YUVAL SHANY, Regulating Jurisdictional Relations Between National and International Courts (International Courts and Tribunal Series), xxxvi, 216*

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Reviewed by

Filippo Fontanelli

PhD Candidate at the Sant’Anna School of Advanced Studies, Pisa.

A.

Back in February 2007, Marti Koskenniemi, chairman of the International Law Commission Study Group on the matter “Fragmentation of international law: difficulties arising from diversification and expansion of international law,” convened an international conference in Helsinki, with the purpose of presenting and discussing the outcome of the 5-year work carried out by the Study Group, as summarised in the report containing the 42 conclusions reached by the group.¹

During the preliminary speech to said conference, Prof. Koskenniemi was clear in specifying that the Herculean effort made by the members of the ILC did only cover the substantive (lege: normative) side of the problem, that is the principles governing the conflict of rules of different international legal orders. He expressly admitted that another problem - maybe more urgent – simply had not been tackled, that of regulating the phenomenon of the international law’s institutional fragmentation (better: proliferation). In other words, we have a UN-promoted document gathering the principles that must be referred to when a conflict among norms of different legal regimes regulating the same matter occurs (normative overlap), but we haven’t got anything similar when it comes to decide how to regulate the relations between two or more judicial bodies that, for instance, happen to decide upon the same case (jurisdictional overlap).

¹ In the following, mute footnotes will be considered to refer to this book.
² See the report http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf
Prof. Shany admirably and timely filled this gap publishing in 2003 his landmark book “The competing jurisdictions of international courts and tribunals”,² where he provides an encyclopedic description of the current status of ‘competition’ among international judicial bodies (giving rise to overlaps, multiple proceedings, inconsistencies, forum shopping practices) and puts forward some suggestions on how to restrain this chaotic trend making use of some procedural principles that are traditionally rooted in the field of private international law, and are regulated in detail within the national legal orders (lis alibi pendens, ne bis in idem, estoppel, res judicata, electa una via).³ A similar approach proved useful also for studying another sensitive field, that of the relationships between national and international courts. This matter is the core subject of Shany’s 2007 “Regulating Jurisdictional Relations Between National and International Courts”, a book that develops and integrates the findings of the 2003 volume, and enlarges the analysis to the ‘vertical’ relations between domestic and international courts.

B.

The set of problems arising in the national-international narrative, indeed, can be similar to the one analysed in the competition among international courts, and the enlargement and multiplication of international jurisdictions cannot but give rise to overlaps with the competence of domestic courts, which is general and comprehensive by definition.⁴

Such an attempt to take avail of a set of instruments borrowed from international law studies has great potential and proves successful but, as obvious, it cannot fail to take into consideration some ‘classic’ debates that are deeply rooted in the areas of constitutional law and jurisprudence.⁵ The first one is the monistic / dualistic dilemma, which Shany accepts to face in a pragmatic way: were domestic orders to be deemed isolated from the international system, no regulation and coordination would be needed at all. In fact, the multilevel order somehow develops similarly to the proliferating international law system,⁶ and isolation between national and supranational judiciaries would not be very different from the clinical isolation between the so-called self-contained-regimes and the principles of public international law.⁷ The notion of self-contained-regimes has proven to be a wearing but

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⁴ See the examples at pp 9-13.
⁵ See pp 2-15.
⁶ See p 20: “traditional distinctions between the national and the international that may provide doctrinal clarity yet are often blind to an increasingly ambiguous reality.”
hardly useful conceptual cul de sac, just leading to nowhere; likewise, perfectly dualistic views are to be discarded, still bearing in mind that national judges will often have the temptation to resort to them, whenever they seek to reassess the untouchable status of ‘their’ law.8

When adopting a monistic (better: pluralistic) view of the relationship between national and supranational courts a merely hierarchical criterion is often invoked, but even if it often facilitates eluding the lack of regulating principles it cannot work itself as a full-fledged harmonisation device: supremacy in itself implies exclusion rather than coordinated coexistence of different judiciary actors. Both doctrines9 of hierarchy and dualism are further and extensively discussed, under the national and the international perspective, in order for their influence to be recorded in the current status of interrelation between national and international judiciaries; however, they are unable to provide a conceptual framework for the purpose of Shany’s studies10 and they cannot satisfy the need for coordination since, as previously said, they are based on a canon of the superior jurisdiction’s clear-cut preeminence, and are therefore neutral towards – for instance – double proceedings and inconsistency phenomena.

Scelle’s dédoublement fonctionnel11 theory, although it cannot serve as a comprehensive interpretative canon for the role of national courts12 proves useful in overtaking the rigid vertical distinction between the levels of the multilayered legal order: national courts can be treated as ‘horizontal’ peers vis-à-vis international courts, since they occur to apply international law; to hand down decisions that are binding upon international law subjects; to comprehend, retain and take avail of, the international tribunals’ case law; and also just because sometimes they perceive themselves as supreme bodies in a certain system, and they do accept to deal with other judicial actors at equalitarian terms only. It goes without saying that in un-regulated fields as the one under consideration, a good deal of spontaneous cooperation is required (since few real obligations can be invoked), hence also dualism-flavoured views must be carefully considered, regardless of their actual legal justification: whenever a national court does not feel bound report to any superior body, coordination has to flow from inborn or gradually accepted trends of deference, rather than from a top-down set of directions that lack either legal basis or a spread supporting consensus.

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8 See p 80-81: “dualism denies the existence of normative contact points between […] jurisdictions. […] According to dualist thinking, […] conflicting decisions by national and international courts do not present doctrinal problems.”
9 See p 93.
10 See p 93.
12 Since it cannot cover the activity of hybrid courts such as the Special Court for Sierra Leone or the Bosnia War Crimes Tribunal, nor does it take into account the physiologic sympathy for national interest felt by domestic courts, even when they act as international law adjudicators.
Other doctrines are more likely to reflect the actual status of the interplay among courts in the multilevel system, such as the American School of Informal Socialization\(^\text{13}\) or the pluralist approach advocated by scholars as Teubner and Lescano, or Maduro (in the EC constitutional order).\(^\text{14}\) These models are efficient in interpreting the legal reality, but they fall short of providing instructions or to forge steady principles, as Shany concedes. The coherence of the system, rather than in an evanescent and, at best, growing institutional coherence among the judges is likely to be derived from the unity of the normative building they are appointed to manage\(^\text{15}\).

While national and international courts do not function as a unitary judicial system, they sometimes apply a common body of law - specifically, international law. The[se] norms do possess, arguably, coherence and organization-generating features. [... J]urisdiction-regulating rules represent part of the context for the application of international law, ie, background principles, which condition resort to international law norms.\(^\text{16}\)

In other words, whilst for the time being an efficient set of regulations is still missing, the very nature of the global legal order allows scholars and lawyers (and judges) to study and pursue a harmonised model, at least to provide support to what former ICJ president George Abi Saab calls a self-fulfilling prophecy of unity of the international law system.\(^\text{17}\)

C.

The aim of this book, quite differently from the previous one, is not much to provide an exhaustive overview of the infinite interactions between national and international courts, but rather to abstract a number of typical situations that normally occur (as obvious, the larger part is devoted to the study of international courts’ case law) in the interplay between


\(^\text{15}\) See for instance the very initial lines of the ILC report’s first conclusion, see supra n 1: “(1) International law as a legal system. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.”

\(^\text{16}\) See p 104.

\(^\text{17}\) See ‘Fragmentation or Unification: Some Concluding Remarks’, (1999) 31 New York University Journal of International Law & Politics, 919: “The consciousness of the need for a common framework, and the requirements of such a framework, together with the adoption of judicial policies supportive of them, would serve as a self-fulfilling prophecy. Thus, from the exploded constellation of proliferating judicial organs, each endeavoring to fulfill all the components of the judicial function as best as it can and faute de mieux, a tendency would form towards the coalescence of judicial activity in a manner conducive to the emergence and hardening of an international judicial system.”
domestic and supranational judicial bodies, in order to provide the theoretical foundations under which such interplay can be explained and to propose a juridical framework to refer to, a kind of toolkit for keen lawyers in search of a solution.

The book provides an illustration of the provisions that already exist in the treaties currently into force, and singles out some procedural scenarios that have been variously regulated (*lex lata*), and that could serve as a model for prospective regulatory schemes to be brought about by the regulators in the future (*lex ferenda*). It is remarkable how Shany, far from “stating the obvious”, as he modestly puts it, lucidly explores some general principles of inter-level harmonisation and specifies the wideness of their application. In fact, the exploration of this “charted” territory has a double usefulness: on the one hand it makes the reader familiarise with some well rooted principles whose rationale lies in the willingness to regulate the national-international relationship (the exhaustion of local remedies, the EC preliminary ruling, the complementarity instance emerging from the Statute of the ICC, the *electa una via* principle, the recognition of international arbitral awards), whereas on the other hand it makes it clear how extended the “uncharted territory” can be, that is how significant the degree of de-regulation (better: un-regulation) of the interplay is, beyond the occasional occurrence of said principles.\(^\text{18}\)

Accordingly, a description follows of the most apparent cases of overlap between national and international proceedings: the consular notification saga (ICJ and US Supreme Court), the Israel separation wall cases (ICJ and Israele Supreme Court), the ‘zeroing’ cases (as dealt with by the WTO DSM and the US Court of International Trade), the multifora Softwood Lumber proceedings before the WTO para-judicial bodies, NAFTA panels and the Court of International Trade; ITLOS cases dealing with the release of detained vessels and, most notably, the ICSID litigations styled *Vivendi* and *SGS*, representing a prominent example of the difficulties which a blurred jurisdictional allocation results in (in general, arbitral clauses provided for domestic court jurisdiction, however, they were disregarded by the foreign investors that prompted the establishment of an ICSID tribunal, regardless of whether a litigation had been already triggered on the same facts by the host country, before a national court).

The approach of the courts involved in ‘hybrid’ cases can be summed up into two different trends: “disintegration”-friendly courts tend to separate the case in order to preserve the purity of the proceedings (thus making it possible to respect the limit of their given jurisdiction, and to avail themselves of a single set of applicable law), notwithstanding that this could result in the fragmentation of a single case into several cases, each related with a single legal

\(^{18}\) A clear consequence of the difficulty to draw a clear line of demarcation between the unregulated and the regulated area is represented by the debate on the application of the exhaustion of local remedies in the framework of the WTO Dispute Settlement Mechanism. See for instance Kevin C. Kennedy, ‘Parallel Proceedings at the WTO and Under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform?’, (2007) 39 Geo. Wash. Int’l L. Rev., 47.
On the contrary, sometimes the courts prefer to adopt an “integrationist” attitude, and absorb under their own jurisdiction all the elements of a case, preferring pragmatism and judicial economy rather than overly accurate jurisdictional demarcation.²⁰

Significantly, as Shany notes, this review of the international judges’ uneven trend of behavior towards national courts is profoundly affected by the lack of a – even minimal – regulation, and often amounts to little more than a mere enumeration of the occasional discretionary choices made by the single tribunals, on the basis of opportunity considerations. The only elements that could vest a prescriptive nature (ie, that could help us foreseeing the outcome of similar situations in the future) are a certain reliance on path-dependency (choices are more likely to be repeated than overruled) and some degree of connection between the deferential approach of the tribunals and the legal cultures its judges are rooted in.

This last aspect is fundamental to introduce the general terms of the harmonizing regulation under consideration: there are indeed some principles to which the decision makers variously and occasionally refer. Although they are originating from different legal orders and often do not share a common degree of legal bindingness, they are worth being isolated and construed into a (potential) general scheme, an overall model of not-yet-prescriptive nature, where the available dynamics of inter-court relations are fashioned in a consistent and homogeneous structure.

D.

The second part of the book aims at testing the conditions subject to which regulating principles (ne bis in idem, res judicata etc., see supra) could apply, and at describing their functioning in practice. As mentioned, these principles are drawn from infra-system experiences, or at most from horizontal interplay situations, whilst the purpose is to apply them to vertical national-supranational relations. Traditionally, two or more cases fall within the reach of such regulating devices when they are - roughly speaking - similar, and usually they are supposed to pass the “same (legal and factual) issues” and the “same parties” tests. Quite correctly Shany introduces a sub-test that cannot apply at domestic level, concerning the identity of applicable law in the proceedings at issue: two courts could have to deal with the same facts and still have to move within different jurisdictions and apply different sets of norms, possibly leading to a different evaluation and adjudication of the litigated values; in this case they do not necessarily need the same degree of coordination as if they were applying the same norms.

¹⁹ See the careful illustration of the Mox Plant and the Iron Rhine cases, on which see also N. Lavranos, ‘The MOX Plant and Ijzeren Rijn Disputes: Which Court is the Supreme Arbiter?’, (2006) 19 Leiden Journal Of International Law, 223.

²⁰ This approach could actually result in a stay from dealing with the case, in order to preserve the integrity of a proceeding pending elsewhere.
In this sense we feel like further attention should be paid to another conceptual distinction that was fundamental in the resolution of the debate surrounding the possibility of “linking” the WTO DSM with non-WTO issues such as environmental protection and human rights law.\(^\text{21}\)

In particular, we refer to the distinction between applicable law and jurisdiction of a certain tribunal: this distinction is known and correctly used by Shany, however, it could deserve an autonomous treatment. Whilst a court ought to restrain from accepting disputes arising outside its competence (jurisdiction), it could also be necessary, when a court decides upon a case that is properly rooted on norms of the same legal system to which such court belongs, to apply some ‘external’ norms, drawn from another legal (sub)system. To put it differently, once a court has duly accepted its jurisdiction on a case, it sometimes cannot help looking on norms from other legal systems in order to reach the most appropriate legal interpretation of the facts that triggered the litigation. This double step complicates the study of the integration-disintegration trends, as they can affect both the initial choice regarding the court’s jurisdiction (is the court ready to accept a hybrid case without chopping it into sub-cases?) and the subsequent choice of the applicable law (is the court ready - if it is the case - to decide also applying a set of provisions originating in another legal order?). No need to say, at each step judges will have to act at their own risk: the lack of a regulating framework makes it easier for anyone to censure the judges’ behaviour, and to invoke the phantom of judicial activism.

After a description of the legal instruments (contractual or treaty clauses, general principles) aimed at regulating the choice of the forum for a dispute (and after recording that - in principle - forum shopping is an admissible practice), Shany passes to the analysis of the rules regulating the coordination (or limitation) of multiple parallel proceedings (\textit{res judicata, lis pendens, electa una via}). It comes clear that neither of these categories of principles is plainly defined at national-international level, and that as of today “conceptual confusion”\(^\text{22}\) seems to govern their possible application.

\textbf{E.}

In light of the foregoing, other principles can fill the gap of regulations, yet being vested with spontaneous nature - at least to some degree. A large analysis is dedicated to the principle of comity,\(^\text{23}\) by which courts may be willing to \textit{discretionally} grant a wider acknowledgment and


\(^{22}\) See p 164.

higher credit to the case law of other courts, or to their pending or perspective activity. Despite its rhapsodic and politic-prone character, the principle of comity\textsuperscript{24} is still the only device that judges can envisage and use to enhance cooperation with other courts, whenever they deem it appropriate to do so, and irrespective of the absence of any obligations in that sense. Comity has something to do with institutional loyalty and good faith, also on its face,\textsuperscript{25} and there is nothing wrong in entrusting the courts with the possibility of promoting a more efficient administration of justice by way of some courteous practices towards other courts, at least as long as such behaviour does not interfere with the principle of legal certainty.\textsuperscript{26} Likewise, Shany juxtaposes the doctrine of the \textit{abus de droit} to comity considerations: the larger the similarity between two parallel proceedings the higher will be the willingness of the second (or less appropriate) court seized not to harm the other court’s activity (comity), in light of the presumption of unreasonableness of the choice of a party to duplicate the case (\textit{abus de droit}).

Shany is therefore absolutely right in stressing the importance of comity-like choices as one of the few efficient instruments to govern the unregulated realm of inter-court dialogue. The mere fact that comity is not a compulsory alternative is not really much of a concern, as long as we concede that customary rules, by definition, are the outcome of a consistent pattern of non-bound choices, and that legal bindingness is not yet attributable to almost any of the coordinating principles discussed, let alone in the inter-layer dynamics.

This book paves the way for a new branch of studies of law devoted to the relationship between courts in multilevel systems, many subjects of which are still relatively underestimated and deserve a new and more systematic analysis. We just note, for instance, that even within the "charted" territory of the relation between the ECJ or the ECtHR and national courts, new issues are continuously arising. In a sense, the lack of a regulating framework is a preliminary problem, but many others emerge as to the application and interpretation of the few existing rules, thus the main subject of this book is fated to be an ever-debated one, as it goes hand in hand with the developments of the case law of the dozens of courts and tribunals that treat inter-jurisdiction cases on a daily basis.


\textsuperscript{24} See A.M. Brown, ‘Comity in the Federal Courts’, (1915) 28 Harvard Law Review, 589: “it is perhaps true that no more definite principle than caprice can be said, on the whole, to govern the attitude of the courts of one nation towards those of another.”

\textsuperscript{25} The concept of "\textit{abus de droit}" as well is strictly linked with the principle of good faith.

\textsuperscript{26} The Italian Constitutional Court, for instance, chose to deal with a case of parallel proceedings (the other was pending before the ECJ in a preliminary ruling procedure under Art. 234 of the European Community Treaty) staying the proceedings pending before it, thus waiting for the ECJ’s judgment before restoring the constitutional trial. See order of the Italian Constitutional Court no. 165 of 2004, available at www.cortecostituzionale.it, and the judgment of the ECJ 387/02 Berlusconi and others [2005] ECR I-3565. This “double preliminarity”, in other words, represents a case where a court autonomously chose a deferential approach towards another court (the stay of the proceedings to wait for the ECJ’s ruling), still without being bound to do so. This possibility is described at pp 179-181, where other cases are mentioned as comity examples.
Moreover, the comparative study of the deferential elements in courts' case law can be hugely enriched with cases and judgments of domestic tribunals: once that we accept not to overestimate the vertical distinction of the multi-level order we could be able to appreciate the migration of bottom-up rules to the top-down dynamics. In the normative field this happened for instance with the ‘internationalization’ of the Solange principle (under which a court is not supposed to review a norm of another legal order, “as long as” this latter features a satisfactory level of protection of rights), which was coined by the German Constitutional Court to govern its relation with the European Court of Justice, before being borrowed by the European Court of Human Rights, and reflected in certain provisions of the Constitutional Treaty and the Lisbon Reform Treaty that appear to codify a supra-national deference for national constitutional traditions.

One example in the judicial field can be found in the call for consistent interpretation made by the Italian Constitutional Court, that asked national courts to interpret domestic law in keeping with international law as interpreted by the relevant judicial body. This obligation is a veritable step forward towards institutional comity (rather than merely normative integrationism, like the Charming Betsy doctrine), as it is clearly intended to preserve and foster not only the unity of the global legal framework, but also the coherence of the legal interpretation offered by different judicial players: in other words the unity of the interpretation is pursued not only to avoid conflict of norms, but also as a value in itself.

The plethora of issues arising from the discussion of the themes tackled in this book cannot but further demonstrate its value: we are likely to face and to study similar matters repeatedly, and this book surely provides us with the right theoretical framework and the suitable set of practical information and precedents which will definitely be of use to us in finding our way in these “uncharted” lands.

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30 See judgments no. 348 and 349/2007, available at www.cortecostituzionale.it