

# CIR

## **CENTER FOR INTER-LEGALITY RESEARCH**

Working Paper No. 03/2020

**WEI FENG**

***HIERARCHY, FORMAL PRINCIPLES, AND A NON-POSITIVISTIC  
CONSTITUTIONALISM***

***Comments on Gabriel Encinas' 'Interlegal Balancing'***

The Inter-Legality Working Paper Series can be found at

[www.cir.santannapisa.it/working-papers](http://www.cir.santannapisa.it/working-papers)

# **HIERARCHY, FORMAL PRINCIPLES, AND A NON-POSITIVISTIC CONSTITUTIONALISM**

## **Comments on Gabriel Encinas' 'Interlegal Balancing'**

Wei Feng (Beijing/Kiel)\*

I appreciate the opportunity to participate in the Seminar of Gabriel Encinas, organized by Sant' Anna, and further to have the opportunity to publish my comments on the topic of 'interlegal balancing'. What is more, since I'm not very familiar with Italian research or legal practice in related domains, my comments will mainly be based on general legal theory on the one hand and on developments both in Germany and elsewhere in the European countries on the other hand.

Frankly speaking, I agree with Gabriel Encinas on many points, especially the structural-theoretical framework of principles theory as well as the possible application of the method of balancing in multi-level legal orders. Besides, Encinas' extensive reply gives me further chance to learn more about what he calls 'inter-legality' and the implicated methods. Still, I have some divergent opinions on certain details.

### **1. Hierarchy and Legal Order**

Encinas distinguishes between four positions of multi-level legal communities, including the radical pluralism, the moderate pluralism, the moderate constitutionalism, and the radical constitutionalism. The first two positions contain no hierarchy, while the latter two positions construct themselves hierarchically. Furthermore, only the second and the third positions allow balancing, which is

---

\* Lecturer at the China University of Political Science and Law, Beijing, once as teaching postdoctoral researcher at the Renmin University of China, Beijing (2015-2020), also working on a further doctoral project at the Christian-Albrechts-University of Kiel, Germany. I should like to thank Stanley L. Paulson for suggestions and advice on matters of English style.

‘interlegal’. (Encinas: 11) One can observe immediately an interesting point, that is, a moderate pluralism containing no hierarchy and, simultaneously, allowing balancing.

My first doubt is, however, whether a legal order without hierarchy is conceptually possible. What ‘hierarchy (*Stufenbau*)’ means in Hans Kelsen is only the formal aspect of empowerment– that is, a content-independent context – between different levels of the legal order.<sup>1</sup> The contents of rules found on different levels, respectively, could be left untouched, even though it is also *possible* to have restrictions on the content of lower-level rules, which is a contingent matter.<sup>2</sup> The conflicts between the contents of lower-level norms and those of higher-level norms could be resolved only by means of some competent organ, either some kind of ‘constitutional court’ or empowerment accorded to the state’s leaders personally.<sup>3</sup> Furthermore, we can read similar opinions by Kelsen on conflicts between national and international laws,<sup>4</sup> which would be helpful for understanding the current topic of multi-level legal orders.

Nevertheless, Encinas seems to have a different reading of Kelsen, when he says that the radical constitutionalism may disavow ‘the real dimension of law, represented by popular sovereignty as democracy and self-determination.’ He adds, ‘Kelsen’s monism belongs here.’ (Encinas: 20) On the contrary, the hierarchy (concerning the municipal or national legal community) and monism (concerning multi-level legal communities) in Kelsen’s sense does *not necessarily* implicate the

---

<sup>1</sup> See Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, 1<sup>st</sup> edn. (Leipzig and Vienna: Franz Deuticke 1934); repr. as Hans Kelsen, *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934*, ed. Matthias Jestaedt (Tübingen: Mohr Siebeck 2008), at 74, 107; and its translation in English, see Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press 1992), at 63, 91.

<sup>2</sup> See Kelsen, *Introduction to the Problems of Legal Theory* (n 1), at 63, 65.

<sup>3</sup> *Ibid* at 71-5.

<sup>4</sup> *Ibid* at 117-9.

direct disavowal of some rules with significant contents or values,<sup>5</sup> such as those of democracy or with respect to human rights.<sup>6</sup>

One may argue that there is no legal *order* at all in a radical pluralistic community, either national, international or supranational.<sup>7</sup> As Encinas puts it, '[t]he *genus proximum* of pluralism is individuated from constitutionalism by its disavowal or denial of hierarchy between overlapping legal order.' (Encinas: 19) It would be the case when the hierarchy may well be understood in other ways, say, substantively. Even though, this understanding is not necessary, especially not in Kelsen's sense anymore. Regarding cases of pluralism, be it 'radical' or 'moderate', there could still be some formal aspect of law to form a hierarchy, which eventually constructs a multi-level legal *order* or *orders*. The only controversy is whether and to what extent this 'inter-legal hierarchy' would or not have an impact on the contents of multi-level legal order(s) respectively.

It is more problematic when one asks what brings about a change in pluralism from a 'radical' one into a 'moderate' one, if the latter still contains no hierarchy, but, simultaneously, endorses the procedure of 'inter-legal balancing'. (Encinas: 11 and 19) Actually, the assumed inter-legal balancing would probably, through the results of

---

<sup>5</sup> Ibid at 71-5, 117-9. According to Martin Borowski's research, the 'hierarchy of conditions' – initiated by Kelsen's *Schüler* Adolf Julius Merkl and then received by Kelsen himself – ought to be strictly distinguished from the 'hierarchy of derogation' as common understood. See Martin Borowski, 'Sein und Sollen am unteren Ende des Stufenbaus der Rechtsordnung', in Michael Anderheiden et al. (eds.), *Verfassungsvoraussetzungen. Gedächtnisschrift für Winfried Brugger* (Tübingen: Mohr Siebeck 2013) 183-201, at 200-1; his 'Concretized Norm and Sanction qua Fact in the Vienna School's *Stufenbaulehre*' 27 *Ratio Juris* (2014) 79-93, at 80, 89-90; and his 'Legal Pluralism in the European Union', in Agustín José Menéndez and John Erik Fossum (eds.), *Law and Democracy in Neil MacCormick's Legal and Political Theory. The Post-Sovereign Constellation* (Dordrecht, Heidelberg, London, New York: Springer 2011) 185-209, at 190.

<sup>6</sup> Otherwise, if these cases of disavowal really took place, an appropriate solution would be the famous Radbruch formula. See Gustav Radbruch, 'Gesetzliches Unrecht und Übergesetzliches Recht', *Süddeutsche Juristen-Zeitung* 1 (1946) 105-8, at 107, repr. in Gustav Radbruch, *Gesamtausgabe* (Collected Works) 20 vols, Arthur Kaufmann (ed.), vol. 3: *Rechtsphilosophie III*, Winfried Hassemer (ed.) (Heidelberg: C. F. Müller, 1990) 83-93, 282-91 (editor's notes), at 88. See the English-language translation, 'Statutory Lawlessness and Supra-Statutory Law', trans. Bonnie Litschewski Paulson and Stanley L. Paulson, 26 *OJLS* (2006) 1-11, at 7. For the discussion of the possible connection of Hans Kelsen's theory of 'basic norm' to Radbruch's formula, see Robert Alexy, 'Hans Kelsen's Legal Theory in the System of Non-Positivism', *Archiv für Rechts- und Sozialphilosophie*, Beiheft 163 (2020) 31-44, at 43-4.

<sup>7</sup> I should also like to thank Prof. Gianluigi Palombella for his immediate response on this point.

balancing, lead to the hierarchy in Kelsen's formal sense. According to Encinas' taxonomy, it ends up as a 'moderate constitutionalism'. However, if the procedures of inter-legal balancing never produce any definitive rules to eventually form some kind of hierarchy, say, only in order to keep the shape of a 'moderate pluralism' as described by Encinas, then one may wonder what those procedures of inter-legal balancing are meant to do.

## 2. Qualifying Criteria of (Inter)Legality and Non-Positivism

It is also illuminating that Encinas apply the distinction between classifying and qualifying connections between law and morality, which has been introduced by Robert Alexy,<sup>8</sup> and also the application of the criteria of legality or inter-legality. (Encinas: 22 and below)

Curiosity compels me to ask a further question, namely, whether the qualifying criteria of legality necessarily imply or at any rate suggest an *inclusive non-positivistic understanding*<sup>9</sup> of inter-legal order and its 'inter-legality'. If so, what role does balancing play in this non-positivistic inter-legal order? This question is correlated with my third question below.

## 3. Models of Balancing Concerning Formal Principles

To be frank, Encinas' final section on balancing and formal principles are of special interest to me. Encinas expresses, however, an ambivalent attitude towards the model of balancing where formal principles are concerned, especially with respect to

---

<sup>8</sup> See Robert Alexy, *Begriff und Geltung des Rechts* (Freiburg & Munich: Karl Alber 1992), at 48-9; and its English translation as Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press 2002), at 26.

<sup>9</sup> See Robert Alexy, 'The Dual Nature of Law', in *IVR 24<sup>th</sup> World Congress Papers Plenary Sessions* (Beijing 2009) 257-274, repr. in *23 Ratio Juris* (2010) 167-82, at 176-7. For the European Union Law in particular, Borowski, 'Legal Pluralism in the European Union' (n 5), at 202-8.

the separation model of balancing competences, as set out by Jan-R. Sieckmann<sup>10</sup> or the ‘two-level-model’ introduced by Matthias Klatt and Johannes Schmidt.<sup>11</sup> (Encinas: 28-9) It seems to me that he may also want to accept another model of combination, that by Martin Borowski<sup>12</sup> (Encinas: 29, footnote 138), which stands in a sharp conflict with the models defended by Sieckmann as well as by Klatt and Schmidt.

Both Sieckmann’s and Klatt and Schmidt’s models begin with the balancing of competences or, more exactly, of the formal principles that lie behind each competence norm. My first doubt is that they correspond not to the proper conflict situations that arise between legal principles, but rather the classical conflict situation between legal rules or between different levels in the hierarchy of law, e.g. *lex superior derogat legi inferiori*.<sup>13</sup> Nevertheless, according to the definitions introduced by Robert Alexy, principles are optimization requirements, while rules are definitive requirements.<sup>14</sup> In this sense, competence norms are always definitive requirements, that is to say, they are legal rules, not legal principles. Although this understanding of competence is not fully clear in Alexy’s book *A Theory of Constitutional Law*,<sup>15</sup> one can find, in Alexy’s article on ‘Alf Ross’ Concept of Competence’, that in the end he

---

<sup>10</sup> See Jan Sieckmann, *Recht als normatives System. Die Prinzipientheorie des Rechts* (Baden-Baden: Nomos 2009), at 200-4.

<sup>11</sup> Matthias Klatt and Johannes Schmidt, *Spielräume im Öffentlichen Recht. Zur Abwägungslehre der Prinzipientheorie* (Tübingen: Mohr Siebeck 2010), at 65 and below; Klatt and Schmidt, ‘Epistemic Discretion in Constitutional Law’, 10 *I · CON* (2012) 69-105, at 99 and below; Matthias Klatt, *Die praktische Konkordanz von Kompetenzen. Entwickelt anhand der Jurisdiktionskonflikte im europäischen Grundrechtsschutz* (Tübingen: Mohr Siebeck 2014) at 156-273; and his ‘Balancing Competences: How Institutional Cosmopolitanism Can Manage Jurisdictional Conflicts’, 4 *Global Constitutionalism* (2015) 195-226.

<sup>12</sup> See Martin Borowski, ‘The Structure of Formal Principles – Robert Alexy’s “Law of Combination”’, *Archiv für Rechts- und Sozialphilosophie*, Beiheft 119 (2010) 19-35.

<sup>13</sup> At first glance, this assessment of models by Sieckmann and also by Klatt and Schmidt might sound astonishing, since Klatt e.g. tries to construct conflicts of competences exactly as ‘conflicts of formal principles’, other than ‘conflicts of rules’. See Klatt, ‘Balancing Competences’ (n 11), at 211. What is decisive, however, is the role of formal principles in the model of balancing itself, considering substantial principles altogether.

<sup>14</sup> Robert Alexy, *Theorie der Grundrechte* (Baden-Baden: Nomos 1985), at 75-6, trans. Julian Rivers as *A Theory of Constitutional Rights* with a ‘Postscript’ (Oxford: Oxford UP, 2002), at 47-8.

<sup>15</sup> Nevertheless, it is to mention that Alexy gives those constitutive legal rules the name as ‘competence norms’. See Alexy, *A Theory of Constitutional Law* (n 14), at 153.

defines the competence norms as ‘meta-rules’ vis-à-vis behavioral norms.<sup>16</sup> Therefore, competences as rules do not lend themselves to balancing.

My second doubt is that even the principles behind the competence norms, that is, the so-called ‘formal principles’, cannot be balanced *directly* with each other. Both Sieckmann’s and Klatt and Schmidt’s models of direct balancing between formal principles are then categorized as ‘separation models’.<sup>17</sup> To this extent, they are based on a different conception of ‘formal principle’ as that introduced by Alexy,<sup>18</sup> even if not a theoretically impossible construction.

On the contrary, according to Alexy’s conception, a principle takes precedence over a rule only if this principle could be stronger than the substantial principle *together* with the so-called ‘validity principle’ behind the rule; this latter principle ‘requires the satisfying of rules and in this sense supports [this rule – added by the author] *formally*’.<sup>19</sup> It is then labeled by Martin Borowski as the ‘model of combination’<sup>20</sup> or later by Alexy as a more subtle ‘epistemic model’.<sup>21</sup> Accordingly, there should be, firstly, at least two substantial principles engaged in the balancing and, secondly, some formal principles are to come into play. Actually, Alexy also develops an ‘epistemic law of balancing’. It concerns the theory of constitutional rights, which says: ‘The more intensive an interference in a constitutional right [understood as substantial principle – added by the author] is, the greater must be the certainty of its underlying

<sup>16</sup> Robert Alexy, ‘Alf Ross’ Begriff der Kompetenz, in Andreas Hoyer et al (eds.), *Gedächtnisschrift für Jörn Eckert* (Baden-Baden: Nomos 2008) 43-64, at 63; and its translation into Chinese, trans. Wei Feng, 129 *Journal of Comparative Law*, No. 5 (2013) 145-160, at 160.

<sup>17</sup> Robert Alexy, ‘Formal Principles. Some Replies to Critics’, 12 *I · CON* (2014) 511-24, at 522.

<sup>18</sup> This is especially apparent in the work of Matthias Klatt and Johannes Schmidt, when they argue that ‘contrary to Alexy’s position, the so-called formal principles are not relevant in order to establish the nature and the scope of epistemic discretion. For formal principles concern only question of competence, whereas epistemic discretion arises just at the level of material principles.’ See Klatt and Schmidt, ‘Epistemic Discretion in Constitutional Law’ (n 11), at 71. Somewhat later, Klatt directly equates competences and formal principles when he says that ‘competences are a specific kind of principles, namely formal principles.’ See Klatt, ‘Balancing Competences’ (n 11), at 211.

<sup>19</sup> Alexy, *A Theory of Constitutional Rights* (n 14), at 48, footnote 24. (emphasis original)

<sup>20</sup> Borowski, ‘The Structure of Formal Principles’ (n 12) 19-35.

<sup>21</sup> Alexy, ‘Formal Principles’ (n 17), at 520; see also Martin Borowski, ‘Alexys drittes Modell formeller Prinzipien’, in Martin Borowski et al. (eds.), *Rechtsphilosophie und Grundrechtstheorie. Robert Alexys System* (Tübingen: Mohr Siebeck 2017) 449-76.

premises.<sup>22</sup> The two models claimed, respectively, by Borowski and by Alexy differ from each other mainly on the details of ‘combination’ of formal and substantial principles, which cannot be discussed here.

Concerning the situation of ‘inter-legal balancing’, the competent authority of one legal order would claim to have competence over the exclusive, final decision without considerations of the competent authorities of other legal orders. The latter may contest the competence of the former, speaking on behalf of their own competences. So far, there is no discretion with respect to balancing between competences, or between the formal principles lying behind them. *Only when the latter argue further on the basis of certain substantial principles*, e.g. requirements of fundamental rights or human rights, can there be discretion for balancing by the respective authorities. One may take the recent judgement of the German Federal Constitutional Court concerning European Central Bank as an example, which, along with various discussions on competence issues, emphasizes that ‘the principle of proportionality requires that the programme’s monetary policy objective and the economic policy effects be identified, weighed and balanced against one another.’<sup>23</sup> Therefore, what is decisive is the balancing between substantial principles lying behind the corresponding legal rules, while the competence norms and the formal principles lying behind them would be able to function only in combination with those substantial principles or, more subtly, function with an eye to the epistemic certainty of the premises of substantial principles.

#### **4. Excursus: Competence Rules and Formal Principles**

In his concise reply, however, Encinas improves his clearer attitude towards the possible models of formal principles, which compels me to make necessary clarifications as excursus.

---

<sup>22</sup> Alexy, ‘Postscript’ to *A Theory of Constitutional Rights* (n 14), at 419.

<sup>23</sup> *BVerfG*, Judgement on 5 May 2020, at 2 and 76-7.



#### 4.1. *Competences are Rules, But Cannot Lend Themselves to Balancing Directly*

As stated above, I have tried to explicate that competence norms are rules, other than principles. Although before that, I mentioned the possibility of apply the classical rules of conflicting to solve the concordance of competences. My main concern is and will still be, however, the more accurate understanding of the character of competence norms,<sup>24</sup> which should be considered seriously in reconstructing the model of balancing concerning formal principles. To this extent, I do mean that this process of balancing cannot be reconstructed as *direct* conflict between competence norms – if so, then the only way were to apply the classical rules of conflicting. Otherwise, it would be contradictory to my above understanding of Kelsen’s notion of hierarchy.

#### 4.2. *Formal Principles and Where to Find Them?*

Another recurring controversy is whether the epistemic certainty of the premises of substantial principles – being represented by the reliability operators – are equal to the formal principles themselves. If not, and nor are they equal to competence norms, as emphasized above, then where to find them? This is the last myth of formal principles, which can only be answered, however, after full scrutiny of all the possible formulations, functions and construction models of formal principles.<sup>25</sup>

Only concerning current context, I need to add immediately, that I never try to cut off the ‘ties’ between formal principles and competence norms, understood as rules. Based on those understandings above, one can trace back to Alexy’s discussions on

---

<sup>24</sup> I would like to mention, besides Alf Ross and Robert Alexy, also my dear colleague Gonzalo Villa Rosas, who is also cited by Encinas in his reply. See Gonzalo Villa Rosas, ‘Commanding and Defining. On Eugenio Bulygin’s Theory of Legal Power-Conferring Rules’, *Crítica* 49 (2017) 75-105.

<sup>25</sup> See e.g. Wei Feng, ‘Formelle Prinzipien: ihre Formulierungen, Definitionen, Konstruktionen’, presented at the doctorate colloquium by Prof. Martin Borowski, Ruprecht Karl University of Heidelberg, 06. Sept. 2016 (unpublished).

competence norms in his book *A Theory of Constitutional Law*. In the scope of certain competence norm, the authorized subject has the corresponding *discretion (Spielraum)*, so that he or she can fulfill the requirement of competence norm *definitively* with any measurement that falls under his or her discretion. What is more, according to Alexy, the division of competence, e.g. which between the constitutional court and the legislature, is not quite that easy to be solved through rules of conflicting. As Alexy puts it, ‘there is no simple *rule* which definitively delimits the prognosis competence of the legislature and that of the constitutional court in all cases.’<sup>26</sup> Competence as meta- or constitutive rules are definitive and, at the same time, they let some legal rights or obligations, either *prima facie* or definitive, to be possible or, more accurately, potential. To this extent, competences do have relation to *substantive contents*, since they *construct* discretions referring to the contents of legal rights or obligations. It is then the function of formal principles, which ‘lie behind competences’ and provide reasons or justifications for those discretions.

We do not need to be annoying or even disappointed and to abandon formal principles if we only find the reliability operators being presented in the so-called ‘weight formula’. Formal principles need not and cannot ‘show up’ directly in the first-order balancing, rather mainly in the second-order balancing according to the ‘epistemic model’, which has been elaborated by Alexy relative later.<sup>27</sup>

## 5. Open Question: A Non-Positivistic Constitutionalism?

Finally, I would like to shed light on Encinas’ usage of qualifying criteria of (inter)legality, as mentioned above, in relation to the formal principles. Balancing is deemed to be a real challenge for the hierarchical model of the legal order, either national or international. Even when the hierarchy is formally understood, it can only

---

<sup>26</sup> Alexy, *A Theory of Constitutional Law* (n 14), at 313.

<sup>27</sup> See Alexy, ‘Formal Principles’ (n 17), at 520-2.

allow the definitive rules to be recognized, but not principles.<sup>28</sup> However, it is formal principles that, through their epistemic role in the procedure of balancing between substantial principles, construct a *relation* between rules in hierarchy and other substantial principles without hierarchy.<sup>29</sup> It turns out to be a *non-positivistic* picture containing both ‘pluralistic’ and ‘constitutional’ elements, since substantial principles are necessarily incorporated into the legal order, even though the formally hierarchical aspect is still reserved. Some authors may suspect that the universal balancing procedure or proportionality review leads eventually to the ‘constitutional adjudicative state’ or to ‘over-constitutionalisation’.<sup>30</sup> Nevertheless, only a mistaken understanding of ‘hierarchy’ and that of ‘formal principles’ might bring this about.

---

<sup>28</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard UP 1977), at 36-45; see H. L. A. Hart, ‘Postscript’ to his *The Concept of Law* (first publ. 1961), 2<sup>nd</sup> edn. (Oxford: Oxford UP 1994), at 263-8.

<sup>29</sup> Related research is rare. However, see Borowski ‘Concretized Norm and Sanction qua Fact in the Vienna School’s Stufenbaulehre’ (n. 5), 90, footnote 27; and his ‘Legal Pluralism in the European Union’, 202-8. For the discussion in China, see Wei Feng, ‘Can There Be a Legal System? – From Axiomatics through Order of Values to Model of Principles’ (in simplified Chinese), 1 *Journal of Soochow University: Legal Studies*, No. 1 (2014) 34-48, repr. in *China Social Science Excellence: Jurisprudence and History of Law*, No. 7 (2014) 47-65, at 59-60.

<sup>30</sup> Ernst-Wolfgang Böckenförde, ‘Grundrechte als Grundsatznormen. Zur gegenwärtigen Lage der Grundrechtsdogmatik’, *Der Staat* (1990) 1-31, at 21-6, repr. in his *Staat, Verfassung, Demokratie* (Frankfurt a. M.: Shrkamp 1991), at 190-7.