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Zu Inhaltsverzeichnis

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# Keynote

# Judicial dialogue – Contextualized

ULRICH HALTERN[1]

Ladies and gentlemen, it is a pleasure to be back in beautiful St. Gallen. I feel very honoured to be invited to give the first keynote. Carl Baudenbacher has managed, again, to put together an impressive group of scholars and practitioners. Stepping up to the podium, one feels truly humbled. So thank you so much for having me. The task Carl has set me is to introduce and to contextualize the concept of judicial dialogue. There is no way I can do justice to the rich phenomenology of judicial dialogue and the learned and lively debates surrounding it. However, let me try and make a few observations, meant as an effort to structure our discussions to come, as well as to provide a theoretical backdrop – perhaps a sobering backdrop as well to something that seems overwhelmingly promising.

My first remark is purely academic, and on top of it, it is a remark that I must ask forgiveness for, being a German academic. German legal academia still all to often engages in what Martin Shapiro almost 30 years ago famously described as "Constitutional Law without politics, the written constitution was a sacred text, the professional commissary as legal truth, the case law as the inevitable working out of the correct implications of the constitutional text and the constitutional court as the disembodied voice of right reason and constitutional teleology." To be sure, I do not mean to disparage doctrinal work, quite on the contrary. Doctrine is the first intellectual stratum of judicial developments, and as such it is neither intellectually empty nor without systemic significance. Doctrinal work is the foundation of everything that comes after. However, in doctrinal work, political institutions (like governments, international interests, organisations and, of course, other courts) are objects of a court's jurisprudence. This is not the world of judicial dialogue. Speaking of judicial dialogue means to adopt an actor-centred approach to law. Here, other courts are subjects, interlocutors, partners to a dialogue. Doctrine alone can only take us so far, although we can, from studying some court's jurisprudence, learn something about what that court believes itself to be or claims to believe itself to be. We learn nothing, however, about the power and the compliance pull of its decisions. That, of course, is a matter not of logical deduction from doctrine but of empirical observation and social and political explanation. We must therefore go beyond the self-referential legal universe. The question of the legal content of a court decision is only part of the whole picture.

There is also the question of persuasion, or, we might say, of a decision's compliance pull, which adds an institutional layer to our inquiry. As Carl has already pointed

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out, it is a truism to state that courts all over the world are talking to one another. National, supranational, transnational, and international courts increasingly, and at length, cite and discuss foreign and international precedent on a wide range of issues. Over time, this cross-citation among the world's courts has developed into a kind of informal dialogue. Courts use judicial dialogue in a way that seems to cross-fertilize ideas. This development is not at all limited to constitutional law. We see it in areas such as bankruptcy, antitrust, intellectual property, and defamation law. We should not be surprised because the increasingly globalized nature of trade relations and the Internet drive the world's legal systems into closer contact with each other, and judges respond by participating in various forms of dialogue. While this may not be entirely unexpected – it is, after all, a truism –, for a German legal academic, it is a happy and almost miraculous development that we are able to theoretically frame these developments as "judicial dialogue", and even call it a truism. Because to recognise judicial dialogue as such means to leave behind Shapiro's disembodied voice of reason that we Germans hold so dear. Judicial dialogue drives German positivism towards recognizing the severe limitations of purely doctrinal legal thought.

My second remark concerns different forms and levels of judicial dialogue. I have neither the intention nor the time to establish an exhaustive taxonomy of judicial dialogue. Others will do so; Carl has already begun, and today and tomorrow, we will continue to hear about the details of very different forms of dialogue. Still, let me point out at least some categories.

There is, of course, the sort of institutionalized judicial dialogue between the European Court of Justice and its Member State counterparts. Judicial review on the Community level, as you all know, is a tandem system of justice; one leg being located at the Community level, the other at the Member State level. The largest number of cases reaches the ECJ by way of preliminary references through national courts according Article 267 TFEU. The importance of this procedure cannot be overestimated. It has become the principle vehicle for imposition of judicially driven Community discipline. The results have been quite extraordinary. National judicial hierarchies have been torn apart. Sacred cows have been slaughtered. British Courts overturned the doctrine of parliamentary sovereignty, and issued an injunction blocking the effect of a British law pending judicial review at the European level. The French Cours de Cassation accepted the supremacy of EC law in the face of threats from the French legislature which distributes jurisdiction under the age old charges of Gouvernement de Juge.

Outside of this procedure, ECJ national courts keep talking to each other no less intensely than under Article 267. The prime example, of course, is the German Constitutional Court. Noting that its power was being eroded, it fought back. And the result is what the Court calls the "cooperative relationship" between the ECJ and national highest courts. We have seen the last instance of that cooperation in the recent decision on the Lisbon Treaty. Yes, we do have a tug of war between the ECJ and the German Court, which of course gathers support from the Italian, Belgian, Spanish, and

Polish highest courts. Still, the tug of war is incredibly fertilizing. For instance, there would be no, or less, human rights jurisprudence at the EU level had it not been for threats and demands from Karlsruhe. And sometimes those highest courts even look to each other and come out with integration-friendly (and sometimes not so integration-friendly) decisions in support of each other.

Then, there is an external dimension as well. The European Court is partner in the dialogue with many other non-national courts as well. Unsurprisingly, it has close relations with the EFTA Court; they cite each other frequently. Also, the relationship between the ECJ and the Strasbourg Human Rights Court has become more and more intense. Suffice it to mention the European Court of Human Rights decisions in Matthews, Cantoni and, of course, Bosphorus. In Yusuf and Kadi, Segi and Gestoras Pro Amnistía, the ECJ made its decision with a view to talking to the Strasbourg Court. In MOX Plant the ECJ talked to international tribunals, perhaps in less fortunate words than it did when it talked to the European Court of Human Rights or to the national courts. Finally, the WTO panels and Appellate Body are never quite happy with how their conversation with the ECJ turns out.

There is, alas, not always convergence. Sometimes there is resistance. Invariably, however, there is engagement. Judicial dialogue can be understood as a site of engagement between domestic law and international or foreign legal sources and practices. Courts do not treat foreign legal material as binding, but neither do they put on blinders that exclude foreign legal sources and experience. Foreign sources are seen as a way of testing the understanding of one's own traditions. How does that help judicial discourse, or facilitate the decision? First, to the extent legal systems perform similar functions, similar concerns may arise about interpretive choices. Approaches taken in other countries may be helpful information in deciding what interpretation works best. Secondly, comparisons shed light on difference. Considering the questions that other systems pose can sharpen our understanding of how different our own system is. To understand yourself, it is helpful to step out of yourself and look from the outside. Thirdly, there may be something universal, trans-national and perhaps natural about some rights. While they are enshrined in specific constitutions, perhaps they reflect something like essentialia humana, the ubiquity the idea that human beings are the central concern for any legal system. That, at least, is the hope.

My third remark, finally, is less disjointed and less cheerful. I would like to address an issue that is widely discussed in the United States, but seems less plausible in Europe. It happens more often than not, even under President Obama's administration, that Americans and Europeans are facing each other in a curious mixture of fascination and total bewilderment. This is true in politics as it is in law. Judicial dialogue has become a matter of intense discussion in the United States as well. However, we hear many more critical voices than, in the light of our European integration experience, we would expect. I will try to make sense of that critique. I believe it points to a deepstructure of law that is perhaps readily overlooked in Europe – if you will, the law's dark underside. The

case that sparked off the heated debate in the United States was Roper v Simmons. Of course, there have been others, like Atkins v Virginia and Lawrence v Texas, where the Supreme Court has considered foreign and international law, causing considerable praise and also criticism from the academy. Roper, however, was a new dimension. The United States Supreme Court granted a motion against juvenile execution, holding it cruel and unusual punishment. Justice Kennedy, writing for the majority, observed that international opinion had turned against juvenile death penalty, and he cited foreign courts. Unsurprisingly, Justice Anthony Scalia dissented. He bristled at the notion that foreign and international law might be used by the United States Supreme Court and argued that "either America's principles are its own, or they follow the world; one cannot have it both ways". Scalia acidly continued that "[t]hough the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage." Justice Scalia concluded that "the basic premise of the Court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand."

You might think: This is, well, Scalia. But no, members of both the House and the Senate introduced resolutions declaring that "judicial determinations regarding the meaning of the Constitution of the United States should not be based on foreign precedent, unless such foreign precedent informs an understanding of the original meaning of the Constitution." At the confirmation hearings of both Chief Justice Roberts and Justice Alito, US senators expressed the view that a judge's citation of foreign precedent constituted an impeachable offence. Prominent scholars called for a constitutional amendment banning that practice.

What is going on? What happened to the idea, also voiced by some members of the United States Supreme Court, that American judges are participating in an emerging world community of courts? Are those who believe that reliance on foreign authority to interpret constitutional rights represents a dramatic departure from American traditions, crazy nationalists? To be sure, there is some truth to the notion of American exceptionalism. While I have no time to explore it more deeply here, I am sure you all know examples. It is fair to assume, then, that there is more to the matter than simple starry-eyed nationalism.

Here is what the European experience suggests. Legal scholars understand constitutional courts to be working on a common set of problems, dealing primarily with rights and legitimacy. They look to the variety of national constitutional courts in order to learn from the experience and arguments of others. Every modern liberal state confronts the same set of constitutional issues (rights to privacy, speech, due process and welfare) on the one hand, and issues of legitimate institutional design on the other. Since courts address these issues in an order that is entirely accidental, one constitutional court can make use of the research and reasoning of another constitutional court that may have confronted a similar problem earlier. Comparative materials thus come to compete with precedents as a substantial source of legal reasoning. If the authority of

the court decision rests upon its appeal to reason, then this approach appears not only natural but essential. It draws upon the model of inquiry of other sciences. No research programme can fetishise its own past; rather it must be open to new discoveries wherever they are made. Universal constitutionalism rests on two familiar and intertwined discourses: on a doctrine of rights, and on a theory of political legitimacy. The former locates constitutionalism in a discourse of human rights, the latter in a discourse of the social contract tradition. Both are based on reason, both know no boundaries. Human rights, social contract and, alas, reason do not end at national borders. That is precisely what our European experience suggests.

This experience speaks to most, if not all of us. It does not speak, however, to all Americans, and I wish to suggest why that is. Based on the borderless discourse of rights, interests, and reason, universal constitutionalism misses much of what is essential to law and democracy. It fails to understand how law is deeply embedded in beliefs about the rule of law. The rule of law is not merely about justice. It is a shorthand expression for the imaginative construction of a complete social political order. It is a way of perceiving events. It is a framework for our understanding that makes it possible to perceive legal meaning in every single event. Finally, it provides a geographical and temporal shape to events, a normative foundation for claims of authority and understanding of the self and others as subjects of rights and responsibilities. Law has its own imaginative universe. It is the imagination that constructs the past and the future of the polity just as it constructs, at the same time, the political identity of the citizen. For example, in the political imagination of citizens of Germany, the rule of law echoes with the memory of World War II and Auschwitz. American citizen's political imagination of the rule of law echoes with the memory of the Revolution and the Civil War, with a continuity between the citizens and the founders. In other words, the rule of law is a structure of beliefs about the meaning of the polity. Its value lies not in objective facts, but in the deployment of power to sustain these beliefs. What we must investigate, then, is the structure of meaning within our experience of public order as the rule of law occurs.

National law usually has a richly textured cushion of cultural resources that it can rely on. It is a symbolic form which establishes the world of pre-existing rules to which individuals appeal in order to make sense of their lives. That means it serves as a community's memory, as a storing space that preserves existing meaning. In other words, there is a deep-structure underneath law's smooth, liberal surface design. There is also myth and memory, not only rationality and principle. There is also sacrifice, not merely contract. There is also will, and not just reason and interest. A nation state's legal system exerts a tremendous normative pull, not because of the threat of punishment or some sort of basic consensus. Rather, the legal regime expresses in traditional terms the sovereign will of the community. To disconnect law from the idea of sovereignty fails to see the crucial connection of the rule of law to self-rule. In a democratic regime sovereignty and law are tightly linked. The sovereign people governs through the rule of law; by following the law, citizens participate in popular sovereignty and achieve

self-government. Law, then, is not simply about the promise of order. It is about identity. And as such, as any identity question, it is incredibly political, erratic and also a little dangerous.

I believe that if we really want to understand what is at stake in law and in sovereignty, we need to turn from the discourse of justice and liberty to that of love. Certainly in the United States, popular sovereignty in and through the rule of law constitutes a civic religion of ultimate meanings, which is love. How can we doubt for a single second that as soon as Justice Kennedy cites European Court of Human Rights decisions as precedent, there will be a call for impeaching him?

If you want another analogy, here it is. There is a theological conundrum, thousands of years old. Why do we accord ultimate value to God's words? Do we because they are true and right, or because they were spoken by God? We see the same conundrum with regard to law. Do we value the law, and follow it, because it is good and just, or because it was spoken by the popular sovereign? Both questions are hard to answer; perhaps it is both. Perhaps it is impossible for theology and for democratic theory to separate one from the other. But at a closer look, in Europe, with its progressive understanding of global constitutionalism, we do separate these two. We value the law because it is good and just, not because it was spoken by the sovereign. In Europe we have begun to liquidate, to fragment or at least to invisibilise the sovereign. We like to think of our political order as post-sovereign if not even post-political. Law is what it is, whoever spoke it into existence. Different from the United States, in Europe there is no law that is more authentic or more valuable than other forms of law simply because it was brought into existence by our sovereign, our Founding Fathers. On the contrary, EU law trumps national law. In Europe law is law. Not so in the United States.

We need to remember that this European way of seeing things is a social construction, no less mythical or metaphorical than the American myth of popular sovereignty and authentic law spoken into existence by the Founding Fathers. We also need to remember that a post-sovereign order has consequences far beyond the law. It is an order stripped of its attachment to the popular sovereign, a world of economic transactions, consumption and markets. A world, that is, in the words of the Schumann declaration, where war becomes unthinkable. The political seems widely replaced by the market ideas. Identity is as fluid as money flows. Citizenship becomes more a matter of consumption than of political rights and duties. And in such a world, with the political and the market largely conflated, the citizen and the consumer become essentially one and the same thing. There is a flattening of identity and experience. But still, this may be progress, because we are leaving behind a heritage of sacrifice, of collective sovereignty with all its dangers, and calls for pro patria mori. Maybe this is what we want? It comes at a cost, but it may be worth it. It is not up to me to decide. But let me be crystal clear: the European model is not the model of the world. Judicial dialogue is but a manifestation of an entire mindset that marginalises sovereignty, history, authenticity and identity. This mindset holds a lot of promise, but also means loss. There is a

reason why President Obama can seriously speak of sacrifice and love in the political realm while we cannot. None of this means we have turned the wrong corner. But it does mean that we need to be aware of where we are going.

Thank you very much.