Interlegality - Symposium

The Importance of Being a Case. Collapsing of the Law upon the Case in Interlegal Situations

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Abstract

The article aims at delving into the concept of a concrete 'case' within the general framework of the theory of interlegality. The argumentation starts from the acknowledgment that it is not possible to identify in advance and in abstract terms the rule governing the case, and according to which it should be adjudicated: in the interlegal scenario no other ordering criterion can be ascertained but for a reference to the interplay of regulatory claims in respect of the 'facts of the case'. The analysis firstly focuses upon the concept of the case from a theoretical point of view. It then highlights the relationship between facts as empirical ground and the case as the result of the qualification by multiple normativities. Lastly, after stressing the importance of ascertaining facts in order not to misunderstand the content and import of legal cases, it explains why in the interlegal scenario a paradigm shift can be acknowledged: from the abstract rule valid in a given jurisdiction, to the centrality of the case for the identification of the law governing it.

I. Introduction

The present article aims at delving into the concept of a (concrete) 'case' as a key device of the theory of interlegality. The 'case' appears to operate as the endpoint of many converging lines, along which multiple legal qualifications claim to validly and legitimately regulate a given concrete situation of life. At the same time, it is not possible to identify in advance and in abstract terms the rule governing the case, and according to which it should be adjudicated: in the interlegal scenario no other ordering criterion can be ascertained but for a reference to the interplay of regulatory claims in respect of the 'facts of the case'.

The *Lebenssachverhalt*, that is the concrete, complex situation of life relevant for the law, can be depicted as a pitch on which a game of rules must be played. All the convergent legal qualifications that have a bearing on the decision of the adjudicating body (be it a judicial authority in classical sense, or any other body vested with adjudicatory powers)[1] must be taken into account. Then, the

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[1] Self-contained regimes can provide for such authorities: think for instance of the WTO, the International Commission for Assigned Names and Numbers, as well as the Facebook's Oversight Board.

choice depends ultimately on the physiognomy of the case. Whenever multiple rules belonging to different legal orders legitimately claim to be applied to the facts they refer, none of them can be deemed *in abstracto* to be *the* exclusive rule (nor *the* exclusive legal order) set forth for the given situation.

On the contrary, it is the case that frames the remit where the multiple concurrent legal qualifications interfere with each other: sometimes converging, sometimes diverging, sometimes being dramatically opposite. The rule of the case does not stem by its own virtue, for example from a simple, mechanical act of subsuming concrete facts under an abstract provision. The rule for the case depends on the features of the case. They guide the adjudicating body through the choice among multiple, legitimate parameters of legal qualification.

The argumentation will unfold through the following steps. After a preliminary consideration of the importance of the case within the general framework of interlegality (§ 2), the analysis will focus upon the concept of 'case' from a theoretical point of view, and in particular as contrasted with the seemingly corresponding concept of 'fact': consider the recurring expression 'facts of the case', which is commonly used as a longer locution equivalent to the label 'case'. This part of the analysis will be carried out without reference to any specific body of law. However, the account will benefit from a renewed attention that legal scholars, following a methodological debate among historians, devote to the importance of the situation of the case in crafting specific interpretive solutions especially in the framework of international criminal law (§ 3). The main gist of § 3 is therefore to highlight the relationship between the facts as empirical ground attracting legal qualifications and the case as the meeting point between the facts and their qualifications. The last section points out the importance of ascertaining facts in order to understand the actual content and import of legal cases. It then focuses on the relation between facts and rules in the framework of interlegal affairs, as contrasted with the seemingly parallel but different concept of 'case-law' which refers to a merely domestic point of view. This section furthermore aims at explaining why in this context a paradigm shift – from the rule for the case to the case of the rules – can be acknowledged. Far from being a tongue twister, this phrasing exposes how in issues of interlegality, where no single rule or single legal order may claim exclusive right to 'rule the case', there is no room for 'insulated and self-referential legality'; what matters is plurality, that is, the composite law relevant to the case and governing it:

> 'the interpretive outcome results less from the application of a valid rule than from a more open and nuanced itinerarium, where the reconstruction of the facts at hand is the occasion for the interpreter to arbitrate different rationales and countervailing principles on the basis of the investigation of the legality imbuing the issues and the features of the case'.

The following analysis provides evidence of the influence of casuistic logic, where the case is central to set out the concrete application of the rules, upon the theorization of the category (§ 4).

II. Interlegality Universe: Movement of Expansion, Principle of Inclusion, Gravitational Force of the 'Case'

Interlegality is the theory crafted to highlight and address those situations in which the entitlement to set forth the rule relevant and applicable to the case at hand is shared by multiple legal orders.[2] These situations are neither exceptional nor limited to certain topics or branches of law. Each converging legal order may produce legal effects by its own, so that the scenario focusing on the case is composed of all legal sources that refer to the concrete situation, irrespective of the (im)possibility of grading those sources according to ordering principles such as that of hierarchy, because they pertain to discrete and possibly uncoordinated sources.

In these situations, the law relevant for the case at hand is produced by various actors. Each actor, however, may not claim to be the sole originally legitimate source ruling the case and therefore producing legal effects.

As long as the law has been conceived of as valid within –and limited to– State's boundaries, the world of sources could be described as a stationary universe governed by an 'exclusionary principle'. In this universe, only domestic law – where appropriate, at constitutional level – can vest a source with the power of jus-generation: in fact, with the legitimacy of being a legal 'source'. Suffice for present purposes to define a legal source, through a general proposition, as any fact that embeds normative propositions, that belongs to a given legal order by virtue of a superior rule or principle of that legal order.[3]

Within the remit of a domestic legal order, the applicable rules of law are defined according to recognizable criteria of priority, such as hierarchy or competence, setting the sources' architecture. According to Italian law, for instance, the principle of hierarchy traditionally governs the relation between parliamentary law and governmental regulations, therefore deemed to be 'subordinated' to legislation; the principle of competence (either shared or exclusive) underpins the division of legislative capacity, entrusted either to the State or to the Regions as political-administrative territorial entities of a unitary State. The encounter with international and supranational law has only partially shaken this architecture. In domestic legal orders a 'principle of inclusion' emerged, namely, the mandatory

[2] J. Klabbers and G. Palombella eds, *The Challenge of Interlegality* (Cambridge: Cambridge University Press, 2019).

[3] 'Any fact that embeds normative propositions, and determines the bindingness (adoption-worthiness) of these propositions, by virtue of such an embedment': this is the definition provided by G. Sartor, *Legal Reasoning. A Cognitive Approach to the Law* (Dordrecht: Springer, 2007), 657.

consideration of those legal orders in the list of the applicable law. Nevertheless, their relation to the domestic system has long been debated. Indeed, the very relations between international and supranational law, on the one side, and, on the other, domestic law, have long time appeared as regulated by identifiable principles, even though these were represented as opposite. Both monistic and dualistic theories as conceptual reading keys to the relationship between national and international legal orders, belong at close sight to the same interpretive account.[4] The one differs from the other as to which ordering principle coordinates those discrete orders, but they do not put into question that an ordering criterion does actually exist.

As regards supranational law of the European Union, the content and the scope of application of the primacy principle (*primauté*) may be contentious, but again there is no question as to its existence.

In a multi-centered reality such as the contemporary law's architecture,[5] on the contrary, the fixed structure of the sources as well as the ordering principles and the types of relationship among different legal orders are radically put into question. Alongside the movement of expansion spreading through the universe of normativity's sources an implicit 'rule of inclusion' governs the universe of human relations. This rule bestows equal legitimacy on different sources controlling those relations.

One might acknowledge a movement of expansion, because the regulated domains of human life are deeply interwoven despite being heterogeneous. Mireille Delmas-Marty dubbed this interconnectedness and entanglement of legal spaces as 'enchevêtrement des espaces normatifs'.[6] Such entanglement affects every body of law and specialized discipline, from the law of contracts to environmental law, from labour law to company law, up to criminal law, a remit traditionally seen as the most closely related to jealous state sovereignty, and still perceived as its last shrine.

One paradigmatic example is that of the regulation of the Internet. Many global actors claim a legitimate power to regulate this space: from public actors – legal orders in a strict sense, national, supranational, international – to private entities that exert regulatory powers vested with full legitimacy.

At the same time, this universe is governed by a 'principle of inclusion' as its centripetal force: all sources may legitimately claim to rule the human relations

[4] On the traditional doctrines of monism and dualism as explanation of the relationship between domestic and international law see for instance: J.E. Nijman and A. Nollkaemper eds, *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007).

[5] See only M. Delmas-Marty, Vers un droit commun de l'humanité (Paris: Textuel, 1995); M. Delmas-Marty ed, Trois défis pour un droit mondial (Paris: Seuil, 1998); M. Delmas-Marty ed, Études juridiques comparatives et internationalisation du droit (Paris: Fayard, 2003); M. Delmas-Marty ed, Le pluralisme ordonné (Paris: Seuil, 2006).

[6] M. Delmas-Marty, Review of 'Julie Allard, Antoine Garapon, Les juges dans la mondialisation. La nouvelle révolution du droit' 28 *Critique internationale*, 187-189 (2005).

they refer to, irrespective of whether the social intercourse is directly concerning individual persons or is affecting human relations indirectly, especially through technology or legal fictions such as that of corporations. Therefore, it must be acknowledged that many factual situations become legally relevant according to multiple parameters of qualification, national, supranational, international. Furthermore, the nature of such sources and parameters is varied, different origins can be counted, including private regulations and disciplines. This happens whenever certain regulatory powers are explicitly conferred on non-State actors (mainly organizations), or the factual exercise by them is recognized. The multiplicity of qualifications that characterize the interlegal dimension of law is not only including (public) legal orders, but also other private entities and networks, whose legitimacy rests upon private autonomy as formal expression of entrepreneurial liberty and actual regulatory capacity.

If many uncoordinated sources are able to produce legal effects in respect of a given concrete situation, the 'law of the case' results from the interconnectedness of the convergent legalities, even without giving pre-defined priority to any of them. Therefore, the law no longer takes the form of the general, abstract rule, it rather appears to be composite and multiverse, its shape moulded from the features of the concrete case. As Gianluigi Palombella underlines,[7] the entire force of gravity of interlegal situations 'concentrates on the bottom of the concrete case', which attracts the sources for its qualification. The circumstances irradiating from the fact attract diverse legal orders and give birth to the interlegality phenomenon: to the unitary dimension of the fact corresponds the plurality of sources, in turn deriving from the necessity of ruling on it through this multifaceted array of legal –legally relevant– qualifications.[8] Interlegal law is the law of the concrete case. It has been conveniently stressed that the case, in turn, is not a no man's land, that is, it is not the venue of pure facts, incidents that transpire in the course of history. Due to the convergence of many legal sources that potentially rule the case, the case is a remit in which the plurality of regulative sources converges upon the facts. One should acknowledge that around the fact thickens a density of law; the legal question amounts to evaluating a fact coupled with this density of law.

As for the relationship between interlegality and rule of the case a preliminary clarification is due. Interlegality theory works as a *method* of dealing with a relevant case at all levels of jurisdiction: norm-production, adjudication, enforcement. All of these matters, and are to be taken into consideration.

While interlegality at the stage of adjudication is the prototypical situation, interlegal scenario can occur at the legislative level. In some instance legitimacy

[7] G. Palombella, 'Theory, Realities and Promises of Inter-Legality: A Manifesto', in Id and J. Klabbers eds, *The Challenge of Interlegality* (Cambridge: Cambridge University Press, 2017).

[8] See on this G. Palombella, in this short symposium.

is explicitly conferred on a foreign source by an unilateral decision[9] of the referring regulatory order. The referring order can be either one of a state, or of a supranational order, or even a private authority.

As for the first instance (domestic legal order), one might recall the provision enshrined in the US CLOUD Act, according to which:

> 'A provider of electronic communication service to the public or remote computing service, including a foreign electronic communication service or remote computing service, that is being required to disclose pursuant to legal process issued under this section the contents of a wire or electronic communication of a subscriber or customer, may file a motion to modify or quash the legal process where the provider reasonably believes – '…(ii) that the required disclosure would create a material risk that the provider would violate the laws of a qualifying foreign government in preventing any prohibited disclosure)'.[10]

The reference to a foreign legal order (*prise en compte*) may affect criminal law too, namely, the body of law still considered as the most closely related to the state sovereignty. This happens, for instance, whenever:

(*i*) a crime committed abroad can only be adjudicated following the double incrimination principle, that is the verification on whether the act amounts to a criminal offence in both (or more) countries concerned;[11]

(*ii*) a reason not to punish – irrespective of its domestic labelling (*Strafausschliessungsgründe/Strafaufhebungsgründe*; *cause di non punibilità*; *(non excusatory/exculpatory) defences*) [12] – that is applicable under the *lex loci* is admitted in the state claiming jurisdiction even if it is not concretely applicable

[9] It might be a domestic legal order (see for instance the US CLOUD Act quoted in the main text. As regards supranational law, see Art 45 of the European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 (General Data Protection Regulation); furthermore, Arts 15 and 16 of the Proposal for a regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters [17.4.2018, COM 2018/225/final]). As for private authorities, see for instance the ICANN, which enacted a Procedure for Handling WHOIS Conflicts with Privacy Law, available at https://tinyurl.com/5xau7edf (last visited 31 December 2021).

[10] Sec 103 (b).

[11] This a recurring provision in national criminal codes; on this issue see for instance D. Basak, Vor § 3, marg. nr. 13; § 7, marg. nr. 3, in H. Matt, J. Renzikowski, *Strafgesetzbuch. Kommentar* (München: Franz Vahlen, 2nd ed, 2020); F. Jessberger, *Der transnationale Geltungsbereich des deutschen Strafrechts* (Tübingen: Mohr Siebeck, 2011), 151.

[12] '(T)hose defenses that…are not all grounded in a lack of culpability of the defendant. Rather, a nonexculpatory defense is supported by some other important public policy consideration. A balancing of interests is involved, but the balancing is different from that which occurs with respect to those defenses falling into the justifications category…in the case of nonexculpatory defenses the outweighing benefit comes from foregoing conviction of the defendant. Perhaps the best example is the various statutes of limitations, legislative time limits on the commencement of criminal prosecutions (…)': W.R. LaFave, *Substantive Criminal Law* (St Paul: Thomson West, 2003[2]), II, 9.

for whatever reason;

(*iii*) the amount of prison time served in one state detracts from the time that has to be served in another state due to a sentence inflicted for the same facts in the latter (*Anrechnungsprinzip*).

Another instance of the legislative consideration of multiple legalities is, in Italy, a provision of the recently enacted bill laying down the crime of 'failure to comply with maritime interdictions': the component elements of the offence refer to international and supranational law sources. Indeed, more or less explicitly, they recall principles and rules imposed by general international law, international human rights law, and European law, setting out an intertwinement of sources that we may consider interlegal.

That said, the category of interlegality does not entail as such any substantive criterion for ruling the case, nor any result-oriented (content-oriented) solution of the case: interlegal argumentation does not *a priori* tilt toward a solution rather than a different one. From a conceptual point of view, this category recognises all the relevant legalities – all convergent 'normativities'– that are validly controlling the same case at stake. Only the pluralist method is defined in abstract, whereas the solution is commended to the umpire of the circumstances of the case (primarily, but not necessarily, the judge).

It frequently happens that the substantive criterion of the decision is committed to elastic if not vague, political-legal benchmarks such as the 'interests of justice', international 'comity' (which, incidentally, might be deemed vague only under a strict positivistic interpretive attitude, since its content in international relations has been shaped throughout a couple of centuries). Besides, many general clauses (*Generalklauseln*) are widespread in domestic as well as in international and supranational settings, irrespective of strict interlegal situations. They occur every time the universe of legal qualifications comes to terms with other axiological paradigms: think of the 'public interest', 'ordre public' (public order), 'boni mores' (*gute Sitten*, *buon costume*); good behaviour (*buona condotta*).[13]

To sum up, it is the concrete situation, the relevant case that stars as the 'Stone Guest' in Mozart's Don Giovanni[14] in the legal theatre of interlegality. The case comes back to reconquer its role central to this new category, pushing to the background the abstract and general legislative rule emanated by and within a domestic legal order. The principle of inclusion of multiple legalities (normativities) pivots on the concrete case, as a segment of reality which they claim to regulate. Eventually, this same principle of inclusion is the criterion of

[13] In the English system 'the former power to bind over an offender to be of good behavior is no longer available, since it was declared insufficiently certain but there remains the power to bind over an offender to do or not to do a specified act': see for instance A. Ashworth, *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press, 2015), 340.

[14] See also A. Puškin, *The Stone Guest*, 1839 (1830), available in English for instance in A. Pushkin, *The Little Tragedies* (transl. N.K. Anderson) (New Haven and London: Yale University Press, 2008).

adjudication of the case.

III. Fact, Case

1. From the Law as Circumference to the Case as Segment

The concept of concrete case (*Fall, Kasus*) remained traditionally shadowed indeed, at least as long as legal culture and political philosophy have stressed the importance of the general and abstract legislative provision, firstly, as the only true safeguard of the (formal) equality principle and, secondly, as the precondition of the judicial activity, conceived of as having only mechanical, syllogistic nature (judge as 'bouche de la loi'). The forcefully metaphor of the law as circumference was used at the outset of the French Revolution by the well-known Abby Sieyès, who wanted to underscore the fact that every citizen sitting on the circumference line occupies there 'des places égales', an equal standing.

In fact, the centrality of the legislative will, embodied in the parliamentary law (*loi*, *ley*, *legge*), was welded to a theoretical horizon whose ascent has to be traced back to the continental Enlightenment:[15] a philosophy bound by the principle of (formal) equality to be safeguarded within a given domestic legal system. The decline of this idea revealed the delusion of the general and abstract legal provision as the only effective safeguard for the equal treatment of citizens. Much ink has been spilled on the crisis of this vision, there is no room here for crocheting at the edge of great paintings. It must be rather pointed out that, the more the reality of the law detaches from the ideal centrality of the 'legislative law' as well as from the exclusivity of the domestic sources, or their exclusively public nature – the more legal culture must go off the beaten track, conceiving of the nature and the structure of the law and its application in new and unconventional ways.

On the one side, cultural attitudes that inform the Anglo-Saxon legal argumentative experience claim to be on the front stage (burst on the scene of continental culture);[16] but even where this cultural acquaintance is already present, the need arises for a rupture of a traditional image of the law. This is the necessity of overcoming the deeply entrenched habits of textualism and originalism, respectively as method and teleological horizon of the interpretation.[17] It is not

[15] In Italian, see A. Cavanna, Storia del diritto moderno in Europa. 1. Le fonti e il pensiero giuridico (Milano: Giuffrè, 1982), 479-610.

[16] See in Italian, above all, the presentation by U. Mattei, *Common Law. Il diritto angloamericano* (Torino: UTET, 1999) passim and especially 214 et seq. An interesting account of the historical evolution of the north-american private law in the 19th Century is provided by P. Karsten, *Heart versus Head: Judge-made Law in Nineteenth-century America* (Chapel Hill: The University of North Carolina Press, 1997) who underlines the continuity of judicial interpretive attitudes rather than creativity ('continuity, not change, characterized the 'creative era' ': chapter I, at the end).

[17] See a famous phrase of Felix Frankfurter, 'Some reflections on the Reading of Statutes'

by chance that recently, firstly in historical writings,[18] then among jurists too,[19] a new interest in casuistry sparkled. Casuistry is an age-old method of argumentation elaborated by Jesuits to address controversial moral and philosophical issues; in particular, it was elaborated as a method of conceiving of certain paths to derogate from the abstract and absolute precepts of the religious (catholic) morality in certain specified circumstances. As it is well known, casuistry fell into discredit after the criticisms raised against the casuists by the philosopher Blaise Pascal.

As some scholars have pointed out, in recent times casuistry is also applied for resolving legal problems.[20]

> 'In this respect casuistry takes as a starting point that the meaning of the law is not determined by abstract rules alone but develops on a case-by-case basis in interplay with the questions and issues raised in individual cases'.[21]

In order to understand the background of this kind of resurgence of casuistry as a method of dealing with complex moral issues it seems useful to recall a general distinction between theoretical and practical arguments

> 'Theoretical arguments are chains of proof, whereas practical arguments are methods for resolving problems. In the first, formal sense, an argument is a chain of propositions, linked up so as to guarantee its conclusion that in the second, substantive sense, and argument is a network of considerations, presented so as to resolve a practical quandary. Taken in these two contrasted senses, arguments operate in quite different ways and have different kinds of intellectual merits that they conform to different patterns and must be analyzed in different terms'.[22]

Consequently, theoretical arguments are structured in ways that are not dependent on the circumstances in which they happen to appear nor are to be

47 *Columbia Law Review*, 527-538 (1947)): '…I was indiscreet enough to say that I don't care what their (of a legislature) intention was. I only want to know what the words mean'; see furthermore the position of Oliver Wendell Holmes (*Collected Legal Papers*, New York: Harcourt, 1920). On the distinction between 'textualism' and 'literalism' see the explanations by A. Scalia, *A Matter of Interpretation. Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 23 et seq.

[18] See especially C. Ginzburg and L. Biasiori eds, *A Historical Approach to Casuistry. Norms and Exceptions in a Comparative Perspective* (London: Bloomsbury Academic, 2018).

[19] H. van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' 8 *Int'l Criminal Law Review*, 229-272 (2008).

[20] M. Cupido, 'Facing Facts in International Criminal Law' *Journal of International Criminal Justice*, 14, 1-20, 6 (2016).

[21] ibid 2.

[22] A.R. Jonsen and S. Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning* (Oakland CA: University of California Press, 1988), 34-35.

affected by the practical context of use.

> 'in the language of formal logic, the actions are major premises, the fact that specified the present instance are minor premises, and the conclusion to be 'proved' is deduced (follows necessarily) from the initial premises'.[23]

As regards practical arguments, by contrast, contextual argumentation is needed. This kind of arguments, indeed,

> 'involve a wider range of factors than formal deductions and are red with an eye to their occasion of use. Instead of aiming at strict entailment, they draw on the outcomes of previous experience, carrying over the procedures used to resolve earlier problems and we are applying them in new problematic situations. Practical arguments depend for their power on how closely the present circumstances resemble those of the earlier president cases for which this particular type of argument was originally devised… in the language operational analysis, the facts of the present case defined the grounds on which any resolution must be based, the general considerations that current weight in similar situations provide wear and that helps settle future cases'.[24]

The distinction is useful from the legal point of view, since legal arguments are of the type of the practical, contextual arguments. Their demonstrative force depends on the degree of similarity (analogy) between the present circumstances and the preceding cases, in relation to which the specific argument was conceived and applied. Based on this similarity, legal arguments are *demonstrative* not through the path of logics (that is, not in dianoetic Artisotle's sense): They express the *persuasive* force of the *practical* argumentation, [25] oriented toward the solution of a practical problem, the 'case' indeed. Application of the law is therefore never governed by a strict logical rigor; the judicial activity adapts the law to the features of the concrete case.

> 'The application of the law to individual cases cannot be reduced to a mechanical exercise based on deductive reasoning…No matter how detailed the law is, it will never be governed by strict logic…Instead, courts always maintain a certain degree of discretion to adjust the law to the specific features of individual cases'.[26]

[23] ibid 34-35 (italics in original).

[24] ibid 35.

[25] A. Garapon, *Les juges dans la mondialisation: la nouvelle révolution du droit* (Paris: Seuil, 2005).

[26] See also D. Jakobs, 'Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories', in J. d'Aspremont and Jorg Kammerhofer eds, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University

This account does not lead to maintain that interpretation of abstract rules is by itself structurally analogical, that is, based on the relationship '*a simili ad similem*'. Similarity is rather the result of the qualification process in respect of a case which appears similar to another because, through comparison, the actual, concrete reasons that confirm the similarity can be inferred, precisely through an argument from sufficient similarity.[27]

As van der Wilt puts it:

> 'the method of casuistry consists of comparing concrete situations and cases, in order to decide, by inductive reasoning, whether they are governed by the same moral or legal principle'.[28]

In fact, it may happen that there is no correspondence between the compared situations, and the case must be deemed different and therefore distinguished from the precedents. Affirmation, rebuttal, and possible sur-rebuttal of the similarity are nevertheless based on a common premise, that all these arguments must be rooted in the concrete features of the case: facts and value judgments.

The case is then back on the center of the law. In the interlegal situations, relevant for present purposes, two questions arise. First, the difference between facts and case, and the relationships between these two concepts, deserve some further clarification (§ 3.2). Secondly, the narrative of facts is of paramount importance: we need to delve into the issue of how empirical facts are considered and selected to become the object of legal qualifications. Indeed, any legal evaluation of the empirical facts submits them to the value-laden judgments that the legal qualification carries out. Such value-judgements can be different, and even opposite: better still, the very problem of the applicable law in the twisted scenario of multi-level regulatory sources, to which interlegality as a category aims to provide its more original contribution, arises precisely when value-judgment enshrined in different legal qualifications are leading to opposite conclusions. In this framework, the scope of the context in interpreting and applying the relevant law must be considered (§ 3.3). Eventually, this article will consider a suitable technique of describing the case starting from the narration of facts. To this aim, I will follow the approach suggested by André Jolles, an influential linguist of the first half of the twentieth Century (§ 4).

2. The Importance of Being a Fact

Press, 2014); L. Halpérin, *Profils des mondialisations du droit* (Paris: Dalloz, 2009), 275-285.

[27] On this aspect see M. Grabmair and K.D. Ashley, 'Facilitating Case Comparison Using Value Judgments and Intermediate Legal Concepts' *Proceedings of the 13th International Conference on Artificial Intelligence and Law*, 160 et seq (ICAIL 2011).

[28] H. van der Wilt, n 19 above, 265; Cf Id, 'Domestic Courts' Contribution to the Development of International Criminal Law: Some Reflections' 46(2) *Israel Law Review*, 207-231, 220-224 (2013).

The words 'fact' and 'case' are sometimes used as fungible ones, evoked rather than specifically reflected on. In a recent, thoughtful Italian handbook on 'general legal theory', for instance, the nouns 'case' and 'fact' shift from the one label to the other without providing a truly sharp conceptual framework. So Umberto Breccia defines the case as a fact, that is, a fragment of experience which is determined in time and space.[29] The case, it is maintained, is above all a fact of the life. As a fragment of life, it is subjected to – sometimes opposed – legal qualifications.

This account goes alongside a classical way of presenting the relationship between case and facts:

> 'A fact is nothing more than an occurrence at a certain point in time, that is able to modify the concrete reality. it may be legally relevant or not, depending on the legislative provision applicable to them…Facts, or occurrences –which is the same– have a distinct and clear autonomy from the material point of view, since they are separated from each other and individualized by their own nature. However, once taken into consideration by the legislator, they can relate to each other and be reduced in unity'.[30]

The shift from one term to the other is to be avoided. We might seize the opportunity for this conceptual clarification in the context of interlegality. An useful starting point is the account made by Gianluigi Palombella, who authored the *Manifesto* essay on Interlegality:[31] it is the circumstances surrounding the fact, irradiating from it, that attract different regulatory orders. While the fact is intrinsically unique or unitary, it faces the plurality of sources. The legal question arising from the convergence of multiple, non-coordinated regimes concerns precisely what is the legal regime of a *fact*. This statement goes along the specification that the first step of the interlegal argumentation has to be identified as assessment of the features peculiar to the *case:*

> 'the reconstruction of the *facts* at hand is the occasion for the interpreter to arbitrate different rationales and countervailing principles on the basis of investigation of the legality imbuing the issues and the features of the *case*'.[32]

The first, elementary significance of the noun 'fact' in the legal context is that of a life occurrence requiring for whatever reasons the intervention of the law. Recalling the importance of facts could sound trivial but is the starting point for any subsequent question as regards the law applicable to the facts and,

[29] U. Breccia, *Teoria generale del diritto* (Pisa: Pacini, 2019), 305, 405, 451.
[30] F. Gazzoni, *Diritto privato* (Napoli: Edizioni Scientifiche Italiane, 2019), 81.
[31] G. Palombella, n 7 above.
[32] ibid 383.

we should add up, as regards the assessment whether those facts are anyhow legally relevant. As Antonin Scalia puts it:

> 'Don't underestimate the importance of facts. To be sure, you will be arguing to the court about the law, but what law applies–what cases are in point, and what cases can be distinguished–depends ultimately on the facts of your case'.[33]

That said, the concrete fact is the object of multiple possible qualifications, that might lead to results which could be not only different but also opposite. Legal qualifications are in turn the content of a 'balance' by the judge. The subsumption of the facts under one possible legal qualification is only following the decision to be taken about what legal qualification is suitable for the facts of the case. Subsumption, however, is not the tool *through* which the decision is taken; nor the content of the decision is a *direct* consequence of this sole logical process. Too often there is no single rule of qualification applicable to the facts, acting as the general statement (so called major premise) that, in combination with the specific statement about the facts (so called minor premise), allows to deduce a logically sound conclusion. As said above, the facts attract multiple norms of qualification and the choice among them precedes the triggering of the very mechanism of subsumption.

As such, the qualification of the facts in light of abstract schemes is not neutral, since the qualification scheme carries in turn a value judgment. Even if the (hardly resolvable) philosophical issue of distinguishing between facts and values is far beyond the content and space limits of this article, we can underline in general terms the importance of an accurate reconstruction of the facts in light of the different schemes of value judgments that can be applied to this reconstruction.

Think for instance of the well-known *Melloni* case,[34] in which the Spanish Constitutional Tribunal and the Court of justice of the European Union strongly debated on the legitimacy of the refusal to execute an European Arrest Warrant emanated *in absentia* by an Italian judicial authority for enforcement purposes. Whereas the Italian legal order would not have admitted the repetition of the criminal trial in the specific case, the Spanish legal order required the mandatory presence of the accused at trial, and the repetition of the trial, of course with the presence of the suspect, in case of violation of such provision. The Spanish judges therefore considered that fundamental rights were protected in higher degree by their own legal order. Beside the different domestic legal orders, the law of the European Union were also relevant. It sets forth as a general rule that

[33] A. Scalia and B.A. Garner, *Making Your Case. The Art of Persuading Judges* (St. Paul, Minnesota: West Group, 2008), 9.

[34] Case C-399/11, *Melloni* v *Ministerio Fiscal*, [2013], ECLI:EU:C:2013:107.

> '(t)he executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision'.

However, European law provides for some exceptions[35] to the prohibition of a conviction in absentia: the warrant must be executed where the person concerned: in due time either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of the trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, has given a mandate to a legal counsellor, and – among other conditions – was indeed defended by that counsellor at the trial. 'Mr. Melloni fell under the scope of those exceptions exactly'.[36]

The EU law expresses a clear 'value judgement' by its own: the right to be present has a protective function, requiring the complete information about the trial, the right to legal assistance, and in general the right to defend oneself against the punitive power (*pretesa punitiva*) of the state.

The Spanish Constitutional Tribunal stressed that only the domestic legal standards were applicable, since 'the right to be preset at trial is traditionally considered part of the right to a fair trial in the Spanish Constitution',[37] without any consideration for the different approach taken by both the European legal order and the Italian one – the latter, in conformity with European rules.

The ECJ takes the opposite stance. It holds that fundamental rights enshrined in the state's constitution cannot prevail over secondary EU legislation compatible with the EU Charter of fundamental rights, even though the standard of protection guaranteed at domestic level is higher than that deriving from the Charter. Any different conclusion would undermine the principles of mutual trust and recognition that the EU legislation purports to uphold.

If we apply an interlegal perspective to contrasts such as the above, a different way of reasoning would be recommended, one that would better cope with the plurality of orders and their own different value judgements upon the case.

If one agrees – and in fact all competing legal orders did agree – upon the premise that the right to be present at the trial is a fundamental right of the individual concerned; and if one agrees that this right has nothing to do with other interests of non-individual nature (which, instead, might be relevant in other, discrete legal settings such as international trials for crimes under international law),[38] then it is clear that such a right is in fact safeguarded

[35] Art 4 *bis* 1 (a) e (b) of the Framework Decision 2002/584 on the European Arrest Warrant.

[36] V. Mitsilegas and L. Mancano, 'Melloni: Primacy versus Rights?', in V. Mitsilegas et al eds, *The Court of Justice and European Criminal Law* (London: Hart Publishing, 2019), 393, 393.

[37] ibid 394.

[38] W. Schabas, *An Introduction to International Criminal Court* (Cambridge: CUP, 2017),

whenever, in the concrete situation, it is/has been a specific, free choice of the individual not to be present at the trial, even if the legal order has put him/her in the condition to defend herself effectively.[39]

Anyone who has practical experience in whatever jurisdiction as a criminal attorney, or at least in jurisdictions where presence is not mandatory, shall know very well how absolutely important is to guarantee this kind of free choice even if the legal order – functionally personified by a public prosecutor or by a judge who might want to look the accused in the eyes – would have its institutional interest that the accused be present.

The clash between the domestic (Spanish) and the European courts has been read as a clash between different value judgments as regard the scope of the (secondary) European legislation in conflict with fundamental rights recognized at domestic highest level: on the one side, strongest safeguard of individual rights; mutual trust in light of cooperation duties of effectively enforcing European law, on the other side.

Both accounts are, however, unduly unilateral and, through this one-sidedness, they ended by letting out of sight the concrete case. In this case, the value that was shared explicitly or impliedly by each of the convergent legal orders – the right to free choice – was already has been safeguarded: the person concerned consciously chose not to participate in a trial which accordingly could be deemed to be legally 'fair'. This should have been considered sufficient for adopting an interlegal perspective, that is, the account that all different perspectives from which the case could be observed had to be taken simultaneously into account. An accurate consideration of the concrete case as well as of all the convergent legal orders allows for the conclusion that no real contrast exists between the duty to cooperate based on the mutual trust, which prevails in the argumentation of the ECJ, on the one side, and – on the other side – the higher standard of protection of fundamental rights, which prevails in the opinion of the domestic supreme court.

Indeed, what is the higher standard of protection of fundamental rights cannot be assessed solely in light of abstract legal provisions. It can only be maintained in the light of the features of the life occurrence in which those rights are claimed. The relevance of the perspective *in concreto* seems to be the majoritarian interpretive attitude in the case-law of international criminal tribunals and more generally in the framework of international criminal justice. As William Schabas recaps the issue at hand:

> 'Although the accused's right to be present at trial is recognized in the principal human rights instruments, international tribunals and monitoring

285-288.

[39] See also the specification made by the CJEU in Case C-108/16 *Openbaar Ministerie* v *Pawel Dworzecki* [2016] ECLI:EU:C:2016:346, paras 49-53.

> bodies have not viewed presence at trial as indispensable and have recognized that an accused may waive the right by failing to appear after notification of the proceedings'.[40]

Case-law of the European Court of Human Rights confirms this case-by-case approach, considering whether the accused actually waived his right to appear and to defend himself and especially assessing whether the waiver is unequivocal; at the same time, the Court stresses that elaborating a 'general theory' is beyond the judicial task –in fact, it is inappropriate.

> 'In the instant case, the Court does not have to determine whether and under what conditions an accused can waive exercise of his right to appear at the hearing since in any event, according to the Court's established case-law, *waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner*'.[41]

> 'It is *not* the Court's function to elaborate *a general theory* in this area … (T)he impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice. However, *in the circumstances of the case*, this fact does not appear to the Court to be of such a nature as to justify a complete and irreparable loss of the entitlement to take part in the hearing. When domestic law permits a trial to be held notwithstanding the absence of a person 'charged with a criminal offence' who is in (the accused's) position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge'[42].

The perspective on the concrete case, and the taking into consideration of all the legal sources is the most innovative if not revolutionary contribution of the category of interlegality.

3. From the Fact to the Case (*Case*, *Kasus*)

Once the concept of 'fact' and its relationship with the multiple legal qualifications has been clarified, the question arises as to how to conceive of the

[40] W. Schabas, n 39 above, 285-286 (and footnotes to the main text). Schabas comments as follows: 'the fact that common law jurisdictions make a number of exceptions, and allow for such proceedings (=in absentia) where appropriate, shows that this is not an issue of fundamental values so much as one of different practice' (286). The fundamental right, however, is not that of simply being present at trial, but that of the free choice without prejudice to fair trial principles.

[41] Eur. Court H.R., *Somogyi* v *Italy* (2 sec.), Judgment of 11 November 2004, Reports of Judgments and decisions 2004-IV, § 66.

[42] Eur. Court H.R., *Colozza* v *Italy*, Judgment of 12 February 1985, Reports of Judgments and decisions A89, § 29.

concept of 'case'.

It is submitted here that the fact, in the very moment it becomes subject to legal qualification, amounts to a 'case'. It is not the definitive result of the judicial subsumption – which is the decision *on* the case –, rather it must be viewed as a starting condition of the judicial activity that deals with the qualification process. The 'case' can be defined as the relation between the fact(s) and the concurrent legal qualifications, irrespective of the sources' nature. Some of them may be public, some others may derive their normativity from the relevance conferred to inter-private relations or even to ethical and/or social rules. The legal qualification of the fact(s) is always a tangled procedure in and through which the judge must always take into account the plurality of sources as well as the possibility that the facts at the end of the evaluation process cannot be qualified by any legal rule.

To put it in other terms, the fact reduced to the bone emerges, in its pure physiognomy, only if depurated from any value judgment carried by the claiming qualification. The case has its beginning at the very moment when the fact appears as the point of attraction of every possible qualification. Then, it has to be decided what is the most suitable one. In fact, a case originates at the very moment all possible qualifications of the facts are taken into consideration and contrasted with each other. If the case arises at the adjudication stage, those qualifications are taken into consideration by a judge (broadly, an adjudicator) in order to assess and –when needed– balance them in the activity of adjudicating the case that can lead to different end results, that is, to the decision of the case.

Technically, the contexts in which the assessment takes place may have specific denominations depending of the body of law concerned.

For instance, within the remit of criminal law the various types of convergence are labelled depending on the concrete situation as *concorso di norme*, *concorso di reati*, *concurso de normas*, *concurso de delítos*, *cumulative charging*, *multiple convictions*, *Idealkonkurrenz, Gesetzeskonkurrenz*, and similar nouns. Similarly, many labels are conferred to the legal-technical tools for providing a solution to these situations, that is, for choosing, assessing, balancing the diverse legal qualifications of a fact: principio di specialità (the special provision prevails over the general one), consumption, *prise en compte*, and similar ones. As said above, the application of these criteria may lead to multicolor results: from an offence to another, to the irrelevance of the fact from the point of view of the body of law concerned (in this example, criminal law).

As such, legal qualifications are not subjected to the logical step of subsumption, thus they are the object of a choice or, as appropriate, of a balancing: those activities are inevitably and legitimately performed by a judge. This means that, after a first step consisting in the subsumption of a fact under a relevant qualification – or rather and more frequently, among many convergent

ones –, the result(s) of this subsumption is in turn subjected to a further intellectual activity: either the choice between multiple results or a balance between the different qualifications and their respective results: this is the proper content of the legal 'argumentation'.

In light of the above, the judicial activity as assessment of, choice among, and weighing up of different plausible qualifications, does not 'say' (*ius-dicere*) the rule of the case trough a simple, logical subsumption process, it rather contrasts the results of various subsumption processes attracted (or sparkled, if one prefers to say so) by the concrete facts …of the case. This is tantamount to saying that the rule of the case originates as the result of the relationship between the relevant qualifications and the concrete fact(s): it is such relationship that frames the 'case'. This is the reason why it has been said that the case attracts the rule of decision.

With specific relation to the practical experience of international criminal tribunals, where the safeguard of coherence and consistency in applying the law is of paramount importance, Marjolein Cupido has maintained that

> 'the meaning of the law is not determined by abstract rules alone, but develops on a case-by-case basis in interplay with the questions and issues raised in individual cases'.[43]

It has been recalled that international tribunals adjudicating crimes under international law

> 'have regularly drawn up lists of factual indicators, which specify the facts that can be used to determine whether a judicial criterion applies in an individual case'.[44]

Indeed, Courts have always kept a sphere of discretion to carve the law alongside the specific features of individual cases. All that explains why facts must be adequately evaluated, they must be examined in light of the 'prototype' to which the rule has been enacted. Furthermore, the 'holistic functioning of facts'[45] must be stressed in the theoretical discourse. This expression shall mean that interpreters and adjudicators must consider the constant interaction among facts, including the so called 'attendant circumstances' or 'surrounding circumstances' and their 'added value' to the rational reading of the occurrence relevant for the law: 'facts are normally assessed in a holistic way, ie in combination with each other'. Facts, in sum, are necessarily selected and interpreted in light of their context.[46] Differences in the legal treatment of similar patterns of facts are

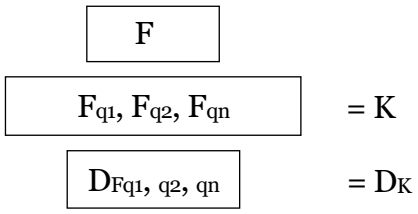
[43] M. Cupido, n 20 above, 2.
[44] ibid 4.
[45] ibid 13.
[46] T. Salmi-Tolonen, 'On the Balance between Invariance and Context-Dependence', in D. Kurzon and B. Kryk-Kastovsky eds, *Legal Pragmatics* (Amsterdam/Philadelphia: John Benjamin

not necessarily synonym of reasoning incoherence, they may be rather explained in light of the different contextual circumstances.

4. Interlocutory Conclusions on 'Fact' and 'Case'

The foregoing analysis can be recapitulated and sketched as follows. The empirical, concrete 'fact' must be dissected to its simple elements, its 'simple forms of appearance' ('*einfache Formen*'), in order to be subjected to the (multiple) legal qualification(s), each of them being capable of subsuming the facts under its own regulative principle. The 'case' arises in this very moment, that is, when facts meet abstract qualifications and their respective regulative criterion. It is up to the adjudicator to decide what is the 'rule of the case'.

We can represent these concepts through following scheme:



F= concrete fact
F_{qn}= fact subjected to abstract legal qualifications (subsumption)
K= case
D_K= decision of/on the case

The subsumption mechanism has no bearing either on the question concerning what are the convergent qualifications, or on what is the prevailing rule (the rule to be set forth in the decision of the case). The syllogism presupposes a different decisional moment, which is not of merely logical nature: it is steered by the features of the concrete case, which definitively affects the qualifications to be selected and used in taking the judicial decision.

The relationship between facts and norms, which emerges in the case and shapes its contours, asks the judge the legal question he/she has to respond. André Jolles, an important linguist of the first half of the twentieth Century, wrote that the case (Kasus) expresses a duty to decide, but does not entail by itself the answer to the legal problem, the content of the decision. What characterizes the form 'case' is that it raises the question, thus does not give any substantive answer: what happens in the case is the fact of weighing up

Publishing, 2018) defines the context as 'a matrix that surrounds the event being examined and provides resources for its appropriate interpretation' (237). The context may be of physical, linguistic, legal, socio-cultural nature.

(arguments), not the result of this weighing activity.[47]

5. Distinguishing Cases

Recalling the importance to be conferred to the facts of the case in the interpretative stage, especially in judicial settings, leads to another important aspect of the relevance of the contextual legal reasoning: how to distinguish cases. On the one side, the empirical occurrence (be it a 'brute fact' or an 'institutional fact' in light of Searle's theory)[48] deserves the utmost attention, and descriptive and axiological (value-laden) propositions must be kept discrete. On the other side, the binding nature of the paradigmatic case is closely related to the specular image of the precedent, that is, the recognition of a dissonant singularity, that suggests the necessity to 'distinguish' cases.

In other terms, it is obvious that relying on the 'precedent' requires to identify a previous decision based upon a cluster of cases either as a binding precedent (*stare decisis*), or as persuasive authority. However, it is crucial in this same context to establish whether the case at hand has to be differentiated from the precedents. In the common law the precedents are simply a starting point for the decision to be taken, as Ugo Mattei has explained to the Italian audience.[49]

Justice Antonin Scalia has clearly maintained that:

> 'there is another skill…that is essential to the making of a good judge. It is the technique of what is called "distinguishing" cases… Within such a precedent-bound common-law system, it is critical for a lawyer, or the judge, to establish whether the case at hand falls within a principle that has already been decided. Hence the technique – or the art, or the game – of "distinguishing" earlier cases. It is an art or a game, rather than a science, because what constitutes the "holding" of an earlier case is not well defined and can be adjusted to suit the occasion'.

[47] A. Jolles, *Einfache Formen: Legende, Sage, Mythe, Rätsel, Sprüche, Kasus, Memorabile, Märchen, Witz* (Halle: De Gruyter, 1930): on the concept of 'case' (*Kasus*) see specifically 171; quotation in the main text above at 198.

[48] J. Searle, 'How to derive "ought" from "is" ' *The Philosophical Review,* 43-58 (1964), (here the distinction between 'brute' or 'non institutional ' and 'institutional' facts: especially at 55). A critical analysis of Searle's account is provided by B. Celano, *Fatti istituzionali, consuetudini, convenzioni* (Roma: Aracne, 2010), especially First Part. See furthermore the original account of M. Ferraris, *Manifesto del nuovo realismo* (Roma-Bari: Laterza, 2012), 74, for example, on the relationship between epistemology and ontology as regards the 'social facts'); Id, *Documentalità. Perché è necessario lasciar tracce* (Roma-Bari: Laterza, 2009), Chapter Two provides a staunch criticism of Searle's account).

[49] For a specification as to the contingent character of the rule (sometimes dubbed 'a legend') of *stare decisis*, which is not decisive within the common law system, see U. Mattei, n 16 above, 214, especially 247-249.

IV. '*Einfache Formen*', Simplified Features: How to Describe a Case

1. Reducing the Occurrence to Its Simplest Component Elements

Given the importance of the facts as a material (as well as logical) premise for building a case, the closest attention is due to details in historical occurrences. It may sound trivial to recall that the first intellectual operation to be carried out is primarily that of setting out with humble and patient attitude the facts of the case, ie the actual state of things in their strict naturalistic sense. Facts are then going to be sifted into, and looked at through the lens of the specific legal narrative.

Narrative has to start from the simplest forms, as they have been dubbed by Jolles: units or items of which the fact(s) are composed, and that are dissected to the point in which they appear indivisible and therefore simple. Thereafter, facts' are assessed through norms and are made valuable-according-to-norms. Norms are contrasted and – if appropriate – balanced with other norms.[50]

To sum up, it is crucial to accurately split up the concrete fact in its simplest items (forms). It is not appropriate to stop at a level of typological similarities between cases: rather, it ought to decompose the occurrence into its simplest components, until the maximum degree of concreteness.

This activity of reducing facts to their simplest components may appear obvious, but its worth is twofold. First, it is of a significant practical import (4.2); second, it is to be premised to interlegal assessments. (4.3).

2. The Fact Behind the Case

Let's begin with the practical aspects.

It may happen that too hasty a qualification of the facts hampers the accurate consideration of the life occurrence at stake, with the consequence of erroneously building a case, that is, of describing a case that is not consistent with the fact(s) that support it.

A. The above mentioned *Melloni* case (*supra*, § III.2), is an example of that. Any accurate analysis of the concrete situation of the accused has been neglected due to the overwhelming claim raised by the national and the supranational legal orders, to unilaterally qualify the situation to be adjudicated. The individual concerned was worth of protection against the request of executing the European arrest warrant, on the understanding of the Spanish law; but he was to be released to the requesting judge in accordance with the *primauté* of European law and the mutual trust principle. However, he had in fact made an indisputably free choice not to be present at trial, all other principles of the fair trial having been safeguarded. Both judicial authorities were remiss *vis à vis* this very specific factual situation. The careful analysis of the 'simple items' of the matter would have led to the conclusion that the apparently diverging legalities, national and

[50] In the words of A. Jolles, n 48 above, 179 ('Norm gegen Norm').

supranational, could have been simultaneously considered and eventually found compatible: which is the added value of interlegality as a method.

B. Another instance of the interpretive added value provided by the pluralistic methodology inherent in interlegal reasoning arises from the consideration of a couple of different online hate speech cases, adjudicated in seemingly opposite terms by (different judges of) an Italian Tribunal. While the decision on one case gave prevalence to the right to free speech, that on the other gave prevalence to the prohibition against discrimination.[51] The common feature of the cases: the social network profile attributable to political exponents of extreme right-wing political parties was deactivated by the administrator of the social network according to internal procedures. This private sanction was motivated with the alleged violation of the rules of conduct of the 'community'. Why then the opposite decisions? In order to analyze the cases and to assess similarities and differences it would not be sufficient to focus only upon the relationship between the different sources of qualification, their convergence on the facts, the balance between freedom of thought and speech *versus* national, supranational, international standards against discrimination. This level of analysis still pertains to a value-laden layer of the argumentation. Prior to this logical step it ought to set out the facts in their simplest components (above, § 4.1). So, whereas the judgment that gave prevalence to the freedom of expression considered that it was *impossible*, on the ground of the gathered evidence, to assess *in fact* the discriminatory character of the association by itself as well as of the conducts charged, the judgment that decided to the opposite motivated by clear evidence that the concerned organization were in fact promoter of discriminatory initiatives as well as of true hate speech episodes.

It is therefore understandable that the two cases have been decided in different manner.

Clearly, it remains open to debate whether the facts have been set out properly, as well as whether the legal evaluation of such facts is appropriate. But it must be underlined that the abovementioned judgments result in different decisions because the 'cases' are different, not because they reach opposite conclusion on the same (type of) 'case'.

3. *False Friends*. The Case of the Rule and the *Case-Law*

The importance of the case as a concept within the theory of interlegality is closely connected with the legal pluralism as a prescriptive method that this category acknowledges. As Palombella writes:

[51] Tribunale di Roma, ordinanza 12 December 2019, no 59264, upheld by Tribunale di Roma, judgment of 27 April 2020, available at https://tinyurl.com/2fce2a6k (last visited 31 December 2021). See also Tribunale di Roma, ordinanza 23 February 2020, available at https://tinyurl.com/mrymt977 (last visited 31 December 2021).

> 'As a prescriptive method, (interlegality) assumes that the plurality of legalities disciplining the case must be taken into account, as a whole. Looking at the law of the case simply means to accept that multiple and even uncoordinated sources fall into the same place, making for a composite interweaving of norms as a third ground irreducible to any of its contributing, and separate, legalities…The law of the case … can be assessed not by answering the recurrent question … as to which legal system, or legal regime, must prevail, but by asking which normative claim, on the ground, can be provided with a better in-context-justification of a legal character'.[52]

The relationship between the special identity of the case and the multiple legal qualifications is a distinctive feature of interlegality, which cannot be equated with the 'case-law' as it is conceived of in the context of common law, as a subset of the latter.

'Case-law' conveys the institutional fact (in the sense of Searle) that judicial decisions are a primary source of law (irrespective of the declamatory tribute payed to the pre-eminence of the legislative law (statutory law).[53] Nonetheless – to fully grasp the specificity of interlegality as centered upon the case – it is useful to compare the concept of the case we have advocated above, with the realists' account according to which the law (of the case) does not stem from the general and abstract legislative rule but from the concrete activity of the judge who *creates* the rule of the case (*judge-made law*).[54] It is precisely the judge's act that amounts to the subject matter of the law (and of its study).[55]

It is well known that some realists such as Jerome Frank deny the normativity of the law, reduced to facts conceived of as the tribunals' decisions, which in turn result out of intuitions and are therefore essentially uncontrollable. Other accounts argue for the decision as a process that develops within the boundaries and alongside the limits set by the legal tradition, shared interpretive habits, and rules.[56]

Nonetheless, even this second account still revolves around the conception of the law as kind of art or discipline aimed at predicting how the judge will decide the case; the abstract rule as source of qualification of the case still remains shadowed.[57]

[52] G. Palombella, 'Interlegality: on interconnections and "external" sources', in this short symposium, § 3.

[53] Cf U. Mattei, n 16 above, 250, 274; G. Fassò (edition updated by C. Faralli), *Storia della filosofia del diritto*, III. *Ottocento e Novecento* (Roma-Bari: Laterza, 2001), 255, 269. It is beyond the scope of this article to recall the streams that went through the modern, and contemporary common law, from Langdell's legal formalism to the realism of Holmes and Llewellyn.

[54] See for all: A. Kronman, *The Lost Lawyer* (Harvard: Belknap Press, 1993).

[55] For any necessary reference see U. Mattei, n 16 above, 276 and fn 278; 274, fn 271.

[56] G. Palombella, *Filosofia del diritto* (Padova: CEDAM, 1996), 210-213, 211.

[57] The study of the cases and the study of the abstract legal rule bear the same importance

Interlegality looks at the normative reality from a substantially different point of view, from which the plurality of normative regimes is indisputable: precisely because of that, law possesses its inherent normativity irrespective and independently of any judicial decision. Rather, it is this normativity that claims to be recognized by the judge. Alongside with this, the interlegal situation requires to be acknowledged not only in its pluralistic dimension, but also in the very moment it arises from the ground, that is, from the case. The features of the case as defined above are the setting of the decision. The law relevant for it reveals itself primarily as it is composite, stemming from all legitimate sources, 'in the absence of an ordered structure of hierarchically defined assignments'.[58]

Inclusiveness of multiple legalities, rather than devolution to the judicial decision, is the cultural message this category intends to convey.[59] Only as a consequence, and subsequently, interlegality operates as a regulative prescription to the activity of the judge who concretely deals with a case characterized by multiple qualification. On this account, interlegality is less concerned with the nature of the judicial activity – whether it amounts to a creation of the rule of the case, or not – than it is with the requirement that 'the legal decisionmaker … account(s) for as many normativities as those involved in the case and … draw the 'just' solution from a composite perspective that is not merely one-sided'.[60]

Interlegality does not partake in the tussle between case law and law in books supporters. The new category is specifically interested in how the case is built up starting from the fact and from the legal qualifications. Indeed, the legal qualifications are acknowledged as sources irrespective of the judicial application.

Interlegality focuses onto the 'case of the rules' in interlegal situations. It ought to be recalled that every single legal order from which the rules stem is only one of the components that have a bearing on interlegal situations. What matters is the plurality of legalities that the actual situation carries with itself. The traditional picture of the relationship between the rule and the relevant subject matter is revolutionized: from the rule for the case to the case of the rules.

('pari importanza nello studio dei casi dell'analisi delle situazioni di fatto rispetto a quella della regola giuridica': so the account of J. Frank summarised by U. Mattei, n 16 above, 284 and fn 325).

[58] G. Palombella, n 7 above, 387.

[59] On the whole discussion on the relationship between the principle of legality in criminal law and its tension with the idea of judicial creativity see only O. Di Giovine, *L'interpretazione nel diritto penale. Tra creatività e vincolo alla legge* (Milano: Giuffrè, 2006). See furthermore V. Manes, *Il giudice nel labirinto. profili delle intersezioni tra diritto penale e fonti sovranazionali* (Roma: Dike, 2012). Interlegality rather suggests the metaphor of the judge sitting (or lost) in the prairie.

[60] J. Klabbers and G. Palombella, n 2 above, 3.