

Conditioned Hierarchies of Law in Europe

Content, legitimacy and default lines

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Content

- A. Legal unity and conditioned hierarchies of law
 - I. The phenomenon
 - II. Some examples
- B. Parameters of conditioned hierarchies of law
 - I. Three basic approaches: dissolution, acceptance, compromise
 - II. Theoretical underpinnings
 - III. Substantial problems
 - IV. Solutions

A. Legal unity and conditioned hierarchies of law

I. The phenomenon

Recent years have witnessed the evolution of complex multilevel orders of law. This development has caused an intense and far reaching debate, not surprisingly so as it poses many complex and sometimes quite fundamental questions. Multi-level orders of law have thus become a standard theme of legal reflection and other disciplines like the theory of governance.¹ These debates are not only of a conceptual nature but have a distinct practical side. This is not the least so because one of the central problems in such multilevel orders of law is how to identify the law which is applicable in concrete cases in the first place: Given that the line between national, supranational or international law has become somewhat blurred and that, consequently, it is not always an easy task to disentangle legal orders with potentially competing claims of applicability, it is of considerable interest to develop clear conceptions of how to determine what is actually the relevant law for a given case and what is not.

The debates have an explicit or at least implicit political side as well. In multi-level orders of law, the sovereignty of states has been mediated by other political entities, supranational and international.² National law in these orders is not su-

¹ Cf. e.g. *Henrik Enderlein/Sonja Wälti/Michael Zürn* (eds.), *Handbook on Multi-Level Governance*, 2010; *Arthur Benz/Nicolai Dose* (eds.), *Governance – Regieren in komplexen Regelsystemen*, 2nd ed., 2010, some overview about recent research on governance.

² For an overview cf. e.g. *Thomas Giegerich*, *Die Souveränität als Grund- und Grenzbegriff des Staats-, Völker- und Europarechts*, in: *FS Schmidt-Jortzig*, 2011, 603 ff.

preme anymore and thus the sovereignty of states, the bedrock principle of the Westphalian System of the international legal order, is in one way or another – e.g. through normative constraints or by pooling of sovereign rights – relativized. The question of the hierarchies of law in such multilevel legal orders is consequently not a legal technicality but a question of the reach and limits of the power of states and the political influence of their citizen under conditions of post-national governance.

One aspect of this political dimension of multilevel orders of law is the question of who is the ultimate arbiter of these questions in case of conflict. A national court? A supranational court? An international court? Is the respective court called upon to play this role always or only in some cases?³

In addition, far reaching theoretical questions are lurking in the background. If such multilevel legal orders have become a constitutive element of modern law, are fragmentation, incongruity, pluralism and hybridity necessary elements of contemporary and perhaps all imaginable future legal orders? Has the time come to abandon the idea (if not already debunked in the dust bin of outmoded ideas of naïve conceptions of law) that there is and even can be a legal order that forms a normative unity?⁴

An interesting element of these developments is the appearance of a phenomenon that can be called *conditioned hierarchies of law*.⁵ The point of such conditioned hierarchies is that the idea of a hierarchy of law is not abandoned but qualified in certain crucial respects tailored to the particular challenges posed by multilevel orders of law: A hierarchy is ascertained in principle but only if certain conditions are fulfilled. If that is not the case, the hierarchical order ceases to be effective and is replaced by a different kind of normative default system.

The functional advantage of such a conception is the possibility to accommodate competing and in practise politically highly loaded validity claims of different legal orders and competencies of the agents of their concretisation. Problematic side-effects are, however, that the price of flexibility may be a loss of legal certainty, a disintegration and de-legitimation of supranational and international layers of multilevel orders. Or can legal orders become flexible without being devoid of sufficiently clear and determined normative standards for identifying the valid and applicable law? Can they remain meaningfully integrated and sufficiently legitimated even if traditional conceptions of well-ordered hierarchy are abandoned? This is a question that has to be dealt with at all levels of contemporary intertwined legal orders because such conditioned hierarchies exist at present

³ There are various attempts to conceptualise this problem. A prominent example is the idea of a “*Verfassungsgerichtsverbund*”, a multilevel cooperation of the European Constitutional Courts, cf. *Andreas Voßkuhle*, *Multilevel Cooperation of the European Constitutional Courts – Der europäische Verfassungsgerichtsverbund*, *EuConst* 2010, 175 ff. For an attempt to systematize the discussion on this matter cf. *Heiko Sauer*, *Jurisdiktionskonflikte in Mehrebenensystemen*, 2008, 357 ff.

⁴ Cf. e.g. on the problem of fragmentation from a perspective of international law, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by *Martti Koskenniemi*, General Assembly, A/CN.4/L.682, 13 April 2006.

⁵ Cf. on such “*bedingte Rechtshierarchien*”: *Matthias Mahlmann*, *Grundrechtstheorien in Europa – kulturelle Bestimmtheit und universeller Gehalt*, *EuR* 2011, 469, 485.

between national and supranational as well as between supranational and international law.

This phenomenon poses problems of very different kinds, ranging from normative theory to power politics as elements of multilevel orders of law in general do. The remarks that follow seek to describe the phenomenon by shortly recapitulating some well-known examples. A recent decision of the Swiss Federal Court will then be the focus of attention. This decision is very important for the Swiss legal system and its position in the European multilevel order of law. It has, in addition, further heuristic merits: It can serve as an interesting example of some central problems of conditioned hierarchies of law in general. It highlights in particular the importance to understand clearly what the possible foundations of the legitimacy of such conditioned hierarchies are and what perspectives exist beyond their current framework. It is consequently informative for any attempt to understand an important feature of contemporary law and to determine the normative parameters to deal with it successfully.

Multilevel legal orders are very complex entities that concern very different subject matters. There are good reasons to differentiate among them. The most contentious and most important area is that of human rights. It is therefore useful to focus mainly on this topic in what follows.

There are big issues at stake. The point of multilevel orders is to legally institutionalise the interdependence and the common normative projects of modern states, in the European context not the least by creating new political bodies that genuinely transcend the national sphere like the EU or by making human rights instruments like the ECHR the effective law of more than one land. This is in many respects uncharted territory and it is not surprising that attempts to overcome various obstacles on the way ahead may appear different and less straight forward than expected from the point of view of traditional conceptions of the structure of systems of law.

Given the current crisis of European integration within the framework of the EU as well as the ramification this crisis may have for the European legal order as a whole and beyond the EU for international relations in general, the solutions to the issues raised are highly relevant to maintain the functionality and legitimacy of European integration in its various institutional settings in the long run. But the questions concern not only these concrete challenges, crucial as they certainly are. At the end, the debates about conditioned hierarchies of law are about the feasibility and framework of a concrete, practically effective and politically sustainable legal cosmopolitanism that can find its place not in legal utopias but on the ground of contemporary international reality with its unequal power structure and many political aspirations that are quite contrary to a cosmopolitan rule of law.

II. Some examples

1. *The relevance of hierarchies*

It is a traditional assumption about the law that a legal order implies the hierarchical positioning of norms. Hierarchies are, additionally, a practical reality. Le-

gal orders have explicit or implicit rules that determine what kind of hierarchy of norms exists, e.g. that federal law supersedes the law of the states, that the constitution takes precedence over ordinary statutory law, that public international law (perhaps qualified in this or that respect) outranks national law, that certain elements of international law prevail over other obligations under international law and so on.⁶

In legal theory, *Kelsen's* account is a classic example of such a hierarchical structure of the law but its roots are as old as the systematic reflection about law as the natural law tradition with its delicate differentiation of legal spheres exemplifies.⁷

The hierarchy of law is a central tool for the preservation of the unity of law because it precludes – by rules providing for the primacy of some norms over others – the validity of norms with contradictory content.⁸ Another tool is harmonisation by interpretation,⁹ but this may not be always be possible because of genuine normative conflicts.¹⁰ This unity appears to be elementary for core tenets of law: The rationality of law seems to be bound to the non-existence of contradictory norms. Legal certainty and consequently the rule of law are at stake as well. Without a hierarchical order, one may think, it becomes uncertain which the valid law is – a higher level norm, a lower level norm, some hybrid form of both? Hierarchy seems equally central for the applicability of the law: Any practitioner, judge, advocate or a lawyer in an administration, for instance has to know what the law actually is to be able to even begin to interpret and apply it.

Central elements of a legal order like rationality, legal certainty, the rule of law or the applicability of law thus seem to be wedded to the idea of a structured and well-defined normative hierarchy.

⁶ Cf. e.g. for examples for such rules in the latter case Art. 103 UN-Charter: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”, or Art. 53, 64 VCLT on *ius cogens*.

⁷ Cf. e.g. *Hans Kelsen*, *Reine Rechtslehre*, 2nd ed., 1960, 210 f.

⁸ This hierarchy may culminate in a foundational norm, e.g. *Hans Kelsen's* “Grundnorm”; *ibid.* (n. 7), 209: on the logical unity of a legal system: “Da die Grundnorm der Geltungsgrund aller zu einer derselben Rechtsordnung gehörigen Normen ist, konstituiert sie die Einheit in der Vielheit dieser Normen”; or a Hartian rule of recognition, cf. *Herbert L. A. Hart*, *The Concept of Law*, 3rd ed., 2012, 91 ff.

⁹ Cf. e.g. ECtHR, app. no. 10593/08, 12.9.2012, *Nada v. Switzerland*, para. 170: “When creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law.”

¹⁰ An example for this can be found in the form of individual rights. As the ILC study group rightly observed, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by *Martti Koskenniemi*, General Assembly, A/CN.4/L.682, 13 April 2006, para. 42: “Especially where a treaty lays out clearly formulated rights or obligations to legal subjects, care must be taken so as not to see these merely as negotiating chips in the process of reaching a coordinating solution.”

2. Dissolving hierarchies

Looking at modern multilevel legal orders, however, presents a much more differentiated picture than the idea of such clear cut hierarchies suggests.¹¹ Such hierarchies seem to have dissolved. The European legal order is in this respect of particular interest as it is arguably a paradigm case for differentiated multilevel orders of law as national law is particularly densely interwoven with supranational EU and international law, not the least the ECHR. Prominent voices have consequently spoken of new systematic reflexion called for to conceptualise this order beyond “oversimplistic spatial and hierarchic concepts such as ‘superiority’ and ‘subordination’”.¹²

On each of the levels of national, supranational and international law the issue at hand has entered the stage of legal practice and its reflexion. They are to be considered in turn.

a) Supranational and national law

A classical question in European law concerns the relation between national and supranational law.¹³ The fundamental answer is clear enough and an element of the very bedrock principles that constitute EU law and underlie its daily practise: EU law enjoys primacy over national law,¹⁴ including constitutional provisions. In the words of a recent decision in which national fundamental rights were at stake: “It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State”.¹⁵

For courts of the member states the situation is, however, different. The supremacy of EU law is accepted but only with caveats. The Federal German Constitutional Court is not the only one to have formulated such limitations on the supremacy of EU law. It has, however, in many respects taken the lead in outlining where – in its view – the lines should be drawn.¹⁶

¹¹ This observation is not limited to legal questions. To the contrary, these are discussed in the framework of multilevel governance as well, cf. e.g. *Michael Zürn*, *Global governance as multi-level governance*, in: *Enderlein/Wälthi/Zürn* (eds.) (n. 1), 80 ff., highlighting not the least horizontal compliance mechanisms not based on a hierarchy of law because of the „possibility of horizontal, reciprocal compulsion deriving from social interdependence“, e.g. in the EU, *ibid.*, 91.

¹² Cf. *Vofßkuhle* (n. 3), 183.

¹³ Cf. *Bruno de Witte*, *Direct effect, primacy and the nature of the legal order*, in: *de Burca/Craig* (eds), *The evolution of EU law*, 2nd ed., 2011, 323: “evergreen of European legal studies”.

¹⁴ ECJ, Case 6/64, *Costa/ENEL*, 1964, ECR 585.

¹⁵ ECJ 26.2.2013, Case C-399/11, *Meloni*, not yet published in the ECR, para. 59. For an endorsement of this principle without exception, cf. e.g. *Ingolf Pernice*, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, CJEL 2009, 349, 404.

¹⁶ Cf. for some comments *Antonios Tzanakopoulos*, *Judicial Dialogue in Multi-Level Governance: the Impact of the Solange Argument*, in: *Fauchald/Nollkaemper* (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law*, 2012, 185 ff.

An unsurprising condition for the supremacy of European law is that the order of competences under the principle of conferral has to be maintained.¹⁷ Consequently, the ECJ has to act within the ambit of its competences. This condition is rather narrowly construed. The German Federal Constitutional Court has clarified in a highly contentious case¹⁸ that to assume an *ultra vires*-act of the ECJ is only possible in exceptional cases.¹⁹ Simple misapplications of law are not enough.²⁰ It even explicitly stated the ECJ's "right to error".²¹ A decision that may be legally erroneous is not necessarily *ultra vires*.²²

There are other substantial conditions for the supremacy of EU law, too. A primary example is the famous *Solange*-jurisprudence of the German Federal Constitutional Court whereby the supremacy of EU law is accepted only as long as certain conditions are fulfilled.²³ The content of these conditions has varied over the years to a certain degree, but the main elements have remained constant. EU law enjoys supremacy only, if it respects fundamental rights, democracy and the rule of law within the framework of a social state to a sufficient degree and – a more recent and much debated precondition – the constitutional identity of member states.²⁴

The Federal Constitutional Court explicitly stated in its most recent case law on the matter that the European legal order is not organised according to a strict hierarchy.²⁵ The relation of the different legal spheres is in its view a different one. From this perspective, "it does not in any case factually contradict the objective of openness towards European law, i.e. to the participation of the Federal Republic of Germany in the building of a united Europe (Preamble, Art. 23 para. 1, first sentence of the Basic Law), if exceptionally, and under special and narrow conditions, the Federal Constitutional Court declares European Union Law inapplicable in Germany".²⁶

This jurisprudence is a first example for what is meant by a conditioned hierarchy of law. According to the Federal German Constitutional Court, EU law takes precedence over German national law if a set of conditions is fulfilled, namely if a sufficient protection of fundamental rights, democracy and the rule of law within the framework of a social state is maintained on the level of the EU and the constitutional identity of Germany remains untouched. Otherwise, EU law will not be applied.

¹⁷ Art. 4 para. 1 TEU.

¹⁸ Cf. for some comments *Matthias Mahlmann*, The Politics of Constitutional Identity and its Legal Frame – the Ultra Vires Decision of the German Federal Constitutional Court, GLJ 2010, 1407 ff.

¹⁹ BVerfG, 2 BvR 2661/06, 6 July 2010, para. 55. English version available at <http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html>.

²⁰ *Ibid.*, para. 61.

²¹ *Ibid.*, para. 66.

²² Consequently, the Federal Constitutional Court left it open whether or not the decision of the ECJ (*Mangold*) under consideration had been *ultra vires* or not as in any case it did not qualify as being manifestly ill-founded and thus the object of review by the Federal Constitutional Court, *ibid.*, para. 72 ff.

²³ BVerfGE 37, 271; 73, 339; 89, 155.

²⁴ BVerfG, 2 BvE 2/08, 30.6.2009, head note 3 and 4; English version at <www.bverfg.de>.

²⁵ *Ibid.*, para. 340.

²⁶ *Ibid.*, para. 340.

b) *Supranational and international law*

aa) *EU law and international law*

The Federal German Constitutional Court has been much criticised for its jurisprudence.²⁷ To some, the jurisprudence appeared as an ill-conceived defence of outmoded conceptions of national sovereignty that can have no place in an evolving European legal order.

Interestingly, the ECJ has taken recourse to a comparable line of argument when facing the question whether public international law enjoys supremacy over EU law. In its decision concerning the effects of a resolution of the UN Security Council on the legal order of the EU, it held that such acts do not necessarily take precedence over EU law.²⁸ Central in this respect were fundamental rights. Consequently, it reviewed the respective EU regulation based on the UN Security Council resolution for possible violations of such fundamental rights.

This decision raises many questions that are not the topic here, including the important one about the use of anti-terror lists and their legal effects. Central for the interests at hand is, that it embodies a solution to the problem of how to conceptualise the relationship between EU law and international law comparable to the jurisprudence of the German Federal Constitutional Court in respect to national and EU-law.²⁹

As in the latter case, there is a hierarchy that is accepted in principle: Public international law may take precedence over EU-law. But this is not necessarily and under all circumstances the case. If fundamental rights are violated, the ECJ reserves the right to refrain from applying public international law.³⁰

Substantially, this is the solution to the problem of the relation among different legal spheres outlined in the jurisprudence of the German Federal Constitutional Court up to the Lisbon-decision: The supremacy of international law is only effective as long as the respective international act does not violate certain (perhaps qualified) legal standards, especially fundamental rights. Again, one can identify a conditioned hierarchy of law.

bb) *EU law and regional human rights law*

Yet another interesting example of jurisprudence that belongs in this context is the case law of the ECtHR on the relation between the Convention rights, EU law and international law. Again, the question is: Which legal order is supreme,

²⁷ Cf. e.g. *Giegerich* (n. 2), 628 ff.

²⁸ ECJ, joined Cases C-420/05 and C-415/05, *Kadi and Al Barakaat*, 2007, ECR I-67, para. 303 ff.

²⁹ This turn of events has not escaped the attention of the Federal German Constitutional Court, which comments in the Lisbon-decision, BVerfG, 2 BvE 2/08 (n. 24), para. 340: "The Court of Justice has thus, in a borderline case, placed the assertion of its own identity as a legal community above the commitment that it otherwise respects. Such a legal construct is not only familiar in international legal relations as a reference to the *ordre public* as the boundary of a treaty commitment; it also corresponds, if used constructively, to the idea of contexts of political order which are not structured according to a strict hierarchy."

³⁰ The ECJ explicitly rejects the idea of an absolute supremacy of international law, ECJ, C-420/05 and C-415/05, *Kadi and Al Barakaat* (n. 28), para. 305.

and if any under which circumstances? The ECtHR has formulated a differentiated answer regarding these different legal spheres.

As to EU law, it decided that it is primarily up to the ECJ to apply EU law, including the question of whether or not fundamental rights have been violated by a legal act of EU organs. However, it reserves itself the right to supervise this jurisprudence to assure that the ECJ maintains a level of protection of fundamental rights that is comparable to the protection under the ECHR. “As long as” the ECJ lives up to this demand, the ECtHR waives its competence of control.³¹ The principle was established in a case that concerned the EU, the principle as such is, however, framed by the ECtHR in terms that apply to obligations stemming from the membership in any international organisation, including, but not limited to supranational international organisations.³²

Recently, the ECtHR had the opportunity to clarify its stance in this respect in a case involving the obligations of states under the UN-Charter. The Court endorsed the established principles of its jurisprudence on the matter³³ but felt that it did not have to spell out their meaning for the concrete case, because the respective contractual party had not used all the leeway allowed by the Security Council resolution to protect the rights of the applicant: “That finding dispenses the Court from determining the question, raised by the respondent and intervening Governments, of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other. In the Court’s view, the important point is that the respondent Government has failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent”.³⁴

The parallel to the observations in other legal spheres is – again – interesting, so are the differences. In the relation between the ECHR and the EU the question of supremacy of the latter does not naturally arise. The ECtHR, however, grants the ECJ a prerogative to protect fundamental rights and retains only a residual control – very much like the German Federal Constitutional Court regarding EU law – in case the protection of fundamental rights is “manifestly deficient”.³⁵ A violation of this condition may trigger review by the ECtHR.³⁶

³¹ Cf. ECtHR, app. No 45036/98, 30.6.2005, *Bosphorus v. Ireland*, para. 154, 155: „The state is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention. In the Court’s view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides” (internal quotations omitted).

³² *Ibid.*, para. 152 ff.

³³ ECtHR, 10593/08, *Nada v. Switzerland* (n. 9), para. 168-172.

³⁴ *Ibid.*, para. 197.

³⁵ ECtHR, 45036/98, *Bosphorus v. Ireland* (n. 31), para. 156.

³⁶ An interesting question concerns the exact relation of the Charter of Fundamental Rights and the ECHR prior to the envisaged accession of the EU to the ECHR. Cf. on this matter e.g. ECJ, C-399/11, *Meloni* (n. 15), para. 50 (harmonisation of rights derived from both regimes), ECJ, 29.1.2013, Case C-396/11, *Radu*, not yet published in the ECR, para. 32 (Charter rights, Art. 47, 48 *lex specialis*); ECJ, 26.2.2013, Case C-617/10, *Aklagare/Fransson*, not yet published in the ECR, para. 44 (no formal inclusion of ECHR in EU law). In the latter case, the General Advocate raised the question of the relation of ECtHR jurisprudence and

c) National law and international law: The Swiss example

aa) The background

The Swiss Federal Court has added to these examples another variant.³⁷ The legal background of this decision is the controversial regulation of the relation between national law, including constitutional law and public international law in Switzerland. This regulation is widely discussed,³⁸ not the least by the Swiss Federal Government.³⁹ The political background of the decision is the equally contentious issue of Switzerland’s position within the international community, most importantly regarding the influence international law in general and EU law in particular should have on the Swiss legal order.

This is of particular concern because of the tradition of direct democracy in Switzerland. Can it be, it is asked with some urgency, that norms that are the product of direct democratic decision-making be acknowledged as inapplicable (if not to void) because they contradict public international law with no such direct democratic legitimacy, if any democratic legitimacy at all?⁴⁰

This is not a theoretical question as recent plebiscites have included amendments to the constitution that arguably or quite evidently violate norms of public international law, most importantly the ECHR. A high profile example is the prohibition of the construction of minarets included in the Swiss federal constitution by a plebiscite.⁴¹ Another example is a norm providing for the extradition of foreigners in the case they have committed criminal actions (apparently) without the possibility of considering matters of proportionality.⁴²

These norms render the problem quite concrete and furnish an important because very tangible example illustrates the problems of dissolving hierarchies mentioned above. Could the Swiss Federal Court permit the construction of a minaret despite the explicit and unequivocal prohibition in the Federal Constitu-

the Charter in detail, arguing for an autonomous interpretation of EU law; cf. Opinion, GA Cruz Villalón, 12.6.2012, Case C-617/10 para. 75 ff., 81 ff. The ECJ did not discuss the problem but decided in fact along these lines. Cf. for some comments *Wolfgang Weiß*, Grundrechtsschutz durch den EuGH: Tendenzen seit Lissabon, *EuZW* 2013, 287 ff.

³⁷ BGer 2C_828/2011, Urteil v. 12.10.2012.

³⁸ Cf. e.g. *Giovanni Biagini*, Bundesverfassung der Schweizerischen Eidgenossenschaft, 2007, Art. 5 Abs. 4 Rz. 26 ff.; *Pascal Mahon*, Art. 5, in: Aubert/Mahon (eds.), *Petit commentaire de la Constitution fédérale de la Confédération suisse*, 2003, Art. 5 Rz. 17 ff.; *Pierre Tschannen*, Staatsrecht der Schweizerischen Eidgenossenschaft, 3. Aufl., 2011, 155 ff.; *Ulrich Häfelin/Walter Haller/Helen Keller*, Schweizerisches Bundesstaatsrecht, 8. Aufl., 2012, 58 ff.; *René Rhinow/Markus Schefer*, Schweizerisches Verfassungsrecht, 2. Aufl., 2009, Rz. 3615 ff.; *Bernhard Ehrenzeller/Philippe Mastronardi/Rainer J. Schweizer/Klaus A. Vallender*, Die schweizerische Bundesverfassung, 2. Aufl., 2008, Rz. 44 ff.; *Daniel Thürer*, Kosmopolitisches Staatsrecht, 2005, 65 ff.; *Regina Kiener/Melanie Krüsi*, Bedeutungswandel des Rechtsstaats und Folgen für die (direkte) Demokratie am Beispiel völkerrechtswidriger Volksinitiativen, *ZBL* 2009, 237 ff.

³⁹ Cf. e.g. the report by the Swiss Federal Government, *Bundesrat*, Das Verhältnis von Völkerrecht und Landesrecht, Bericht des Bundesrates vom 5. März 2010, *BBJ* 2010, 2263 ff.; *Bundesrat*, Zusatzbericht des Bundesrates zu seinem Bericht vom 5. März 2010 über das Verhältnis Völkerrecht – Landesrecht, *BBJ* 2011, 3613 ff.

⁴⁰ Cf. e.g. on this argument from democracy in general *Giegerich* (n. 2), 627.

⁴¹ Art. 72 para. 3 Swiss Federal Constitution.

⁴² Art. 121 para. 3-6 Swiss Federal Constitution.

tion? Could it base its decision on its entitlement, perhaps even obligation to set aside valid constitutional law because public international law, or at least some parts of public international law take precedence over such constitutional law, even if created by mechanisms of direct democracy? Could it demand a test of proportionality as a precondition for any extradition of a foreigner despite the rather clear regulation in the respective constitutional norms that leave no room for such proportionality considerations in subsequent implementing legislation?

The Federal Court decided as to the latter case that it is indeed obliged by international law to include considerations of proportionality and that Swiss constitutional law does not change this obligation but rather endorses it.⁴³ It confirmed therefore the importance of international law especially of the ECHR, though there are further legal dimensions as well⁴⁴ which are significant for the Swiss legal order.

The decision has been taken as judicial activism of an ill-advised court usurping the role of a law-maker endangering the tradition of direct democracy in Switzerland and heralded as a landmark for the preservation of human rights standards in Switzerland and their defence against attacks with the instrument of direct democracy.⁴⁵ Let us consider the decision in some more detail trying to understand how it fits into the context of evolving conditioned hierarchies of law.

bb) The case law of the Federal Court

The Federal Court has had to deal with the problem of the relation between national law and international law on various occasions before. It held that in principle, international law takes precedence over national law. It accepted, however, one exception: If national law is later enacted with the intention of replacing obligations derived from public international law, this national law enjoys priority (so called *Schubert-practice*).⁴⁶ The court later qualified its position further, stat-

⁴³ It is argued that the statements of the Federal Court in its decision BGer 2C_828/2011, Urteil v. 12.10.2012 about the relation of national and international law are mainly merely obiter dicta, cf. *Giovanni Biaggini*, Über die Auslegung der Bundesverfassung und ihr Verhältnis zu EMRK. Bemerkungen aus Anlass des denkwürdigen, aber nicht durchweg überzeugenden Urteils des Bundesgerichts 2C_828/2011 vom 12. Oktober i.S. X betreffend die Tragweite der sog. Ausschaffungsinitiative (Art. 121 Abs. 3-6 BV), ZBl 2013, 316 ff. The core content, the precedence of international human rights law over national law, including national constitutional law is, however, confirmed in other decisions, too, cf. e.g. BGE 139 I 31 E. 2.3.2; 2.3.3, quoted in *Biaggini*, op. cit., as well.

⁴⁴ The case concerns EU law, too, concretely the Agreement on the Free Movement of Persons (“*Freizügigkeitsabkommen*”) of Switzerland with the EU and its Member States and the obligations stemming from it. This dimension is mentioned by the court, though not elaborated, cf. BGer 2C_828/2011 (n. 37) D 4.3.3.

⁴⁵ Cf. e.g. the comments *Eva Maria Belser*, Das Bundesgericht nimmt das Ruder in die Hand, NZZ 12.2.2013; *Christoph Blocher*, Nicht alle im gleichen Boot, NZZ, 6.3.2013; *Andreas Auer*, Direktdemokratie hat Grenzen, NZZ 15.3.2013; *Astrid Epiney*, Das Verhältnis von Völkerrecht und Landesrecht aus der Sicht des Bundesgerichts, jusletter, 18. März 2013; *Ivo Hangartner*, Bundesgerichtlicher Positionsbezug zum Verhältnis von Bundesverfassung und Völkerrecht, AJP 2013, 698 ff.; *Biaggini* (n. 43), endorsing the general position, but critical about the method applied.

⁴⁶ “*Schubert-Praxis*”, BGE 99 Ib 39, E. 3 and 4 (*Schubert*); BGE 125 II 417, 425, E. 4d, (PKK).

ing that this priority was not applicable to international human rights treaties and left the question open as to whether this practice is still regarded as a valid interpretation of the law at all.⁴⁷ These decisions concern statutory law, not constitutional law. The court did not specify to which degree any of its considerations apply to constitutional provisions.

This case law set out a particular kind of conditioned hierarchy of law. One requirement is the existence of an intentional decision of the legislature to contradict a norm of public international law. This condition was not delimited regarding its material, substantive content, e.g. that only later national laws consciously aiming at the protection of human rights or central constitutional values like democracy or the rule of law could be used to derogate from obligations attained by means of public international law. The condition is purely formal – the existence of a contradicting legal act by a state.

This wide ranging condition was rescinded in the subsequent case law as it was not amused to apply to human rights treaties. Notwithstanding, the question remained open as to whether and how any of these considerations could be applied to constitutional law.

cc) A new turn?

(1) Federal law and public international law

In the mentioned recent decision the Federal Court – widely held to be of crucial importance for the Swiss legal system⁴⁸ – confirmed the priority of public international law in relation to statutory federal law.⁴⁹ However, the court did not specify whether or not, this priority also applied in the case of an intentional contradiction between later statutory federal law and obligations derived from public international law (the *Schubert-practise*),⁵⁰ though this practice seems to be confirmed in another recent decision.⁵¹ Instead the court stated that public international law enjoys in principle priority, even if it does not consist in international human rights treaties.⁵² This priority of public international law pertains as well to statutory federal laws that were enacted after the public international law obligation was obtained; the *lex posterior*-rule is – according to the Federal Court – not applicable in these cases.⁵³ Given the provision of the Federal Constitution whereby the Federation and the Kantons are to respect public international law⁵⁴ and given Switzerland’s obligations under the Vienna Convention on the Law of Treaties, Art. 27, Switzerland cannot rely on Swiss internal laws to justify the breach of obligations under public international law.⁵⁵ Consequently, Federal statutory law is held to be inapplicable “on a regular basis” (regelmässig) if it contradicts public international law. The formulation that this priority applies “on

⁴⁷ BGE 125 II 417, 425, E. 4d.

⁴⁸ See above n. 45.

⁴⁹ BGer 2C_828/2011 (n. 37), D 5.1.

⁵⁰ Ibid.

⁵¹ Cf. BGE 138 II 524 E. 5.3.1.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Art. 5 para. 4 Swiss Federal Constitution.

⁵⁵ BGer 2C_828/2011 (n. 37), D 5.1.

a regular basis” leaves the possibility open for it to not apply under certain circumstances though it is not clarified whether this is truly so and if it is, in which cases the exception is possible.

(2) *Constitutional law and public international law*

The Federal Court addressed the relation of constitutional law and public international law as well. It recalled provisions of the Federal constitution that state that constitutional amendments⁵⁶ and plebiscites⁵⁷ shall not violate mandatory public international law.⁵⁸ It concluded that these norms have to be interpreted as implying that other constitutional norms that are contrary to public international law may be valid law. The ECHR, however, is taken to obligatory for Switzerland. Given the constitutional provision obliging the Federal Court to apply public international law, the ECHR is taking precedence even over later contradicting constitutional law, the Federal Court argues.⁵⁹

The Federal Court extends – in consequence – its stance on the relationship between national law and public international law to constitutional law as well, at least in the case of the ECHR: Public international law in this case enjoys supremacy over national prior or later constitutional law.

An interesting problem is posed by the question, to which degree is a constitutional provision that explicitly forbids public international law to derogate from it, reconcilable with this jurisprudence.⁶⁰ Again, this is of practical importance, because this is the strategy employed by yet another initiative aiming to circumvent any restrictions imposed by international human rights law apart from core *ius cogens* norms and its application by the Swiss Federal Court in the case of extradition.⁶¹

How to deal with this very particular situation is yet another dimension of this intriguing case illustrating the many imaginable legal manifestations of tensions with international human rights provisions arising from political agendas of national political forces that challenge basic tenets of international human rights regimes. How to deal with such a case remains an open question yet to be addressed by the Federal Court.⁶²

⁵⁶ Art. 194 para. 2 Swiss Federal Constitution.

⁵⁷ Art. 139 para. 3 Swiss Federal Constitution.

⁵⁸ BGer 2C_828/2011 (n. 37), D 5.2.1.

⁵⁹ BGer 2C_828/2011 (n. 37), D 5.2.2, 5.3.

⁶⁰ Cf. *Epiney* (n. 44), Rz. 31 ff.

⁶¹ Cf. the proposed new Art. 197 no 9, <www.durchsetzungsinitiative.ch>.

⁶² One way to interpret such norms (if adopted) would be to take them as an implied order to terminate the respective contractual obligation, concretely stemming from ECHR, cf. on this matter e.g. *Jörg Künzli*, Demokratische Partizipationsrechte bei neuen Formen der Begründung und bei der Auflösung völkerrechtlicher Verpflichtungen, ZSR 2009, 47, 67 ff. One may argue differently, too, e.g. by restrictive interpretations of such norms. In favour of such an approach e.g. *Epiney* (n. 44), Rz. 33 ff.

d) *The legitimacy of conditions*

aa) *The central question*

This decision of the Swiss Federal Court furnishes a very interesting example not only for the old and highly topical problem of the relationship between democracy and the rule of law, that is to maintain respect for democratic decisions while attempting to preserve basic positions of rights, not the least (though not only) for minorities who may suffer gravely from unrestrained majoritarian rule. The decision provides further material as well to explore the doctrinal and theoretical space existing to find solutions for the difficulties, legal and political, in order to position a legal system in contemporary multilevel orders of law.

The reason for that is that the evolution of the case law of the Swiss Federal Court illustrates quite clearly a central question to be asked if one reflects about the problems posed by conditioned hierarchies of law. The question is: Which conditions – if any – are legitimate in an international, multilevel order of law?

This question arises for all of the examples discussed. Did the German Federal Constitutional Court choose legitimate conditions? Are they too narrowly framed or to the contrary much too widely construed?

What about the principles outlined by the ECJ in respect to the relation of public international law and EU law or the ECtHR's case law on the relation of the ECHR and these legal spheres?

Or is the whole idea of such conditioned hierarchies flawed from its inception? A reason to think so is the very idea of an international or supranational legal order that seems to exclude the possibility that a national, supranational or international court reserves the right to not apply norms of a higher legal order. Does this not sow the seeds of destruction of such orders not the least because if one court does it, any other court (or other institution) may follow suit?

Is the Federal German Constitutional Court really entitled to question the supremacy of EU law and maintain the right to not apply it in case the ECJ does not guarantee fundamental rights and other principles of constitutional law as the Federal German Constitutional Court understands them? Or does this mean to lay the axe on the very idea of EU law and European legal integration? Can a supranational order function if potentially all member states maintain this right? Was it not the point of effective legal integration, of the *effet utile* of EU law that begot the principle of the supremacy of EU law in the first place to avoid differing definitions of what EU law means in the different Member States?

Does the ECJ act wisely by following the Federal German Constitutional Court down this path? Did it not weaken the authority of international law? Did the ECtHR give the EU – on the other hand – too much leeway in perhaps significantly departing from the regime of rights laid down in the ECHR?

Are conditioned hierarchies of law not a particularly dangerous idea in the area of human rights? To give an example: In a recent decision of the ECJ European anti-discrimination law was instrumental in setting limits to the attempt of the Hungarian government to exchange a significant part of its judiciary, prosecutors and notaries by new members more loyal – one may assume – to the current regime pursuing a policy contrary to basic democratic standards and the constitu-

tional rule of law.⁶³ What if a (future) Hungarian Constitutional Court did not accept this decision and set it aside because it was not in accordance with the constitutional identity of Hungary? Can EU law continue to exist on this basis?

Consider a stance that conditioned the supremacy of the ECHR on the reconcilability of the ECtHR's decisions with the interests of the dictatorial regime X in country Y? What argument does one have – if one accepts conditioned hierarchies in principle – against such a stance? If such a position is allowed for the Federal German Constitutional Court, the ECJ or the ECtHR, why not for other actors, too, establishing a highroad to universalised legal cherry-picking?

The problem of the legitimacy of the conditions for the application of law of a different legal order in a multilevel system of law or the residual relevance of often (formally) lower order law is not just a problem of the theory of law. This problem has concrete legal significance. This is so, because a teleological or purposive interpretation of any given norm or ensemble of normative provisions relies on the legitimacy of such a condition. Such teleological interpretation is often decisive.

The Federal German Constitutional Courts justifies its constitutional stance by the very telos of the constitutional order erected by the Basic Law, embodied in such norms as Art. 79 III Basic Law that make human rights, democracy, the rule of law and the principles of the social state permanently indispensable conditions of any legal order in Germany.⁶⁴ On the other hand, the openness towards international and European law (*“Völker- und Europarechtsfreundlichkeit”*) of the Basic Law is underlined by the court, again derived from teleological interpretations of the Basic Law and its aims to firmly position the German constitution in the international order of law.⁶⁵ These aims are to be reconciled by the balance struck by the Court in its recapitulated jurisprudence.

The ECJ sees the EU bound to the legal principles of fundamental rights and derives from this – in the end – the legal justification to interpret EU law in such a way as to allow for the non-application of otherwise binding public international law.⁶⁶

The ECtHR accepts the autonomy of EU law unless it “manifestly” violates ECHR norms to reconcile the fact that the EU as of now has not (yet) acceded to the ECHR-regime and continues to form an autonomous legal order with the obligations of states under the ECHR it aims to protect.⁶⁷

The Swiss Federal Court interprets the obligations of the ECHR in a way that excludes the possibility of even later constitutional law that derogates from these obligations. Like the German Federal Constitutional Court, teleological arguments are evidently of great importance for the arguments based on the position of the Swiss Federal Constitution in the international legal order with, at least in a recent high-profile decision on the matter, consequences that relativize, however, national constitutional law of a certain kind much more significantly than the Federal German Constitutional Court is prepared to accept.⁶⁸

⁶³ ECJ, 06.11.2012, Case C-286/12, *Commission/Hungary*, not yet published in the ECR.

⁶⁴ BVerfG, 2 BvE 2/08 (n. 24), para. 217.

⁶⁵ *Ibid.*, para. 219 ff.

⁶⁶ ECJ, C-420/05 and C-415/05, *Kadi and Al Barakaat* (n. 28), para. 303.

⁶⁷ ECtHR, 45036/98, *Bosphorus v. Ireland* (n. 31), para. 154.

⁶⁸ See above.

bb) Varieties of conditions

The answer to the question of the permissibility of such conditions may depend on the kind of conditions and their rationale. A starting point for reflection on this matter is the observation that such conditions are meant to be a constructive contribution to the stability of the respective multilevel order, not its death-bell.⁶⁹ To be sure, any state is, within the given legal framework and its perhaps quite substantial constraints, free to terminate existing legal obligations under supra- and international law.⁷⁰ But this is not the constellation at hand. The jurisprudence of the Federal German Constitutional Court is not opening a door to leave the EU; it is framing the legal membership within the EU in a particular manner. The ECJ does not question the order of public international law, especially established by the UN Charter. It qualifies – at well-defined points – its legal effects within the legal order of the EU. Nor does the ECtHR aim at undermining international law. The older case law of the Swiss Federal Court does not question the importance of international law or more concretely the supremacy of mandatory public international law. It is about certain caveats that may be introduced to be exempted from international obligations in particular cases.

Another aspect seems clear, too. The legitimacy of such conditions has to be judged on the ground of the respective legal regime with its particular rules. The permissibility of such conditions does not necessarily obey the same rules in the relationship between a member state of the EU and the EU law as in the relationship between a state and public international (human rights) law. To take an example: It could be of importance for these considerations, whether the acts of an entity possessing public authority are subject of judicial review or not.⁷¹

The constellations discussed differ in this sense in many respects but there is a common red thread in the argumentation. In the end, all courts considered motivate their jurisprudence with the protection of human rights, either solely or together with other legal principles. The conclusions drawn from this stance differ. The Federal German Constitutional Court derives from this standpoint the consequence that national constitutional law may supersede EU law under certain conditions. The ECJ reserves the right to consider EU law superior to public international law. The ECtHR maintains a residual control of action of state parties to the ECHR even if their acts are determined by law stemming from international – including supranational – organisations they are members of. Finally, the Swiss Federal Court sees a prerogative of international public law over national law, including constitutional law. But all of this is intended to serve the protection of human rights and related – perhaps even derived – legal positions like democracy and the rule of law. If this is so – are these normative principles legitimate sources for formulating conditions for the application of law in multilevel orders of law, perhaps the only ones? Are others, on the contrary illegitimate?

⁶⁹ Cf. e.g. BVerfG, 2 BvE 2/08 (n. 24), para. 340, which refers explicitly to the need to use “constructively” legal caveats.

⁷⁰ Cf. e.g. Art. 50 TEU, Art. 7 Statute of the Council of Europe.

⁷¹ As the UN is e.g. not a possible party in cases before the court, Art. 92 UN-Charter, Art. 34 para. 1. Statute of the International Court of Justice, whereas the EU is before the CJEU, Art. 263 TFEU. The ICJ can give advisory opinion, Art. 96 UN-Charter, Art. 65 Statute of the International Court of Justice.

This question can only be answered if one considers – from a wider perspective – the implications of conditioned hierarchies of law and the reasons why they sprung into existence in recent years.

B. Parameters of conditioned hierarchies of law

I. Three basic approaches: dissolution, acceptance, compromise

There are basically three fundamental approaches to the problems created by multilevel orders of law, if harmonisation through interpretation is not possible: The first is to strive for the reestablishment of a clear hierarchy that creates a unity of law. From this point of view, conditioned hierarchies have to be substituted by clear rules of priority.

The second is, quite to the contrary, to accept, perhaps even emphatically embrace, plural legal orders without looking for any unifying principle because the time of such monolithic legal orders has gone by.

The third is to look for a compromise, for rules that are clear enough to provide for legal certainty but sufficiently flexible too, to accommodate the particular problems created by multilevel orders of law.⁷²

II. Theoretical underpinnings

The ECJ's jurisprudence on the unconditional supremacy of EU law is a practical example for the first approach based on considerations on the *effet utile* of EU law.

The second approach may find inspiration in current theories of legal pluralism. These theories come in different shapes. A shared base line assumption is that a plurality of legal orders that exist along each other is a common feature of contemporary human societies, and perhaps even a universal feature of human legal culture. A background of most of these theories is some kind of social constructivism of norms that assumes the contingent nature of normative content. Nevertheless, the existence of such co-existing orders may have, it is argued, an emancipatory potential by challenging hegemonic juridical discourses.

Given this stance, it may seem evident that no overarching principle of legitimacy exists that could justify the choice of one kind of condition over another. In fact, however, many of these theories imply or state explicitly that legal orders should embody principles of human rights. In the light of such principles existing legal orders are evaluated.⁷³

There are central problems implied in the pluralist picture: Equality before the law, the mandatory force of law, the inclusion of all interests in the formation of

⁷² The question of the hierarchy of law has an institutional side as well: the relationship of the concretising courts (n. 3).

⁷³ Cf. e.g. *Sousa Santos*, Toward a new legal common sense: law, globalization, and emancipation, 2002; on the theoretical landscape in general *Peter Gailhofer*, doctoral thesis on legal pluralism (forthcoming).

law or the political allocation of responsibility for legal actions are put into danger and a rule of the strongest may substitute for the rule of law.⁷⁴ This critique may be regarded as overlooking the support found in many theories of legal pluralism for an order of human rights. This support, however, is not easily reconcilable with the social constructivist and relativistic position underlying these theories. If this stance is taken seriously, the mentioned criticism makes an important point.

Another stance is to assume a “graduated authority” of different legal spheres. This graduated authority is based on moral principles that decide which sphere legitimately prevails in case of conflict. The “graduated authority” of legal spheres substitutes the classical concept of rules of conflict, deciding without such material considerations about the solutions of cases of conflicting laws.⁷⁵

In a related manner, the relation of spheres of law may be regarded as a matter of judicial cooperation and reconciliation, of mutual respect within different legal spheres, with the practical consequence of quasi-institutionalised judicial dialogue that enables the central judicial institutions to take notice of the different approaches.⁷⁶

III. Substantial problems

1. Politics and power

The problems posed by multilevel orders of law cannot be solved without due attention to the underlying questions of politics and power. The question of existing or non-existing legal hierarchies is not just a juridical technicality, as already indicated above. It relates to the power of institutions like courts and – given the development of international law – of nations in relation to other, supranational or international bodies and the other states forming these bodies.

The Federal German Constitutional Court, the ECJ, ECtHR or the Swiss Federal Court, therefore, did not just engage in a textbook exercise on how different legal spheres are related to each other. The questions are, rather, such of intrinsic and paramount importance: What is the ultimate legal standard for central legal positions in a legal community, not the least those that concern fundamental rights? How are the powers of public authority legally circumscribed and who is the ultimate arbiter for disputes over central questions of the law?

⁷⁴ *Anne Peters*, Rechtsordnung und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse, ZöR 2010, 53; *Martti Koskenniemi*, Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought, <http://www.helsinki.fi/eci/Publications/Talks_Papers_MK.htm>; *Klaus Günther*, Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem, in: FS Habermas, 2001, 539 ff.; *Matthias Mahlmann*, Rechtsphilosophie und Rechtstheorie, 2. Aufl., 2012, 221 ff.

⁷⁵ *Mattias Kumm*, Democratic constitutionalism encounters international law: terms of engagement, in: Choudry (ed.), The Migration of Constitutional Ideas, 2006, 292.

⁷⁶ *Peters* (n. 72), 3, 53 ff.

2. *Integration and control*

Another important question concerns the connection of legal integration in supranational and international legal orders with mechanisms of control aiming to insure that this integration abides by central legal standards.

In many ways, modern states and the citizens they organise in a political unity have embarked in the *post*-World War II period on an adventure that is something new in legal history, namely to create orders where their sovereignty is continually being limited and where the perspective of becoming a dependent part of encompassing new transnational institutionalised legal orders – whether state-like or not – is real.

This presupposes first of all institutions that can reliably shoulder the task of securing a legitimate order beyond the nation state in the long run. This kind of institution building and its preservation is a complex and highly arduous task, as the European integration through the EU and the Council of Europe vividly illustrates. It presupposes political trust and good will to give the created institutions a chance to prove that they are able to fulfil this task.

There is, however, no guarantee that the created institutions are indeed reaching the aims they have been created for. What works well today may deteriorate and fail tomorrow. It does not seem farfetched to say that an important part of the rationale of conditioned hierarchies of law is to react to this general problem of institution building within the particular framework of multilevel orders of law by institutionalising mechanisms of control. These instruments may be motivated by the intention to maintain spheres of influence and power. They may, however, as well be regarded as important tools for a state or other body that is prepared to relinquish power to another body in order to assure that the power transferred is actually properly being used as intended.

The message the Federal German Constitutional Court formulated in its jurisprudence that set in a certain sense the tone for these debates is that the EU and its organs, especially the ECJ, are entrusted to create an integrated order of EU law but that it reserves a residual competence to control whether basic standards of law are met. Similar considerations hold for the ECJ and the ECtHR. The ECJ followed this path and signalled that acts of public international law can be questioned and that it thus continues to check whether UN organs abide by the rules that it regards as fundamental. Equally, the ECtHR underlined its competence to assure that the ECJ shows proper respect for the ECHR.

The Swiss Federal Court dealt in its most recent decision with a slightly different constellation. Here the question is how to secure that national law follows standards of international human rights law. The question is not whether a supranational or international order strayed away from the path of due consideration of fundamental norms like human rights enshrined in a national constitution, but on the contrary how to keep a national legal system in line with international human rights law. The background assumption seems to be, that the international human rights law as it stands today imposes reasonable demands on states. The Federal Court has, however, not said anything about different scenarios. Consequently,

there is at least a possibility that any other state of affairs would find resistance, perhaps along the lines of other courts that have been discussed.⁷⁷

IV. Solutions

If this analysis is on the right track, the question is: Are these reasons for the creation of conditioned hierarchies of law good reasons or not?

If conditioned hierarchies are created for no other purpose than to preserve the power of a certain court the answer is easy to find: It is evidently not the case. Power and influence of an institution are not an end in itself, they are a means to serve other purposes, most importantly for courts to protect fundamental rights and other constitutive principles and institutions of a democratic rule of law.

The same holds if such conditions are tailored to protect the power of a state or other entities entrusted with public authority contrary to an integration program these states agreed to join – be it one with a wide (if not limitless) supranational mandate or be it one limited in its core to the international protection of human rights.

If the point is, however, to control a substantial normative orientation of a legal order, such mechanism may serve an important aim. Multilevel orders of law are political instruments of human beings to deal with their affairs at a certain stage of their social and political development efficiently and based on certain foundational normative principles. They are open to many political influences. The grounds of international politics are often shifting sands. Judicial institutions are no exception to this. There is always the possibility of even fundamental regressions by these or other institutions.

The caveats of courts may thus be an element of vertical intra-judicial checks and balances beyond traditional conceptions of such mechanisms but serving their central aim: To make the abuse of power more difficult and to prevent it by signalling where some boundary lines must be drawn. The example of the practice of UN terror-lists can serve as a reminder that there may sometimes be a need for such action. There is a temporal element as well: Such conditioned hierarchies serve a transitional function in a slow process of establishing, perhaps constitutionalizing a new legal order transcending more and more profoundly national statehood and the traditional legal conceptions bound to it. They may be catalysts of change, as arguably the stance of the Federal German Constitutional Court has been for the establishment of a system of fundamental rights in the framework of the EU by creating a strong incentive for the ECJ to meaningfully protect fundamental rights in the EU by judicial means.⁷⁸

Given these effects, conditions bound to the protection of human rights, democracy and the rule of law may indeed serve a constructive role in multilevel orders of law, conditions recreating prerogatives of states irreconcilable with the obligations at hand, however, do not.

⁷⁷ Cf. *Biaggini* (n. 43), 333, comments on this matter; on the Schubert-practice cf. n. 51.

⁷⁸ Cf. on this well-known story e.g. *Matthias Mahlmann*, 1789 renewed? Prospects of the Protection of Human Rights in Europe, *CJICL* 2004, 903 ff.; as to the wider impact, e.g. *Tzankopoulos* (n. 16), 185 ff.

The resulting picture is untidier than one may hope for. Should clearer, more straightforward arrangements not be possible for the time we live in? Perhaps they should. Given the arduous path to a meaningful international order of law such multi-layered arrangements may nevertheless serve an important function for generating acceptance and trust that in the long run can prove to be an important tool to render them superfluous.

Given these considerations, the question as to which conditions can be regarded as legitimate can be answered as follows: The only legitimate conditions are those that aim at protect fundamental rights and related or – more precisely – derivative principles thereof, such as the rule of law and democracy. Others conditions, e.g. deference to national preferences unrelated or even at odds with such principles are not. In addition, even legitimate conditions may have an expiration date. At some stage of the development of a legal system, their functional legitimacy can cease to exist if this system is firmly grounded and has the appropriate structure to ensure the relevance of the normative principles at stake.

Finally the rationale of such conditions appears to be central. The Swiss Federal Court – in this sense – delivered an encouraging example of a legal order that is prepared to take the protection of human rights as important enough to even circumscribe the leeway for constitutional amendments which aim at curtailing the protection afforded by those rights, whatever – if any – residual caveats it may think to exist. It is therefore an important reminder of what the establishment of multilevel orders of law, conditioned or not, is in the last instance about: the cosmopolitan, unconditional protection of fundamental rights.

3. Teil / 3^{ème} Partie:

Schweizerische Praxis im Europarecht und Bilaterale Abkommen

La pratique suisse en matière de droit européen et les Accords bilatéraux