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Heiko Sauer, Jurisdiktionskonflikte in Mehrebenensystemen

SUMMARY

Legal integration and linkage beyond the state are increasing. Manifold international law regimes are gaining importance, and the supranational integration of the European continent is progressing. This coexistence of different legal orders and their interrelation entail competition and conflict. Competing claims of authority make it difficult to identify which rules are paramount and thus apply. Treaties and statutes often leave it to the courts to find answers to the questions following from international legal interaction. Yet not only may the substantive legal issues be resolved differently by different legal systems, but also may these regulate the prior issues of jurisdiction to adjudicate and the extent of legal review inconsistently: the question of *quis iudicabit*? As a result, the number of conflicts among courts of linked legal orders – which the author names "conflicts of jurisdictions[1] in multi-level systems" – is increasing. These conflicts jeopardise integration in those multi-level systems as they lower confidence, induce dysfunction and may produce conflicting obligations for the states involved. This thesis analyses conflicts of jurisdictions in multi-level systems in a general manner and, based on the examination of precedents, it develops a universal model *de lege lata* as a response to such conflicts. The results of the analysis can be summarized as follows:[2]

1 A comparative survey of adjudication and its functions in the national, the international and the suprational legal orders provides useful evidence: Despite significant structural differences, the functions courts fulfil are very similar. Their primary task is dispute settlement which serves objective control and individual legal protection alike. Moreover, adjudication becomes more and more important in domestic legal orders as well as beyond the state. In domestic law, instancing the Federal Republic of Germany, judges are far more than "la bouche de la loi" – they do not only apply rules but even enact them. In the international legal order, dispute settlement by international courts and tribunals is increasing, and still more of these courts are established in the ambit of decentralised regimes. In the multi-level system of the European Union, the European Court of Justice (ECJ) has crucially influenced the inte-

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[1] In this thesis, this refers only to jurisdiction to adjudicate.

[2] Numbers refer to chapters of the book.

gration process as a result of which it has been characterised its "motor". This universally increasing importance of adjudicating bodies promotes new conflicts of jurisdictions and underlines the exposure of such conflicts alike.

2.1 Conflicts of jurisdictions are not necessarily multi-level phenomena; they can emerge within a single legal system as well. In the domestic legal system of Germany there are significant differences in jurisprudence as regards content as well as conflicts relating to competencies of courts. This causes major difficulties: If courts are in conflict, their functioning and thus effectiveness of legal protection and legal certainty may be affected. For these reasons, German law provides effective legal mechanisms to avoid such conflicts. Firstly, an assignment of jurisdictional competencies that is as clear as possible is required by the Basic Law. Secondly, despite the constitutional guarantee of the independence of judges, German law provides for a minimum unity of jurisdiction and even includes particular rules according to which courts are bound by the decisions of higher courts. These legal mechanisms in German domestic law show that conflicts of jurisdictions generally can be resolved.

2.2 In multi-level systems, conflicts of jurisdictions are increasing as a result of legal integration and interrelation. Such conflicts can be subdivided into different categories, the principal distinction being between conflicts arising from different answers to the same substantive legal question on the one hand and conflicts regarding issues of competence on the other hand. Given the aforementioned exposure, the question of how conflicts of jurisdictions can be resolved and prevented in the future is of utmost importance. Whereas legal scholars have examined these questions solely with regard to specific conflict situations so far, the analysis of these situations in the thesis at hand serves as a basis for developing a legal method of resolution, a model generally applicable to every multi-level system.

3.1 In the third chapter, different set-ups of non-multi-level conflicts of jurisdictions are analysed. The increasing creation of international courts and tribunals in the international legal order is effected without considering competition and conflicts necessarily resulting therefrom. Hence, public international law provides few mechanisms to advance consistent jurisdiction and to resolve conflicts arising from parallel, overlapping and incompatible competencies. For instance, proposals by legal scholars of interconnecting international courts by means of referral proceedings or advisory opinions will not be realised for the fore-

seeable future. Therefore, the international legal order is ill-prepared for the increasing challenge resulting from conflicts between international courts and tribunals.

3.2 International law does not define the jurisdictions of states without overlap. Thus, in principle, several states may have jurisdiction over a concrete issue which causes conflicts of jurisdictions in the broader sense, i.e. not limited to conflicts between courts. Such conflicts must be resolved since, for example, individuals may be confronted with incompatible orders of different states attempting to enforce rules contradicting each other. The broadly accepted reference to comity, i.e. the need that states consider moderating the exercise of their enforcement jurisdiction, is of little avail. Hence, courts of several states resort to a balancing of interests, a practice not undisputed by international legal scholars. This balancing is intended to decide which of the involved states is paramount in the enforcement of its jurisdiction. Yet, neither scholarship nor practice have so far persuasively developed the legal foundation and the details of applying this balancing of interests for the purpose of confining jurisdiction of states in international law.

3.3 General conflicts of law between states may result in conflicts between courts (being conflicts of jurisdictions in terms of this work). For example, courts of different states may be competent to judge a particular case under private international law. This leads to "forum shopping" and conflicts regarding competencies. To avoid parallel proceedings, the law must determine which of the proceedings is preferential; criteria are priority in time or adequacy. Prior and lower-ranking courts then have, in general, different options to settle the conflict. However, the legal mechanisms of the various states being significantly different, this settlement frequently fails. Change for the better can be achieved by legal harmonisation of the different national rules, a process widely progressed within the European Union.

3.4 The multi-level system of international and domestic law so far has produced few conflicts of jurisdictions of general interest. But, in international criminal law there is the perceivable risk of future conflicts between national and international criminal courts. As national courts are, in principle, also competent to adjudicate international crimes, the competencies must be defined. For this, international criminal law resorts to two different models: The International Criminal Tribunals for the Former Yugoslavia and Rwanda are vested with primacy, i.e. they may, at any stage of the procedure, formally request national courts to defer to their competence. In contrast, the model used by the

International Criminal Court is that of complementarity, i.e. it has concurring jurisdiction, but national courts have priority unless the state is unwilling or unable genuinely to carry out the investigation or prosecution. Thus, complementarity basically means subsidiarity of the International Criminal Court. Particularly the complicated system of the complementarity principle foreshadows future conflicts regarding competencies. In any event, in international criminal law the issue of confining jurisdictions has been recognised which led to rules aiming to prevent such conflicts.

3.5 In the multi-level system of the German federalism, the federal as well as the State (*Länder*) levels hold autonomous constitutional jurisdictions. State constitutions comprise specific fundamental rights, constitutional review being assigned to the state constitutional courts. This brings forth competition and conflict of fundamental rights regimes with respect to the Basic Law and, as regards procedural aspects, partly a duplication of constitutional protection with respect to the Federal Constitutional Court. Particular conflicts as to the interpretation of the Basic Law are prevented by the obligation of state constitutional courts to seek a preliminary ruling by the Federal Constitutional Court in case they intend to deviate from this Court's interpretations of the Basic Law; in the following, they are bound by its decisions. The Federal Constitutional Court has utilised these proceedings to inhibit a federalisation in the application of federal statutes based on diverging fundamental rights in the state constitutions. Hence, individualised conflicts of jurisdictions will scarcely emerge in this field of complementary constitutional jurisdictions. This mainly is a result of the aforementioned bias towards a hierarchy in favour of the Federal Constitutional Court, a bias mostly lacking in the sphere beyond the state.

4.1 The multi-level system of the European Union requires a rule resolving collisions of norms of the national and the supranational levels. The European Court of Justice in its constitutional perspective of the supranational legal order assumes European law to be invariably prior in the application, whereas the German Federal Constitutional Court, in an international law-oriented view of the integration community, holds that this primacy is bounded by core principles of the Basic Law. These incompatible perceptions are decisive for both of the cases of conflict between the two courts which are discussed separately in this thesis: the conflict regarding legal review of the exertion of Community competencies on the one hand and the conflict regarding legal review of European law with respect to compliance with fundamental rights on the other hand (to the latter see *infra* 6).

4.2 The competencies of these Courts for judicial review can be defined as follows: Whereas the standard for review of the European Court of Justice is only European law, the Federal Constitutional Court is, in principle, competent for judicial review both based on constitutional and, *incidenter*, European law. The ECJ does not only review Community acts, but, in some of its proceedings, provisions of the member States as well. In contrast, Community acts are never objects of constitutional review by the Federal Constitutional Court. Its own dissenting opinion to this question, mainly focussing upon the effect of those acts in the domestic legal order, is not convincing. Exclusively the statutes ratifying past and future EC and EU Treaties are possible objects of constitutional review relating to European law. However, this does not entitle the Federal Constitutional Court to invalidate single Community acts or rather declare them inapplicable within the German legal system. Domestic provisions transforming or executing European parameters may be constitutionally reviewed. But, as far as contents of such acts are compulsory, the sole standard of review is the constitutional limit to supranational integration. An issue of central importance for the relationship between the European Court of Justice and the Federal Constitutional Court is the preliminary ruling according to article 234 of the EC-Treaty. The Federal Constitutional Court can be bound to institute such proceedings, but, so far, it has not done so. However, it reviews the practice of lower courts in this regard which is of significant practical relevance.

4.3 It was from this relationship between the two courts that the conflict regarding legal review of the exertion of Community competencies evolved. Based on article 220 of the EC-Treaty, the European Court of Justice considers itself solely competent to review the compliance with the assigned competencies by the EU organs. In contrast, the Federal Constitutional Court reserves a competency of its own in this field, holding in its famous *Maastricht* decision that actions *ultra vires* are not binding in Germany which implies the final word of the Federal Constitutional Court in European competency issues. However, the standard for review being solely the European Treaties, *de iure* only one of the courts can be entitled to finally define EU competencies.

4.4 This Federal Constitutional Court's claim for the last word in defining EU competencies challenges legal unity and with it, the Community itself. In the aftermath of the *Maastricht* decision, German courts have scrutinised if Community actions were *ultra vires* without any increased awareness of the precariousness involved. Hence, possible

measures for solving the conflict have been discussed intensely. Persistent is the request for a more precise and transparent delimitation of EU and member States competencies. Others submit relocating review of EU competencies from the European Court of Justice to a separate "European Competency Tribunal". This, however, would not solve the problem of possible *ultra vires* acts by the European courts themselves. Thus, member States would not necessarily abandon their corresponding claims only because of the establishment of a new court on the supranational level. Strikingly, a resolution of the conflict *de lege lata* is scarcely discussed, even more so as some consider the conflict unresolvable.

5.1 The European Community is member of the World Trade Organization (WTO). The legal effects of the WTO Treaties can be subdivided into three categories: International Treaties ratified by the European Community are, according to article 300 para 7 of the EC-Treaty, part of domestic Community law without any further prerequisites (first category). Single Treaty provisions have direct effect (second category) if this is not excluded on the international level ("authority to apply") and if these provisions could theoretically serve as objective standards of legal action, both in terms of content and density of the particular provision, without previous implementation by Community legislation ("ability to apply"). As regards WTO law, there is authority to apply. The ability to apply must be established with respect to every single provision, and the analysis shows that there are WTO norms that are directly applicable. The third category of domestic effects of Community Treaties is that of enforceability: A treaty provision is enforceable if there is evidence that it is intended to grant a certain position to an individual. As the action for annulment according to article 230 of the EC-Treaty is a purely objective legal remedy as far as the action is filed by member States, they can always assert that Community law, being hierarchically superior to secondary law, infringes a Community Treaty; this is true for WTO law as well. The inconsistent jurisprudence of the European Court of Justice, according to which WTO law is, in principle, no standard for review of Community action thus violates article 300 para 7 of the EC-Treaty.

5.2 The WTO dispute settlement system has been significantly judicialised with regard to former GATT panel proceedings. Its central organ, the Dispute Settlement Body, can therefore, in a functional perspective, be considered a court for the purposes of this analysis. If panel or Appellate Body reports establishing infringements of World Trade law by WTO members are adopted by the Dispute Settlement Body,

the respective member is under a binding *international* legal obligation to remedy the established violations within a certain period of time. In contrast, the *domestic* legal effects of WTO dispute settlement decisions are laid down by the legal systems of the member States autonomously.

5.3 According to the European Court of Justice, World Trade law is not a standard for reviewing Community law even if a particular WTO dispute settlement decision has already established violations of WTO law by the Community. As the decision made on the WTO level does not prejudice the question of domestic legal review and since the decision by the European Court of Justice does not apply WTO law, this does not lead to contradictory judicial decisions in terms of content. However, there are contradictory effects of the decisions entailing a conflict of jurisdictions in the multi-level system of the WTO and its members: Whereas the dispute settlement decision requires to remedy the established violations by altering the provisions concerned, this obligation is counteracted and undermined by a decision of the European Court of Justice declaring the same provisions as lawful and thus committing member States and EU organs alike to further observe and apply them. The omitted judicial review of the Community law action with regard to WTO law therefore has similar effects as a theoretical finding that the act in question was in conformity with WTO law. Thus, the willingness of the EU organs to effect the legal alterations required by international law is weakened. The contradicting effects of the decisions result in equally contradicting legal obligations of the EU member States because they are internationally responsible for violations of WTO law caused by Community law which they are not entitled to disapply. The case of WTO law impressively shows that conflicts of jurisdictions in multi-level systems often represent central questions of sovereignty and power in the respective systems of competing public authorities: The European Court of Justice with its jurisprudence of declaring WTO law and even WTO dispute settlement decisions largely irrelevant in the EU legal system obviously intends to give wide leeway to the other EU organs – including unlawful conduct.

5.4 Discussions of the problems by scholars focus on the domestic effect of World Trade law in the Community legal order in general and thereby frequently disregard the problematic implications of the conflict of jurisdictions described above. The decisive question of the domestic effects of WTO dispute settlement decisions in Community law is not always correctly identified and present answers to this question are not yet convincing. A substantial legal consideration of dispute settlement decisions by the European Court of Justice is to be achieved

only if the Court is firstly, by way of exception, under an obligation to review whether Community law is compatible with WTO law, and is secondly, in doing so, bound by the findings in the dispute settlement decisions; the question of whether dispute settlement decisions have direct effect in Community law thus does not correctly reflect the problem. A legal obligation of the ECJ to invalidate Community law provisions which have been declared internationally unlawful by a WTO dispute settlement decision directly follows from article 300 para 7 of the EC-Treaty if the time-limit for implementation has exceeded.

6.1 In Europe, different fundamental rights regimes are competing: In addition to fundamental guarantees in the state constitutions and the rights warranted by the European Convention on Human Rights (ECHR), the EU legal order includes fundamental freedoms as well, the latter being primarily addressed to the EU organs. Germany is bound by the ECHR under international law; in the domestic legal system, the Convention has the same status as federal statutes. In contrast, the EU is not a party to the Convention and thus not directly bound by it. The ECHR is, however, of significant relevance in Community law as the European Court of Justice closely refers to the Convention and the jurisprudence of the European Court of Human Rights (ECtHR) in its interpretation of Community fundamental rights (cf. article 6 para 2 of the EU-Treaty).

6.2 The competing fundamental rights regimes raise the question of how the competencies for judicial review of the Federal Constitutional Court, the European Court of Justice and the European Court of Human Rights are distributed and delimited in this regard. This is of little difficulty as far as the respective standards of review are concerned: The standard for the ECtHR is solely the Convention as are the Community guarantees for the ECJ, notwithstanding the important role of the Convention as to the interpretation and application of the fundamental rights in Community law. The Federal Constitutional Court examines compliance with the fundamental rights of the Basic Law, and – *incidenter* – with Community fundamental guarantees insofar as domestic organs are bound by them. By 2004, i.e. before its *Görgülü* decision, the Federal Constitutional Court had reviewed conformity with the ECHR only in exceptional cases. In this decision, the Court then pronounced that it would exert a much stricter constitutional review of the consideration of the Convention guarantees and of the respective jurisprudence of the ECHR by German courts in the future.

6.3 As regards the concrete objects of review, however, there is a conflict of jurisdictions between the three courts concerning legal review of Community actions as to their compliance with fundamental rights: The ECJ holds that secondary law can be reviewed only with respect to Community fundamental rights, the competency for this control being attributed solely to itself. In contrast, the Federal Constitutional Court has assumed since 1974 that it is itself competent, in principle, to examine if secondary law is in conformity with the fundamental rights of the Basic Law. However, it has never considered a particular Community action incompatible with German fundamental rights. Finally, in its *bananas regulation* decision of 2000, it has considerably raised the bar for the activation of its competency. After all, the European Court of Human Rights has given up former restraint of the Strasbourg control organs with respect to Community law. The ECtHR holds that Community actions must be compatible with the Convention. On the basis of a collective international responsibility of the EU member States the Court exercises this control as a matter of principle. However, the Court has, in its recent *Bosphorus* decision, expressed a reservation for this control: the lack of legal protection appropriate to Convention standards on the Community level. The international law approach taken by the ECtHR is convincing, but it may cause contradicting obligations of the EU member States as they can be held internationally responsible for Community actions that they are bound to implement. The exclusive right to invalidate Community law claimed by the ECJ is thus *de facto* challenged by the Federal Constitutional Court and the European Court of Human Rights alike, i.e. one can speak of a "triangular" conflict concerning the compatibility of Community law with Human rights.

6.4 Scholarly discussions of this conflict – or rather its two close-knit parts – are focusing on the so-called "relationship of cooperation" mentioned by the Federal Constitutional Court in its *Maastricht* decision as regards its correlation with the European Court of Justice. Yet, the analysis is often limited to remind the courts of such cooperativeness. Beyond, there is a firm tendency to understand the cooperational relationship as an obligation of mutual respect and considerateness regarding central constitutional concerns of the other legal system. However, exact guidelines for this obligation have not yet been developed, and without concrete criteria for prerequisites and consequences of an obligation to mutual respect, the governance of the conflict is left to the discretion of the courts. As far as the relationship between ECJ and ECtHR is concerned, the "eternal" discussion as to the accession of the

EU to the ECHR plays the central role, although this accession would not *per se* resolve the problems caused by the competing judicial authorities.

7.1 Regardless of substantial diversity in detail, the individually analysed conflicts are by all means comparable as to their origin, development, status and consequences. This not only justifies a joint examination but is also a prerequisite for the attempt of developing a general legal model for resolving such conflicts. This starts by attributing every single method of resolution suggested with respect to one of the particular conflicts discussed above to a different category of solution.

7.2 This classification in categories shows that all the suggestions can be attributed to only four different classes: They are either models of cooperation, models of legally binding precedent, models of interconnection or models of delimitation. Models of cooperation refer to obligations of mutual respect and cooperation of the courts involved in a conflict of jurisdictions. Models of legally binding precedent focus on obligations of courts to consider decisions taken by other courts. Models of interconnection relate to future institutional linkage between courts by means of preliminary rulings or in terms of joint judicial institutions. At last, models of delimitation emphasize the need to resolve basic legal questions of multi-level systems *de lege ferenda*, especially as regards the delimitation of judicial competencies. This results in three basic ideas which may serve as a basis of a general model for the resolution of conflicts of jurisdictions: Given the goal of this study to develop a solution *de lege lata*, in particular – first – models of cooperation and – second – models of legally binding precedent must be analysed in a profound manner. As a third step, models of interconnection and models of delimitation will be only complementarily discussed as to possible generalisations (see *infra 9*).

7.3 A general model of legally binding precedent can not be drafted. The examples displayed in the different legal systems are insufficient and not homogeneously enough. Even on the national levels the differences are great – a general doctrine of *stare decisis* applies in common law states only. In Germany for instance, courts are bound only in exceptional cases by the decisions of other courts. The decisions by international courts normally neither bind other international tribunals nor national courts. In turn, national courts are bound by the decisions of the European Court of Justice solely if these decisions invalidate or explicitly validate Community legislation. Thus, a doctrine of binding

precedent as a general solution of conflicts of jurisdictions in multi-level systems does not seem conceivable.

8.1 In contrast, the basic idea of models of cooperation relating to mutual respect and considerateness of the legal systems involved can be seized and developed further for the solution of conflicts of jurisdictions. The analysis of the national, supranational and international legal systems proves the existence of such cooperational duties which also call upon the judiciary. Furthermore, it can be established that such obligations are integral parts of any multi-level legal system. Numerous consequences of legal integration and linkage, thereunder conflicts of jurisdictions, cause potential blockade and dysfunction and are thus opposed to the purposes of these integrated systems, i.e. performing common tasks and promoting common values. Thereby, the efficiency of multi-level systems is challenged time and again. Founding treaties or statutes can not *a priori* ensure the functioning of the system in any possible conflict. Here, the principle of loyalty acts as necessary corrective: It is *conditio sine qua non* of the efficiency of the system as a whole and can be deduced from the basic norms of any one of the systems by means of teleological and efficiency-oriented interpretation. Such derivation of legal mechanisms managing the exertion of competencies corresponds to the accepted efficiency-orientation as regards the delimitation of competencies, e.g. in terms of *effet utile* or *implied powers*.

8.2 However, the finding that the principle of loyalty managing the exertion of competencies forms an integral part of any multi-level system only constitutes a first step of a model for the resolution of conflicts of jurisdictions. It needs to be clarified what can be deduced precisely from this principle with regard to a particular conflict. As conflicts of jurisdictions produce serious dangers for the affected multi-level systems, the general principle of loyalty results in a commandment to resolve and avoid these conflicts. This commandment must be shaped with and achieved by specific requirements for the exertion of judicial competencies by the courts involved. The aforementioned commandment of resolution and avoidance is complied with only if neither an absence nor a clash of decisions is possible. Hence, the result of the exertion of competencies by the courts must be the determination which of the contradictory findings is prior-ranking and must thus be respected by the other court.

8.3 Prior-ranking is the jurisdiction which, taking into consideration every relevant aspect, is closer to the decision at issue. The model developed in this thesis shares this keynote idea with the Anglo-American

doctrine of *forum non conveniens*. With it, the commandment to resolve and avoid conflicts of jurisdictions results in a principle of appropriate jurisdiction ("*Prinzip der entscheidungsnahen Jurisdiktion*"), a legal principle demanding to meet its requirements the best possible; it requests maximising appropriateness in the aforementioned sense of adequacy by assigning the competency at issue to the prior-ranking jurisdiction in order to resolve the conflict. This primacy must be identified by balancing all relevant factors and interests. Every court in a situation to decide whether to start or go on with a conflict by a forthcoming decision is under on obligation to enter into a balancing of this kind.

8.4 Consequently, the further development of the principle of loyalty inherent in any multi-level system results in a three-stage model for the resolution of multi-level conflicts of jurisdictions: Initial point is the best possible utilisation of the institutional mechanisms of cooperation available which might resolve or avoid conflicts (first stage). Failing resolution, primacy of one of the courts involved in a conflict must be determined by an over-all balancing of interests (second stage). In a final step, this primacy must be enforced; it can be achieved as the principle of loyalty generally operates as legal limitation of the exertion of competencies (third stage). Having balanced, the court is under no restriction if it is itself prior-ranking. In this case, only the competency of the other court is limited, i.e. the resolution of the conflict is postponed. If, in contrast, the court having balanced, and respectively its jurisdiction, is lower-ranking, it must, as a consequence of the principle of loyalty, exercise its judicial functions in such a way as to resolve or avoid the conflict. Depending on the particular conflict, the court may be under an obligation to decide a legal question having regard to the jurisprudence of other courts ("soft binding") or even to withdraw from exercising a competency formerly claimed.

8.5 The balancing as core piece of a model based on judicial cooperational duties of courts in case of a pending conflict of jurisdictions must be further shaped to achieve an effective and predictable conflict resolution. However, only an open-ended catalogue of relevant factors to balance can be compiled which must be completed with respect to the specifications of each conflict. So, the balancing connects the abstract model of conflict resolution to each concrete conflict insofar as the identification of an adequate and thus appropriate primacy acceptable to each of the courts is only achieved by considering all factors and interests relevant for the individual case. Factors typically relevant for the balancing are questions of expertise and acceptance, the impact of the

possible primacies, further estimation of consequences, the principle of effective legal protection and the question of whether there is an alternative to deciding the conflict before a court.

8.6 Within the framework of the balancing procedure, the presumption of priority is of central importance: It asks the question of which of the courts involved first claimed the competency at issue. As the principle of loyalty, as a matter of principle, results in an obligation to respect the earlier decision of another court, it is presumed that the temporally prior jurisdiction is prior altogether, i.e. more appropriate. Thus, a court having balanced is entitled to oppose to an earlier decision of another court and thereby raise or continue a conflict only if the balancing of all other relevant factors proves that the aspects militating in favour of its own primacy *unequivocally* prevail. Solely under this condition can the presumption of priority be rebutted. Hence, the presumption at the same time avoids a stand-off as result of the balancing. In case the presumption can be rebutted, the solution of the conflict by withdrawing from exercising the competency formerly claimed is incumbent on the other court. For this court, it is no more possible to disprove the – evident – primacy of the other court, i.e. to uphold its former claim. If, in contrast, the presumption of priority can not be rebutted, the court having balanced must consider and respect the earlier decision of the other court. Inasmuch, the principle of loyalty in general results in an obligation to consider the decisions of other courts in multi-level systems (*concordance of jurisprudence*): It is to determine which of the conflicting judicial claims to a particular competency has to be respected as prior-ranking by the other court.

8.7 Applying this conflict resolution model for conflicts of jurisdictions to the specific multi-level conflict situations analysed in the second part of this book, it can be shown that each of the conflicts can be resolved. A modification of the model is necessary as far as the triangle conflict between Federal Constitutional Court, European Court of Justice and European Court of Human Rights is concerned due to the lacking legal interconnection of Community and Convention legal systems, so that there are merely indirect cooperational duties between the courts. But, this does not militate against the model of conflict resolution in general: In fact, the model is amenable to specifications with regard to the individual conflict. Just as little disadvantageous are the facts that additional factors to balance may be identified or interests may be pondered divergently, for the evaluation of the model's suitability for use is not supposed to provide the *ideal* solution of each single conflict

but rather to verify that the application of the model of judicial cooperational duties is able to resolve conflicts of jurisdictions.

9 A complementary legal policy-outlook as regards general approaches to legal reform shows that basic questions of multi-level systems which have produced conflicts of jurisdictions in the past or might produce such conflicts in the future, particularly questions concerning the delimitation of judicial competencies, should be resolved *de lege ferenda* with regard to each specific system. Unambiguous delimitations of competencies should be ensured by establishing preliminary rulings, modelled on the proceedings according to article 234 of the EC-Treaty, as institutionalised multi-level cooperational relationships. In contrast, the general establishment of "joint senates" in the multi-level systems, conceivable in different forms, which would serve as judicial institutions for the settlement of conflicts of jurisdictions and would thus bindingly determine the prior-ranking jurisdiction, is only a subordinate option. After all, the model for conflict resolution *de lege lata* developed above might be declaratorily written down in the law of each multi-level system – a model clause can be designed. However, the need for such legislation is low. If the political actors are willing to tackle the problem, more than the declaratory legal implementation of a resolution mechanism already valid might and should be accomplished *de lege ferenda*.

All in all, the analysis has shown that courts in multi-level systems must change their attitudes. Legal integration and interrelation does not work in practice if each of the courts mainly focuses on its own positions and, above all, on the preservation of its judicial competencies. In a multi-level context, courts are *de facto* responsible for and *de iure* bound, by the principle of loyalty, to implement and promote the fundamental political decision in favour of the integration of different legal systems. They must assure that coordination and cooperation are effectively achieved in practice. Without this cooperativeness of the courts which is compulsory yet unenforceable, neither conflicts of jurisdictions in multi-level systems can be resolved nor, more generally, an undisturbed and effective cooperation of the legal levels in the interest of the entire system can be accomplished. It is therefore crucial that courts of all levels make their contributions to the integration of the legal orders and that thereby a well-balanced distribution of jurisdictions in multi-level systems is achieved.