and non-positivism and arguments related to both the nature of law and to legal validity in Borowski (2018: 102 and ff)
[26] See Palombella (2019: esp. at 371) on the relevance of the distinction between understanding and applying relevant values.

Finally, regarding what I understand as a proposal to collapse both middle positions in the "scale" into each other, I believe that their distinction is justified insofar as we focus upon argumentative premises and processes: what matters is to understand the relevant premises for reasoning. This is so as doing otherwise would blur distinctions which bear on cases at hand. The relevant scope of cases for interlegality extends beyond the jurisdictional conflicts of multilevel structures and also embraces those which arise "horizontally", due to commercial, technological and other transnational facts and legal relations. Therefore, an important possibility must remain to account for cases that do not involve an *ex ante* hierarchy presumption.

4. In lieu of a conclusion

I may only reiterate my thankfulness for the very valuable comments I have received. Along with the comments formulated during the webinar, these are difficult questions which deserve careful reflection and elaboration in order to advance an answer. I am deeply thankful for the opportunity of looking more clearly at these important issues.

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