

Heiko Sauer, ***Jurisdiktionskonflikte in Mehrebenensystemen: Die Entwicklung eines Modells zur Lösung von Konflikten zwischen Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen.***

Berlin, Heidelberg, New York: Springer, 2007. Pp. 605. \$129. ISBN: 9783540772279.

The issue of competing jurisdictions between courts and tribunals belonging to different legal orders has gained increasing attention in academic research and debate. In recent times a number of excellent books and articles (by Shany, Romano, Dupuy, to name a few) have been published and interesting conferences have been organized (e.g. by the Project on International Courts and Tribunals on 30 November and 1 December 2007 in The Hague).

Due to the complex and multi-layered nature of the issues involved, the topic can

be and has been approached from various angles: national constitutional law, European law, and public (and even sometimes private) international law. Essentially, these studies aim at finding workable solutions for dealing with overlapping jurisdictions which entail the potential for conflicting judgments regarding the same issues of law. Conflicting judgments are considered to enhance the risk of fragmentation of the international legal order, in particular since there is no formal hierarchy between the increasing number of courts and tribunals which are called upon to adjudicate on complex disputes involving different legal orders.

Heiko Sauer's doctoral dissertation which was concluded in 2005 but updated to the end of 2006, and which received the prize for the best dissertation in the law faculty of the Heinrich-Heine Universität Düsseldorf (University of Düsseldorf, Germany) in 2006, is an attempt to analyse systematically the topic of competing jurisdictions.

This 500-page book essentially analyses examples of competing jurisdictions, or rather conflicting jurisdictions, in various legal orders and configurations. Starting within the German legal order, he moves on to the relationship between the German Constitutional Court and the European Court of Justice (ECJ), the German Constitutional Court and the European Court of Human Rights (ECtHR), the ECJ and the ECtHR, and the ECJ and the WTO Appellate Body (AB).

The conflicts discussed are well-known, like the *Solange* jurisprudence of the German Constitutional Court, the *Bosphorus* judgment of the ECtHR, and the *Bananas* dispute before the ECJ and the WTO AB. Sauer carefully examines in fine detail the background to the cases, the judgments, and the solutions eventually applied.

Sauer's analytical framework is based on the assumption that there are substantial structural differences between the national and international legal orders, in that at the national level there is normally one final highest judicial authority (i.e., a Supreme or Constitutional Court) which is able to settle disputes *in fine*. In contrast, at the international level such a hierarchy between the

different international courts and tribunals is lacking. However, and at the same time, Sauer recognizes the central and indeed increasing importance of courts and tribunals at all levels in adjudicating disputes which transcend a single order. In that sense, Sauer assumes that we are currently in the process of a judicialization of international law, although he does not expressly go so far as to assume a constitutionalization of international law.

Accordingly, Sauer's main research question focuses on developing generally applicable tools that go beyond the judicial configuration of a specific case. In other words, Sauer is in search of tools that are suitable for avoiding or solving jurisdictional conflicts irrespective of the specific characteristics of the case at hand.

After a comparative analysis of the cases and 400 pages later, the book becomes rather more interesting, in that Sauer extrapolates and presents several factors that judges should take into account when determining whether or not they should exercise their jurisdiction.

Essentially, Sauer develops a three-step test: the first step uses possibilities of institutional cooperation to the maximum, for instance by requesting preliminary rulings. The second step entails the determination of which court is best placed by using the principle that the 'closest' court to the case should decide the dispute. Finally, Sauer proclaims an obligation of conflict avoidance by applying the loyalty and self-restraint principles by the second best-suited court/tribunal.

In most cases, however, preliminary ruling systems between courts and tribunals do not exist; they are limited to some national systems and the ECJ. Similarly, in many cases it is not possible clearly to determine which court is best suited; often two courts are equally suited. Consequently, in most cases it boils down to applying the conflict avoidance principle. The central factor for Sauer's solution is the loyalty principle which can be found in the German constitutional law tradition as well as within the Community legal order, and even in the international

legal order. On that basis, he develops a conflict avoidance obligation for courts and tribunals. This obligation is to be fulfilled by determining which court is best placed to decide a case. Factors for this determination are: the 'closeness' of a court to a case on the basis of a sort of *forum conveniens* doctrine, i.e. the court that is best suited to deal with the case in relation to another possible court that could also exercise its jurisdiction, a balancing of interests, a priority test, and an adequacy test in terms of the expertise of the courts involved.

In short, these factors boil down to an obligation on each court and tribunal to perform a serious assessment of whether or not another court or tribunal may be better suited to deciding a dispute.

Applying these factors to the cases discussed in the previous chapters, Sauer comes to the conclusion that conflicts of jurisdiction and conflicting rulings could have been avoided if these tests had been applied. However, reality demonstrates that in most cases courts and tribunals are not ready to perform such an extensive assessment. Instead, they tend to conclude that they must exercise their jurisdiction. The only exception in those examples is the ECtHR, which applied the *Solange* method in its *Bosphorus* judgment by stating that it would not exercise its jurisdiction as long as the fundamental rights protection within the EC was adequate. In fact, at 489, Sauer in passing states that the *Solange* solution in the *Bosphorus* judgment is in the end similar to his proposed solution.

So the question arises, what is the added value of the tests and factors identified by Sauer?

In general, Sauer must be praised for going into great length and detail in finding the reasons for jurisdictional conflicts and the solutions that were or should have been applied. His book demonstrates that such conflicts occur on all legal levels and can involve all sorts of configurations, i.e., national courts alone, European and national courts, European courts alone, and European and international courts. Despite those differences, Sauer

identifies similar approaches to reconciling conflicting jurisdictions. Indeed, the tests and factors developed by Sauer clarify and broaden the understanding of the underlying issues, which are not confined to strictly legal ones, but rather include diplomatic, political, economic, and cultural aspects.

But, at the end of the day, Sauer does not go beyond what other academics have already proposed, namely, that exercising judicial comity and applying the *Solange* method are the principal solutions. The problem with those soft solutions is that they depend entirely on the will of each and every judge. Therefore, Sauer briefly mentions the creation of a special court (a sort of *Tribunal des Conflits*) which could decide cases of overlapping jurisdictions.

In sum, the book is a valuable contribution in systematizing in an inclusive way the topic of competing jurisdictions in a multi-layered and interconnected world.

Dr. Nikolaos Lavranos

University of Amsterdam, Law Faculty

ACIL and Max Weber Fellow, EUI

Email: N.Lavranos@uva.nl

doi: 10.1093/ejil/chn052