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Judicial Cooperation in the European Legal Culture: Terminology and Conceptual Framework

First of all, I would like to thank Fabrizio Cafaggi for inviting me to participate in the workshop on Judicial Cooperation in the Area of Fundamental Rights (EUI, Florence 28-29 October 2011).

I. Domestic and International Litigation (and beyond)

Judicial cooperation comes into consideration not only in relation to international disputes, but also in relation to domestic ones.
The decision of the italian *Corte di cassazione* Cass. 16 ottobre 2007, n. 21748, *Foro it.*, 2007, I, 3025, *in re Englaro*, whose reasoning refers to a big deal of foreign legal materials as a persuasive authority can be a good example of this.
Nevertheless, the most challenging issues of judicial cooperation arise obviously in relation to international disputes.
Therefore I will focus my attention on them.
I will not deal with the problem to what extent the results of my remarks can be referred to domestic disputes.

II. International Litigation: a Broad Definition

A broad definition of international litigation can serve as a starting point.
It includes cases between states, between individuals and states, and between individuals across borders. Cases can be brought both before domestic courts and international tribunal.

III. Judicial Cooperation: Two Meanings, Two Worlds Apart

In the european legal culture, the expression «judicial cooperation» is used with a plurality of meanings. I should say it better. It is used not only with a plurality of meanings, but also in diverse conceptual frameworks, in diverse branches of the laws and – consequently – it is used by diverse legal scholarships.
Perhaps, a scholar in civil procedure can see these diversities a little bit better, because civil procedure goes through the great historical divide between private law and public law.
There are indeed two main meanings of judicial cooperation and two main conceptual frameworks in which one can speak of judicial cooperation.

Electronic copy available at: http://ssrn.com/abstract=1951509

IV. First World: Judicial Cooperation as Dialogue between Judges

The first meaning of judicial cooperation refers to «judicial dialogue», i.e. dialogue between judges, or dialogue between courts. The conceptual framework belongs to the constitutional law. The discussion is mainly hold by scholars in constitutional law.
In this context, judicial cooperation refers to the following circumstances.
Dealing with international litigation, both international tribunals and domestic courts are more and more aware of belonging to a developing «global community of adjudication».
As A. M. Slaughter puts it, the focus shifts is from two systems - international and domestic - to one; from international and national judges to judges applying international law, national law, or a mix of both: «The institutional identity of all these courts, and the professional identity of the judges who sit on them, is shaped more by their common function of resolving disputes under rules of law than by the differences in the law they apply and the parties before them».[1]
This common function leads the courts to share or exchange informations or ideas with each other. Judges are coming in touch with one another in many sorts of ways.

V. Forms of Judicial Dialogue

A rough distinction is to be drawn between «formal» and «informal» dialogue.
Formal can be referred to the dialogue regulated by statutory provisions of public or constitutional law.
Informal can be referred to the dialogue promoted and developed by the judges themselves, either:
a) through own case law, or
b) within the framework of private law regulation (for instance, foundig an Association).

VI. «Formal» Dialogue (regulated by statutory provisions), e.g.: 1. Preliminary Reference to the ECJ; 2. Accession of the EU to the ECHR.

The most powerful example of formal dialogue in Europe is the Preliminary Reference to the European Court of Justice (ECJ) in Luxembourg, which is «the core of the legal order of the European Union».[2]

[1] A. M. Slaughter, *A Global Community of Courts*, in 44 *Harv. Int'l L.J.* (2003), 191.
[2] J.H.H. Weiler, *Editorial: Judicial Ego*, *Int J Constitutional Law* (2011) 9, p. 1-4.

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Domestic courts adjudicating a local dispute, typically between an individual and a public authority, which involves a question of European Law, may, and if they are a court or tribunal against whose decision there is no judicial remedy, must, request the European Court of Justice to give a Preliminary Ruling on the interpretation or validity of the European Law or measure involved (art. 267 TFEU).

Lower courts, for the most part, have embraced the system with energy. The Preliminary Reference procedure gives them the power of Judicial Review over national law, even national constitutional law, ensuring its compliance with European law.

Quite reluctant to refer for Preliminary Ruling have been up till recent times Member State Constitutional Courts, especially those, like the German and Italian, with full power of Judicial Review under their own Constitution. However, things are changing in recent times. The italian *corte costituzionale* has for the first time referred for Preliminary Ruling with a decision of 2008.[3] The most important decision in this new context was issued by the German Constitutional Court in 2010.[4] According to this decision, *Ultra vires* review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences. Furthermore, prior to the acceptance of an *ultra vires* act, the Court of Justice of the European Union is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen.

VII. «Informal» Dialogue: 1. Through private law (e.g., RPCSJUE); 2. Through case law (e.g., interpretation of the public policy clause, margin of appreciation, self restraint, deference, judicial comity, etc.)

Let me speak about informal judicial dialogue.

Firstly, I would like briefly to address the informal dialogue within the framework of private law regulation. Judges meet more and more frequently in a variety of settings, from workshops to judicial networks.

A good example in Europe is the network of the Presidents of the Supreme Courts of the Member States of the European Union. They decided to found an

[3] Corte cost. 15 aprile 2008, n. 108, in *Foro it.*, 2009, I, 2009.

[4] BVerfG, 2 BvR 2661/06, 6 July 2010, in R. CAPONI, *Karlsruhe europeista (appunti a prima lettura del Mangold-Beschluss della corte costituzionale tedesca)*, in *Riv. it. dir. pubbl. com.*, 2010, 1103.

Association with the financial support of the European Commission. The Constituent Assembly was held in 2004 at the French *Cour de cassation*.[5]

Secondly, I would like to address the informal dialogue promoted and developed by the courts through own case law.

As an example one can consider the public policy defence as an impediment to recognition and enforcement of foreign judgments. The starting point is that judicial decisions are acts of state authority and produce effects only within the territorial boundaries of the state. State sovereignty still plays a central role. Jurisdiction is an aspect of state sovereignty ([6]). Since sovereignty is exercised over a particular territory, the effects of judicial decisions are limited to the state boundaries ([7]). They produce effects in the legal system of another state with the consent of the latter, i.e. recognition ([8]). Presuppositions and conditions for recognition are the result of an approval by the state which, in principle, does not face any limits in general international law. However, there are many international – bilateral and multilateral - treaties which provide for the mutual recognition of judicial decisions between contracting states. In this respect, the experience of the European Union is very advanced. It involves the development of a new concept of sovereignty which entails the inclusion of the state within the larger international and supranational communities. Elsewhere, there is still a great emphasis on the notion of sovereignty conceived in traditional terms.There is a lack of confidence in the courts of other states, especially in the case where the prevailing party is a citizen of the state where the decision has been taken, and the losing party is a citizen of the state where such decision is supposed to be recognised and enforced ([9]). The considerable variation between procedural systems of different countries, even within the western civilisation, and the different values that emerge from the substantive law at the global level, have weighed in favour of the preservation of the public policy defence (*ordre public*) as an impediment to the recognition and enforcement of foreign judgments. This general clause has two components: a substantive and a procedural one. It concerns the respect of fundamental substantive or procedural values. Once we leave aside the substantive law aspect, the link between public policy defence and fair trial/due process guarantee becomes apparent ([10]). If the process in the Forum State is sufficiently respectful of the guarantees of fair trial, there is no scope for the public policy defence in its procedural aspect. Alongside the substantive aspect of the public order defence, its procedural element should be maintained as a sort

[5] For further information, s. http://www.rpcsjue.org

([6]) F. MANN, 1964.

([7]) «*No legal judgment has any effect, of its own force, beyond the limits of the sovereignity from which its authority is derived*», so *Yahoo! Inc. v. La Ligne Contre Le Racisme et l'Antisemitisme*, 169 *F. Supp.* 2d 1181, 1187 (*N.D. Cal.* 2001), quoted by N. TROCKER, 2010 [..], p. 26.

([8]) For a brief outline, see A. F. LOWENFELD, 2006, p. 471.

([9]) See N. TROCKER, 2010, p. 26.

([10]) The link is clearly captured in the definition of the reason for denial contained in § 328 (1), n. 4 of the German Code of Civil Procedure (*Zpo*): '*if the recognition would lead to a result that is obviously incompatible with basic principles of German law, especially when it is inconsistent with basic constitutional rights*', including the right to be heard in court (Art. 103 (1) *Grundgesetz*).

of «emergency brake» ([11]) to be activated in exceptional circumstances. This restrictive interpretative approach is held, in particular, by the case law of the European Court of Justice. It is one of the expressions of solidarity between the interest of the European Union for the proper functioning of the internal market and the individual interest of the creditor. The leading case is *Krombach* ([12]). The solution is balanced: the public policy is a clause set to protect the fundamental boundaries ([13]) of the national identities of the Member States inherent in their fundamental political and constitutional structures ([14]). It is therefore advisable to leave it initially the Member States to determine, in accordance with their own national concepts, the aspects of their public policy ([15]). However, to fully entrust the identification of the key elements of the national identity to the «reserved domain» of the Member States would mean to «inoculate the seed» for the dissolution of the European Union. And in fact this does not happen: the respect for the national identities of the Member States is part of the competences of the European Union ([16]). Hence, the role of the Court of Justice to ensure respect for the law in the interpretation and application of the treaties is directly called into play ([17]). The determination of the content and limits of the concept of public policy is then placed in a framework of mutual learning between the Court of Justice and the courts of the Member States. This is implemented through a dialogue in the search of the best solution, tailored to the specific case at hand, and achieved through the preliminary rulings ([18]). In this dialogue between judges, what is at stake is the respect for the essential content of the debtor's right of defence ([19]). Who has the final word on whether the decision violates or not a fundamental principle of the Member State? Is it the national court called upon to identify the content of the notion of public policy? Or is it the Court of Justice called upon to identify the limits of the same notion? In a flexible way and according to each case, the Court of Justice is inclined to retain the competence or – after refering to «*the*

([11]) See *Ali/Unidroit Principles of Transnational Civil Procedure*, 30: «A final judgment awarded in another forum in a proceeding substantially compatible with these Principles must be recognized and enforced unless substantive public policy requires otherwise. A provisional remedy must be recognized in the same terms».

([12]) ECJ, 28 march 2000, C-7/98, *Krombach c. Bamberski*.

([13]) See J.H.H. WEILER, 1999, p. 102.

([14]) Art. 4 (2) TEU: '*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional*'.

([15]) ECJ, 28 march 2000, C-7/98, *Krombach c. Bamberski*, no. 22.

([16]) Art. 4, II TEU.

([17]) Art. 19, TEU.

([18]) ECJ, 28 march 2000, C-7/98, *Krombach c. Bamberski*, no. 23: «*Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State*».

([19]) ECJ, 28 march 2000, C-7/98, *Krombach c. Bamberski*, no. 37: «*Recourse to the public-policy clause in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order*».

See also ECJ, 2 May 2006, C-341/04, *Eurofood*.

general criteria with regard to which the national court must carry out its assessment» ([20]) – to entrust the national courts with this task.

VIII. Two Opposite Outlooks on Judicial Dialogue: 1. *Diskurstheorie* of J. Habermas: speech acts do solve (almost) all problems; 2. N. Luhmann, *Die Weltgesellschaft* (1971): radical fragmentation of the global law, not along territorial, but along social sectoral lines

The most influential point of view on the judicial dialogue is philosophically grounded on the *Diskurstheorie* of Jürgen Habermas[21] and leads to an optimistic appraisal of judicial dialogue. As Aida Torres Pérez powerfully puts it, «the dialogic process becomes the source of legitimacy of interpretive outcomes»[22].

The results of both formal and informal dialogue is that participating judges see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavor that transcends national borders. They face common substantive and institutional problems. They learn from one another's experience and reasoning. They cooperate directly to resolve specific disputes[23].

This is true especially for the judicial cooperation between the European Court of justice, the European Court of Human Rights an the national Constitutional courts.

As Andreas Vosskuhle puts it, the focus should be on establishing a European constitutional jurisdiction dedicated to developing a culture of cooperation and substantive coherence. Constitutional courts are called upon to play their part and assume «responsibility for integration» (*Integrationsverantwortung*) in a «multilevel cooperation between European constitutional courts» (*europäische Verfassungsgerichtsverbund*): «The simplistic hierarchical system of legal protection characterised by strict super-/subordination designed to implement an almost uniform structure of norms has shown itself to be unworkable. Rather, we need to equip the complex and uniquely intertwined multilevel system of protection of human rights with an adequate sharing and assigning of responsibilities. The most suitable «systematic concept» (*Ordnungsidee*) would appear to be that of multilevel cooperation (*Verbundkonzept*), since this incorporates all the factors of autonomy, diversity, responsiveness and the ability to act jointly»[24].

What's the problem with the judicial cooperation? Judicial cooperation is performed through speech acts between lawyers, but speech acts between lawyers do not solve all problems. In particular they are not able to recompose the fragmentation of the global law. In 1971, while theorizing on the concept of world

[20] Così, ECJ, 2 April 2009, C-394/07, *Gambazzi*, no. 39.
[21] J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1992).
[22] A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication*, Oxford, 2009.
[23] A. M. Slaughter, *A Global Community of Courts*, in 44 *Harv. Int'l L.J.* (2003), 191.
[24] A. Vosskuhle, *Protection of Human Rights in the European Union. Multilevel Cooperation on Human Rights between the European Constitutional Courts,* in *Our Common Future*, Hannover/Essen, 2-6 November 2010 (*www.ourcommonfuture.de*)

society, Luhmann put forward the «speculative hypothesis» that global law would experience a radical fragmentation, not along territorial, but along social sectoral lines ([25]). I think, he was right. And indeed, thirty years later, an almost explosive expansion of independent and globally active, yet sectorally limited, courts, quasi-courts and other forms of conflict-resolving bodies did occur[26]. High expectations of our ability to deal adequately with legal fragmentation must be curbed since its origins lie not in law, but within its social contexts.

IX. Second World: Judicial Cooperation as «International Legal Assistance»

The second meaning of judicial cooperation refers to «international legal assistance», i.e. the cross-border cooperation between judicial and administrative authorities, related to the managing of (civil and criminal) proceedings, i.e., related to service of process, taking of evidence, recognition and enforcement of judgments, etc.

The conceptual framework belongs to the procedural law.

The discussion is mainly hold by procedural lawyers.

In this field, traditionally there has been an overestimation of public policy concerns, like sovreignty concerns, overestimation which runs the risk to inbalance plaintiff's and defendant's interests[27].

As Burkhard Hess in his General Report to the XIV IAPL World Congress in Heidelberg (2011) puts it, international legal assistance is undergoing a period of transition. Concepts of sovereign procedural assistance on the basis of international treaties and comity have been replaced by direct communication between courts and judicial authorities. Therefore we can observe a trend towards more informal cooperation in this field too. The new concept of judicial assistance focuses on the needs of the parties whose procedural rights have (also) to be guaranteed in judicial cooperation proceedings.

X. Final Remarks

It is necessity to overcome the dualism of meanings of «Judicial cooperation» and to unify the discussion, identifying common trends, e.g. towards informal cooperation (but: Accession of the EU to the ECHR), and common problems, e.g. the language problem: If I only could speak italian, *quante cose belle vi direi*. The close relationship between law and language calls for the consideration of a special care

[25] N. LUHMANN, *Die Weltgesellschaft*, 57 *Archiv für Rechts und Sozialphilosophie 21 (1971)*.

([26]) Così, A. FISCHER-LESCANO e G. TEUBNER, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts*, Frankfurt am Main, 2006.

[27] R. Caponi, *Transnational Litigation and Elements of Fair Trial*, General Report, XIV World Congress of Procedural Law, Heidelberg, 2011.

in the work of translation and interpretation of legal texts especially when they serve judicial activity.
Expectations have to be curb: «The center of gravity of legal development therefore from time immemorial has not lain in the activity of law making or in jurisprudence or in case law, but in society itself, and must be sought there at the present time» (E. Ehrlich, *Grundlegung der Soziologie des Rechts*, 1913).