Interlegality - Symposium

Administrative Inter-Legality. A Hypothesis

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Abstract

The article discusses the possible relevance of inter-legality in the process of implementation of public policies. It opens by observing that inter-legality emerges, both as a situation and as a prescriptive criterion, not only in the context of judicial disputes, where it finds a highly fertile ground, but also in the policy cycle. It then focusses on the implementing phase of the policy cycle, with a view to examining the manifestations of inter-legality as a situation and the ways in which it may operate as a prescriptive criterion. It is argued that inter-legal situations are, in the implementing phase of the regulatory process, diverse and changing, in constant movement between the three macro-poles of joint responsibility, co-ordination of responsibilities and conflict of responsibilities. It is also suggested, as a matter of hypothesis, that inter-legality might operate as a meta-criterion allowing administrations to recognize and manage the complexity of inter-legality situations.

I. Inter-Legality in the Executive Phase of the Regulatory Process

Inter-legality can be reconstructed and critically discussed in the first place as a situation emerging in a specific case brought before a court, as well as a criterion to reach a decision on that case. While courts are used to approach the issue from their own legal order – be it a State, a supranational order such as the European Union (EU) or an international or global regime – the principles and rules potentially relevant for the solution of judicial disputes brought before them often stem from a much wider and composite *mélange* of sources. Since legal orders inevitably overlap and regulate beyond their own borders, a multiplicity of rules laid down by sources of different legal systems may be in principle and in practice applicable to a certain case and ought to be taken into consideration both by the parties and by the court. Such 'composite law', made up of norms laid down by diverse but functionally overlapping and inter-connected orders/regimes, forms the legal material bringing about inter-legality as a concrete legal situation. In this perspective, inter-legality is a legal occurrence manifesting itself in the context of judicial litigation. Yet, it is also the methodological criterion by which a decision on the case should be made. It recommends – or, better, prescribes – not to resort to purely formal doctrines, such as those governing the relationships between sources of different legal

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systems, but to take seriously the composite law potentially relevant for the solution of the judicial dispute. It is by taking the angle of the case, indeed, that courts may avoid the unilateral perspective of a single jurisdiction, reveal the richness and complexity of a situation in which several normativities are relevant to the case, and to engage in the identification of an appropriate balance.[1]

While there is no doubt that judicial litigation is a fertile ground for inter-legality, it is certainly possible to argue that inter-legality also affects other processes and dimensions of a legal order. As acknowledged by Palombella and Scoditti,[2] indeed, inter-legality emerges, both as a situation and as a criterion for its management, not only in the context of judicial disputes, but also in the policy cycle, that is, in the process of designing, steering and implementing public policies by political and administrative institutions.

As for the stage of policy formulation, the regulatory process may be said to be inter-legal because the elaboration and adoption of regulatory measures is inevitably conditioned by the regulatory responses provided by other orders/ regimes to similar issues. If – due the relevant subject-matters – such orders are called upon to govern sectors that are overlapping and interconnected in many ways, none of their political or regulatory institutions can realistically carry out their functions without taking into account the disciplines at work in other legal orders. Such regulatory inter-dependence is demonstrated and even accentuated by the proliferation of international and global regimes that promote, in sectors such as economic regulation, security and climate change, the mutual recognition and coordination of different 'legalities':[3] for example, the member countries of the World Trade Organization (WTO) are encouraged, within the framework of the General Agreement on Trade in Services (GATS), to adopt measures of unilateral and mutual recognition; and the Agreement on the Application of Sanitary and Phytosanitary Measures encourages signatories to

[1] The reference is, of course, to J. Klabbers and G. Palombella, 'Introduction. Situating Inter-Legality', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019), 1-3, where it is argued that '(i)t is the inter-legal sense of complexity that requires the legal decision-maker to account for as many normativities as those involved in the case and to draw the "just" solution from a composite perspective that is not merely one-sided. And if that is so, then "forum-shopping" becomes a less useful activity for the forum-shopper. Of course, all of this implies that the focus rests on individual cases, and therefore places judges (and other decision-makers exercising a quasi-judicial capacity) at the forefront'. For the extended elaboration of the theory of interlegality, G. Palombella, 'Theory, reality and promises of inter-legality. A Manifesto', ibid 363-390.

[2] G. Palombella and E. Scoditti, 'L'interlegalità e la 'nuova' ragion giuridica del diritto contemporaneo', in E. Chiti et al eds, *L'età dell'interlegalità* (Bologna: il Mulino, forthcoming), chapter 1.

[3] The features and ways of functioning of such international and global regimes are discussed by a rich literature, particularly from the point of view of Global Administrative Law; for an accurate and thoughtful account of the ongoing process of institutionalization of the globalized legal space, see S. Battini, 'The proliferation of global regulatory regimes', in S. Cassese ed, *Research Handbook on Global Administrative Law* (Cheltenham: Edward Elgar, 2016), 45.

base their regulatory measures on existing international standards, guidelines or recommendations developed by the relevant organizations, including the World Organisation for Animal Health.

With respect to this type of situations, we may wonder how inter-legality operates as a prescriptive criterion: if and at which conditions regulators should better consider normative measures, rationales and policies at work in other legal systems, and how they should acknowledge and value the plurality of legalities in the process of developing sectoral policies. While the issue falls outside the scope of this article, it is appropriate to stress that such situations of inter-legality are often addressed by envisaging, in the sectoral discipline itself, a number of technical solutions managing the relationship between 'internal' and 'external' sources. Regulators often clarify the relevance to be given, in a specific policy-domain, to principles and rules established by sources of other legal orders, as well as the criteria to solve possible conflicts between legal sources. These are sectoral provisions, tailored to the particular exigencies of the policy field. In the field of food safety, for example, the European Union (EU) has laid down a number of general obligations on free trade aiming at governing not only the import-export of food and feed but also the relationships between EU and non-EU legal sources: in this perspective, the EU legislator has established a (sectoral) principle of equivalence according to which food and feed imported from third countries must

> 'comply with the relevant requirements of food law or conditions recognised by the Community to be at least equivalent thereto or, where a specific agreement exists between the Community and the exporting country, with requirements contained therein'.[4]

How much this and other techniques for managing situations of inter-legality are consistent with inter-legality as a prescriptive criterion, it remains to be seen.

Similar considerations can be made with reference to the implementing phase of the regulatory cycle. To begin with, we easily find also in this phase, situations of inter-legality. Admittedly, the implementation process of a public policy takes place within a certain legal system and is governed by principles and rules laid down by sources of that system. Yet, administrations are usually to manage a plurality of procedural and substantive principles and rules of administrative law laid down by different legal systems. This is what happens, for example, in the case of independent Italian authorities, which are subject, in

[4] European Parliament and Council Regulation (EC) 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/24, Art 11; see also European Parliament and Council Regulation (EU) 2017/625 of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products [2017] OJ L95/142, applicable since December 2019.

their respective fields of action (ranging from competition to public utilities, such as transport, energy and communications), not only to domestic disciplines by sector, but also to principles and rules adopted by the EU, as well as to obligations dictated by international and global regimes. An example is provided by the field of financial markets, where the three competent independent authorities (the Bank of Italy, the *Commissione Nazionale per le Società e la Borsa* (CONSOB) and the *Istituto per la vigilanza sulle assicurazioni* (IVASS)) implement a composite law made up of EU and national provisions, as well as of measures elaborated by global regimes such as the International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS). Furthermore, domestic administrations are increasingly exposed to the administrative practices developed in other legal systems, to be taken into account in order to ensure the effective implementation of their domestic disciplines. This is indirectly confirmed by the multiplication of procedural and organizational links between administrations of different legal systems: for example, the Italian CONSOB and the United States (US) Public Company Accounting Oversight Board settled a cooperation agreement which provides, among other things, for the possibility of joint inspections on alleged violations of Italian law by US companies and US law by Italian companies: both authorities commit not only to mutual assistance, but also to facilitating and improving, through comparison and mutual learning, the performance they are entrusted with in their respective jurisdictions.[5]

If inter-legal situations frequently emerge also in the implementing phase of the regulatory process, how inter-legality operate in this phase as a prescriptive criterion? Empirically, one might easily observe that administrations, in spite of the apparent variety of technical arrangements, tend to manage inter-legality by relying on two main sets of doctrines: on the one hand, those relating to the relationships between domestic and external legal sources; on the other, the doctrines that can be traced back to the principle of legality, here understood in the loose but foundational sense of a precept requiring 'the administration to be able to point to some ground of lawful authority on which it can base its action'.[6] It remains to be verified, however, whether these two sets of essentially formal doctrines are actually capable of fostering the needed plurality of perspectives, instead of unilateral standpoints, in line with the recommendations of inter-legality.

Inter-legality is thus relevant, both as a situation and a possible criterion to

[5] Such cooperation has been formalized in the Statement of Protocol Between the Public Company Accounting Oversight Board of the United States and the Commissione nazionale per le società e la borsa, signed in 2016 and available at https://tinyurl.com/2s8ubj8f (last visited 31 December 2021). Similar agreements have been signed by PCAOB and the competent authorities of other European states, such as Finland and Austria.

[6] See P. Craig, 'Legality, Six Views of the Cathedral', in Id et al eds, *The Oxford Handbook of Comparative Administrative Law* (Oxford: Oxford University Press, 2021), 884.

deal with it, throughout the entire regulatory cycle. In the following pages, we will focus on the administrative phase of the process. By exploring the ways in which inter-legality presents itself and could operate in the regulatory process, we may grasp the variety of its manifestations and reflect upon its implications on the functioning of administrative institutions. Three inter-connected questions will be addressed. First, how do the political and administrative institutions of a legal order, when designing the process of administrative implementation of a sectoral policy, take into account the policy delivery techniques available in the same policy field in other legal orders? Second, how can we describe inter-legality as a 'situation' in the implementing phase of the regulatory process? Third and finally, what are the techniques used by administrations to handle the composite set of principles and rules potentially relevant for the adoption of administrative decisions? Is the application of formal criteria, in particular those relating to the relationships between sources of different legal systems, sufficient? Does inter-legality as a prescriptive criterion represent a useful addition?

II. Framing Implementation: Three Models of Recognition

It is appropriate to begin by examining the ways in which each legal order seeks to govern the interactions between the processes of administrative implementation of its own sectoral policies and the patterns at work in other legal systems regarding equivalent or related policies.

While the enormous variations among different solutions, together with the lack of large-scale empirical inquiries, suggest caution in any classificatory effort, we may tentatively identify three main groups of hypotheses, corresponding to different models of recognition:[7] (i) in the first group, the implementation processes of diverse legal orders are regulated in such a way as to support the *joint* administrative execution of political decisions, which have been, in turn, *jointly* elaborated by two or more legal orders; the underlying model of recognition may be described as one of 'joint responsibility'; (ii) in a second group, the implementation processes promote indirect convergence, rather than joint administrative execution; we may trace back such hypotheses to a model of 'co-ordination of different responsibilities'; (iii) finally, in a third group of cases the implementation processes of the legal orders at stake protect their regulatory policies and sustain open or latent competition; this is a model characterized by the 'conflict of responsibilities'.

Admittedly, such taxonomy provides a simplified and somehow artificial account of a rich and complex legal reality. Our purpose, however, is not that of presenting a typology of the administrative law techniques used by legal orders

[7] See E. Chiti, 'Shaping Inter-Legality. The Role of Administrative Law Techniques and Their Implications', in J. Klabbers and G. Palombella eds, *The Challenge* n 1 above, 271.

to govern the interactions between their implementing processes: for that, we may refer to the analytical frameworks provided by various strands of legal research, including Global Administrative Law.[8] Instead, we aim at ordering the various hypotheses on the basis of the type of recognition between different orders that they promote and sustain. This will help to shed some light on the changing manifestations of inter-legality as a legal situation.

The reality of institutional interactions in the world community provides a growing number of examples of the pattern of 'joint responsibility'. It is rather frequent, indeed, that different regimes establish linkages at both levels of political decision-making and administrative execution. Joint political decision-making may take a diversity of forms, ranging from a formalization of the relationships existing between the founding norms of the relevant legal orders to the establishment of composite working groups. But it always aims at reaching an agreement on a specific policy objective falling within the respective spheres of competence of the regimes at stake and may even imply a balancing between different and competing interests, such as for example security and human rights protection. As for the arrangements for joint execution, they may be organizational (as in the case of mixed administrative bodies) or procedural (as in the case of composite administrative proceedings). The overall result is that the administrations of the relevant regimes are called upon to operate as components of wider 'common administrative systems', meant as forms of composition of national and non-national bodies jointly responsible for the implementation of measures and policies jointly adopted by a plurality of regimes.

This happens, for example, when different orders give birth to a 'regime-complex', that is to a regime beyond the State that, although ultimately lacking an overarching architecture, may be represented as a system bringing a number of different institutions into a looser structure of distributed governance in a specific policy domain such as climate change, financial stability or food safety.[9] The sector of military security is a case in point. Over the last two decades, there has been a clear process of functional convergence between a plurality of international regimes responsible in the field of military security. Such a process of convergence stems from a complex game of forces: the ever closer 'horizontal' integration between the functional disciplines and policies of regional bodies operating in the area of security, such as the EU and the North Atlantic Treaty Organization (NATO); the 'vertical' framing of regional disciplines by United Nations (UN) law; and the unifying capacity of certain global institutions, such as the G8 and the Organization for Security and Co-operation in Europe (OSCE), which tend

[8] See eg P. Craig, 'Global networks and shared administration', in S. Cassese ed, *Research Handbook* n 3 above, 153; and the recent account by S. Cassese, *Advanced Introduction to Global Administrative Law* (Cheltenham: Edward Elgar, 2021), passim.

[9] On the notion of regime-complex, see eg R.B. Stewart et al, 'Reaching International Cooperation on Climate Change Mitigation: Building a More Effective Global Climate Regime Through a Bottom-Up Approach' 14 *Theoretical Inquiries in Law*, 273-304 (2013).

to develop strategies for global security within the UN framework.[10] As a result of the interactions between these forces, a number of different non-national regimes tend to operate in a functionally co-ordinated manner, with a view to the achievement of a common policy objective. Such policy objective is set, in overall terms, by UN law and consists in the security of the world community, broadly meant as the maintenance of the integrity of the global order and covering not only the interruption of hostilities between the fighting parties, but also the restoration of international legality and the protection of fundamental rights both in inter-state conflicts and in domestic crises within a given state.[11]

The second model – 'co-ordination of different responsibilities' – is characterized by a different structure. In this type of situations, the relevant legal orders have not established any form of functional or organizational co-ordination of their political decision-making processes. On the contrary, each legal order autonomously carries out its political decision-making process, according to its own choices and procedures. Accordingly, the implementing arrangements do not aim at allowing a joint administrative execution by the involved legal orders. Instead, the administrative bodies of each legal order operate in parallel, internally to their own systems. Powers of implementation are retained by each individual order, rather than shared or reciprocally co-ordinated within a wider framework. However, the administrative bodies of the various relevant legal orders operate on the basis of rules that are functionally oriented to ensure some operational convergence between themselves. This is due to the need to facilitate the performance of the executive functions that they are called to carry out within their jurisdictions.

This kind of co-ordination may be realized in many different ways, from informal exchanges of 'best practices' and *de facto* working relations, such as exchanges of information or reciprocal participation in the absence of a formalized instrument of co-operation, to more institutionalized techniques of mutual assistance in the exercise of their respective functions. It often implies, in any case, that the administrations of a certain regime are subject to rules laid down

[10] For this perspective, emphasizing the horizontal and vertical connections between the functional disciplines and policies of several organizations beyond the State, see E. Chiti, *L'amministrazione militare* (Milano: Giuffrè, 2007), 88; in the same vein, but paying specific attention to the role of the EU, see the contributions collected in B. van Vooren et al eds, *The EU's Role in Global Governance* (Oxford: Oxford University Press, 2013), part II.

[11] Such a broad understanding of global security, which goes beyond the traditional interpretation of the UN Charter, has been developed since the mid-Nineties by the General Assembly and the Security Council, that have interpreted the notions of 'threat to the peace', 'breach of the peace', and 'act of aggression' in such a way to include cases of severe violation of human rights. This has implied a shift from a merely negative approach, focused on responding to specific crises, to a conception of security as an emerging public policy characterized by an active promotion of fundamental rights and protection of individuals within the State borders and against any possible opposition by the States. On the tensions inherent in this definition of global security see E. Chiti, 'The European Security and Defense Administration within the Context of the Global Legal Space' 7 *NYU School of Law Jean Monnet Working Paper*, 1, 10 (2007).

by other orders' legal sources. This happens, for example, when a global regulatory system makes use of the 'borrowing regimes' technique, as in the case in which the Agreement on the Application of Sanitary and Phytosanitary Measures requires its Members to base their sanitary or phytosanitary measures on the Codex Alimentarius standards and other international regulatory measures. Co-ordination may also lead to the establishment of a common regulatory framework between administrations of different regimes, aimed at co-ordinating the individual responsibilities of each of the organizations involved in such a way as to enhance the effectiveness of their parallel administrative actions. This situation is illustrated by the agreements concluded by a European agency and an international regime or one of its internal bodies: for example, the Agreement between Interpol and Europol establishes several co-operation duties, such as reciprocal consultation on matters of common interest, as well as a detailed procedure for the transmission and processing of information.[12]

The third and last model of recognition of the implementing mechanisms available in other legal orders differs from those recalled above in so far as it accepts a 'conflict of responsibilities', instead of aiming at overcoming or attenuating it. This happens when two or more legal orders operate in a position of latent or open competition, both at the political and administrative level. In this kind of situations, often considered as the paradigmatic situation of regime interaction, leading to diversification and fragmentation in the global governance,[13] the political institutions of two or more regimes promote different policies in the same policy field, as the UN and the EU in their counter-terrorism activities or pursue conflicting goals, such as for example market integration and social protection, this group of cases replicate the rationale of the situation that has been previously characterized as co-ordination of different responsibilities. Each legal order autonomously elaborates its own political agenda and carries out its own mission and sectoral policy, without engaging in any attempt of convergence with the values, objectives and interests pursued by other regimes. At the

[12] Agreement between Interpol and Europol (5 November 2001) and Memorandum of Understanding on the establishment of a secure communication line between Europol and Interpol (11 October 2011) available on the Europol website.

[13] See eg C.R. Fernández-Blanco et al, 'Mapping the Fragmentation of the International Forest Regime Complex: Institutional Elements, Conflicts and Synergies' 19 *International Environmental Agreements: Politics, Law and Economics*, 187-205 (2019); H. Van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Cheltenham: Edward Elgar, 2014), passim; M.A. Young ed, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), passim. For a discussion of legal research on institutional fragmentation in the globalized legal space, as well as its relationships with overlapping studies on polycentricty and complexity, see R.E. Kim, 'Is Global Governance Fragmented, Polycentric, or Complex? The State of the Art of the Network Approach' 22 *International Studies Review*, 903-931 (2020). For a radically constructivist approach, A. Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' 15 *International Journal of Constitutional Law*, 671-704 (2017), arguing that the fragmentation-episode has now given way to an era of 'harmonization'.

administrative level, implementing powers are not only retained by each individual system, but they are also exercised on the basis of rules that are functionally oriented to exclude any form of operational convergence between the different systems. The relevant legal orders therefore operate both at the political and at the administrative level as rival and competing regimes.

In the case of the Agreement on the Application of Sanitary and Phytosanitary Measures and the Cartagena Protocol on Biosafety, for example, the implementing mechanisms available in the two regimes operate in parallel, reflect two diverging rationales (respectively, the need of a scientific assessment of the risks to human, animal or plant life or health and the principle of sustainable development), and are oriented to two different overall objectives, that of integration of domestic markets and that of environmental protection.[14] The co-existence of EU and international environmental management systems provides a further example. The EU has developed an Eco-Management and Audit Scheme (EMAS) as a voluntary management tool for organizations aimed at improving their environmental and financial performance and at communicating their environmental achievements to stakeholders and society in general.[15] Yet, the relationships between EMAS and other environmental management systems, such as the EN ISO 14001, a certifiable international standard adopted by the International Organization for Standardization (ISO), are competitive instead of co-operative. EMAS and EN ISO 14001 do not operate as two functionally complementary schemes, serving the same purposes through equivalent regulatory frameworks. On the contrary, the EU is developing its own political strategy towards a sustainable growth, to which EMAS is instrumental. EMAS' implementing arrangement, moreover, is designed in such a way as to induce private actors to join and comply with EMAS' requirements in alternative to other existing legal regimes. In addition to this, EU institutions consider EMAS more advanced than ISO/EN ISO 14001 and encourage EU and non-EU organizations that are already ISO/EN ISO 14001 certified to 'step-up' to EMAS.

III. Inter-Legality as a Plurality of Dynamic Situations

[14] G.R. Winham, 'International regime conflict in trade and environment: the Biosafety Protocol and the WTO' 2 *World Trade Review*, 131-155 (2003).

[15] European Parliament and Council Regulation (EC) 1221/2009 of 25 November 2009 on the voluntary participation by organizations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) no 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC [2009] OJ L 342/45. See also the Commission Regulation (EU) 2017/1505 of 28 August 2017, amending Annexes I, II and III to Regulation no 1221/2009 [2017] OJ L222/20. An account of the EMAS is provided by J. Clausen, et al, 'The State of EMAS in the EU. Eco-Management as a Tool for Sustainable Development' available at https://tinyurl.com/4eksdrfe (last visited 31 December 2021); M.S. Wenk, *The European Union's Eco-Management and Audit Scheme (EMAS)* (Heidelberg: Springer, 2005), passim.

The tripartition proposed above is a tentative classification of the ways in which a legal order, when designing the process of administrative implementation of a specific policy by sector, may take into account the policy delivery techniques available in the same field in other legal orders or regimes. Obviously, it is not alternative to other possible taxonomies and might be developed and articulated in further stages of the inter-legality research. For the purposes of this article, in any case, it may shed some light on the manifestations of inter-legality in the executive phase of the regulatory process.

From a structural point of view, a situation of inter-legality always requires that the administrations responsible for the execution of a public policy are called to handle a composite law, that is a plurality of norms laid down by sources of various regimes, all potentially relevant in the implementing process. The rationale for the relevance of such composite law, however, changes on the basis of the overall model of recognition chosen by a legal order in a certain policy field. The model of recognition, in other terms, provides a general rationale for the relevance of such composite law, which may affect the identification by public administrations and private actors involved of the potentially relevant principles and rules, both internal and external to the legal order, as well as of the possible patterns in which the various sources might be in principle composed.

More precisely, when a legal order supports the joint administrative execution of political decisions jointly elaborated with other legal orders, the composite law of principles and rules potentially relevant for the implementation process is framed in an institutional context which implies and sustains a shared commitment of all involved actors to identifying the potential value conflicts and to searching a convergence on some key values and goals of the relevant policy field. In case a model of indirect convergence is chosen, instead, the various components of the composite law potentially relevant in the process of execution of a certain policy may reflect different normativities and policy goals. Moreover, they co-exist in a wider framework functional to the co-ordination of different trans- or infra-sectoral responsibilities, with the purpose of minimizing the possible inconsistencies and tensions that may arise between two or more legal orders at the operational level. The composite law which gives concreteness to inter-legality as a legal situation, again, implies a conflict between different normativities and values when it emerges in implementing processes aimed at protecting the responsibility of the administration of the legal order from possible external interferences.

It is also important to add that inter-legality situations do not only reflect diverse rationales but are also dynamic and changing. The regulatory choices made by the political and administrative institutions, indeed, are neither stable nor fully coherent. Regulatory changes are a distinguishing feature of contemporary policy-making, even in polities oriented to ensure public policies' stability. This is due not only to the mutability of political orientation in the short time, but

also to the technical complexity of many policy domains. Moreover, it is far from rare that political and administrative institutions make, in the same policy field, different and even contradictory choices, for example by promoting at the same time a co-ordination of responsibilities and a regulatory conflict with other regimes. The stability of regulatory choices is also shaken by the complexity of the arabesque of linkages between legal orders, which escape the full control of political and administrative institutions and often lead to unexpected and even unpredictable outcomes, in a dynamic game that has been equated, in an ironic hyperbole, with the complexity of quantum mechanics.[16]

In this context, the three models of recognition discussed in the previous section – joint responsibility, coordination of responsibilities, and conflict of responsibilities – should not be taken as patterns to understand the overall rationale of the implementing process of a specific sectoral policy. Instead, they represent three macro-options orientating the single implementing choices taken by the relevant administrations. Accordingly, the situations of inter-legality are inevitably dynamic: the rationale for the relevance of a composite body of principles and rules in the implementing process changes together with the evolution of regulatory choices, on the one hand, and reflects the ambiguities and unsolved issues of the regulatory choices, on the other. In order to describe a situation of inter-legality, then, it is not sufficient to identify its basic rationale. It is also appropriate to reconstruct its dynamic trajectory, the movement through which an inter-legality situation gets closer or further from one of the three macro-options.

The mobile and dynamic character of inter-legality may be illustrated by an example concerning the Italian tax policy for large firms providing digital services. Differently from classic manufacturing, clearly constrained by the location of a factory, most multinational technology companies can assign value to low-tax jurisdictions, typically by placing in those jurisdictions the intellectual property underlying the services provided. This means that digital multinationals can make profit from services in a country without having any local dimension. In this case, there is a clear mismatch between the country in which value is created and the country where profits are taxed.

In order to tackle such phenomenon, which has a negative impact on public revenues, states different from those where digital multinationals are tax resident have developed policies aimed at re-establishing the principle that profits should be taxed where the value is actually created. Italy, for example, has adopted in 2018 a Digital Services Tax (DST), or '*imposta sui servizi digitali*' which imposes a three percent levy on the gross taxable revenues generated from several categories of services if their users are located in the Italian territory.[17] In the

[16] S. Battini, 'Il «caso Micula». Diritto amministrativo e entanglement globale' *Rivista trimestrale di diritto pubblico*, 325-341 (2017).

[17] Legge 30 December 2018 no 145; see also Legge 27 December 2019 no 160. See the

perspective of inter-legality, a policy of this kind can be traced back to the third of the macro-options previously identified, conflict of responsibilities. The Italian legislator has opted for a unilateral measure, which is consistent with the taxation scheme proposed by the European Commission but assumes that there is a strong divergence between the policy goals, interests and values of the Italian order and those of states with lower tax rates, hosting large multinationals. At the administrative level, the unilateral and non-cooperative approach taken by the Italian legislator implies that domestic administrations do not concur to the achievement of a common financial interest, apply a composite law or co-ordinate the exercise of their functions with the competent agencies of other involved states. Quite on the contrary, they are called to implement Italian law only and operate through proceedings oriented to safeguard their decision-making autonomy from possible external influences.

While the choice of the Italian legislator is clear and unambiguous, it would be a mistake to conclude that inter-legality is, in this implementing process of the Italian policy on digital taxation, a stable situation. In spite of the unilateralism of the new measure, unsurprisingly contested by the US government as discriminatory, unreasonable and inconsistent with international tax principles,[18] Italian political institutions also promote, in parallel, bilateral and multilateral initiatives. In particular, Italy has signed several conventions with other states and has sustained the efforts undertaken since 2013 by the Organisation for Economic Co-operation and Development (OECD) to address taxation matters related to digital economy. OECD, for example, has recommended its member states a number of specific actions that should be implemented in order to improve the operation of the international tax system (as in the *Base Erosion and Profit Shifting* (BEPS) project). Although those initiatives are far from successful, given the strong opposition of major countries of residence of digital companies, mainly the US and China, they illustrate that Italian political institutions follow, at the same time, two different political orientations: one oriented to the non-cooperative, defensive recognition of other legalities, another promoting the making of a system of joint responsibility, pursuing a common financial interest and co-ordinating the administrative capacities of the participating countries. In this context, Italian administrations are called to manage situations of inter-legality that respond to a double and contradictory rationale. They are responsible for the implementation of measures that are unilateral and defensive. But they cannot ignore that the legal framework leaves room to bilateral conventions and global measures, such as OECD's recommendations, which are oriented to the opposite goal of building some form of shared responsibility. Italian administrations

account by F. Gastaldi and A. Zanardi, 'The Digital Services Tax: EU Harmonisation and Unilateral Measures' available at https://tinyurl.com/4asj27wz (last visited 31 December 2021).

[18] Executive Office of the President of the United States, Section 301 Investigation. Report on Italy's Digital Services Tax, January 2021, available at https://tinyurl.com/7rxts5j8 (last visited 31 December 2021).

find themselves in the uneasy position to handle a plurality of domestic and international sources that may be combined in different substantive patterns, depending on which of the objectives – unilateral action or joint responsibility – is considered to be prevailing over the other.

IV. Inter-Legality as a Meta-Criterion

In the previous pages, it has been argued that inter-legality situations are, in the implementing phase of the regulatory process, diverse and changing. Inter-legality always implies a composite body of law, a set of principles and rules potentially relevant in the implementation of a sectoral policy. However, the rationale for the relevance of such composite law depends on the overall model of recognition chosen by a legal order in a certain policy field. Moreover, it is a dynamic rationale, which varies according to the evolution of regulatory choices and inevitably reflects their ambiguities. Inter-legality situations are in constant movement between the three macro-poles of joint responsibility, co-ordination of responsibilities and conflict of responsibilities.

While such characterization opens the field to further research on the micro-dynamics of inter-legality situations, it is now appropriate to ask how administrations are supposed to deal with such situations and whether inter-legality as a prescriptive criterion may be useful in this regard.

On a technical level, inter-legality situations raise two interconnected issues. The first relates to the identification of the norms that are relevant for the adoption of a specific measure in the implementing process. Such norms may be laid down by legal sources internal and external to the legal order where the policy at stake is in the process of being executed. The second issue concerns the prioritization of the relevant norms, which implies a passage from a composite law that may be structured in a variety of ways to a specific, context-dependent ordering of the relevant norms.

In order to deal with those issues, administrations traditionally rely on a number of well-established principles. A first obvious reference is to the principle of legality. In all contemporary legal systems, legality requires legislative authority for any administrative action. Yet, its meaning has become wider and richer over the years. In the Italian legal order, for example, the principle of legality should now be meant, on the basis of the constitutional framework and administrative case-law, as a principle requiring that legislative or secondary law provisions provide *ex ante* guidance as to the criteria for administrative action.[19] Moreover, as an effect of the opening of the Italian legal order to a multitude of regimes beyond the state, starting with the EU order, legality also

[19] See the overall reconstruction by S. Cassese, 'Le basi costituzionali', in Id ed, *Trattato di diritto amministrativo*, *Diritto amministrativo generale* (Milano: Giuffrè, 2nd ed, 2003), I, 174, 216-222.

implies that domestic administrations are subject to non-national norms. In such wise, legality widens the constraints on domestic administrations, which are no longer subject to national law only, but also to European, international and global norms.[20]

While this evolution over time has expanded the scope of the principle of legality, however, it has not been accompanied by a clarification of the ways in which that principle should operate as a criterion to order the different norms to which administrations are subject. In the wide meaning that is has gradually assumed, legality provides guidance as to what the relevant law should be, requiring domestic administrations to comply with procedural and substantive obligations laid down both by internal and external sources. But it does not provide any clear indication, either formal or substantive, as to the prioritization of the different relevant provisions, and even less when policy implementation is at stake requiring context-relevant choices. While it works by identifying the set of relevant principles and rules, it is less useful to orientate domestic administrations in managing inter-legality situations.

The criteria to order the norms relevant in the implementation of a sectoral policy are provided, instead, by the principles that a legal order has established to regulate the relationships between internal and external legal sources. It is on the basis of those principles that domestic administrations may establish an order between the various norms of the composite law that they are called to apply. This is the case, for example, of the principles of direct effect and supremacy, governing the relationships between EU and national sources in the European (integrated) legal order. It is the case, again, of the principle of 'limited direct effect' ruling the relations between EU sources and international treaties' norms according to the current case-law of the European Court of Justice.

Those principles provide a remarkable formal architecture, a number of criteria functional to rationalize the composite law that domestic administrations have to handle. At the same time, however, they present some rather apparent shortcomings, which clearly limit their capacity to guide administrative action. The main issue is connected to the hyper-complexity of the legal framework defined by the principles at work in the various orders. In that framework, indeed, at least three different paradigms co-exist: the first and most clear-cut concerns the relations between EU and Member states' sources; a second paradigm, clear on paper but certainly problematic in its concrete applications, applies to the relations between domestic and international sources, such as international treaties and measures adopted by international organizations; the third paradigm, highly elusive and not yet fully settled, regulates the relations between national and global sources. Each of the three models responds to a specific rationale. The first is obviously coherent with a supranational and

[20] ibid 221. See also, in the same vein, P. Craig, 'Legality' n 6 above, 884, arguing that legality is foundational in so far as it denotes the need for legal authority for any administrative action.

integrationist understanding of the European legal order, while the second is centred on the power of intermediation of states, which remain formally free to determine how and to what extent international obligations may produce effects within their national legal orders; and the main distinguishing feature of which is the attempt to restrain the power of state intermediation without eliminating it.[21] Domestic administrations, thus, find themselves in the uneasy position to apply a multiplicity of principles which vary according to the legal sources at stake, reflect different perspectives on the relations between legal orders, and may conflict with one another. If the composite law that domestic administrations have to manage is highly complex, the formal criteria that should rationalize that composite law are nonetheless complex. The long judicial dispute concerning the CONSOB sanctions proceedings for market abuse shows how difficult may be to manage a conflict between legislative, constitutional, EU (the Charter of Fundamental Rights of the European Union) and international (the European Convention on Human Rights) norms even when they say… almost the same thing.[22] Moreover, even when such criteria operate more smoothly and orientate administrative action in a rather clear manner, they remain primarily formal criteria. They order the various sources according to parameters that are independent from their substantive rationales and contents. They consider formal aspects, exemplified by the features of a directly effective norm, which do not guarantee that administrations are actually capable of solving at the administrative level the contradictions or instability of the regulatory choices made by the political institutions.

It is in such context that we may situate inter-legality as a prescriptive criterion. Our hypothesis – the hypothesis mentioned in the title of this article – is that inter-legality does not operate as a criterion conflicting with the principle of legality or with the doctrines regulating the relationships between internal and external legal sources, in an artificial juxtaposition between a formal rationale (the need to order relations between internal and external legal sources according to formal criteria) and a substantive one (the need to solve an issue from a non-unilateral perspective, capable of recognizing and taking into account the plurality of potentially relevant norms, values and interests at stake). Least of all, inter-legality should be used as an alternative to or substitute for principles governing relations between legal sources. Instead, inter-legality may

[21] For a discussion of these models, E. Chiti, 'Bringing Global Law Home', in S. Cassese ed, *Research Handbook* n 3 above, 439, 452.

[22] See in particular Corte di Cassazione 16 February 2018 no 3831; Corte costituzionale 21 February 2019 no 20; Corte costituzionale 21 March 2019 no 63; Corte Costituzionale 10 May 2019 no 112; Corte costituzionale ordinanza 10 May 2019 no 2019; on this jurisprudence, B. Randazzo, 'L'inversione della "doppia pregiudizialità" alla prova' *Giornale di diritto amministrativo*, 368-373 (2018); M. Allena, 'Le sanzioni amministrative tra garanzie costituzionali e convenzionali-europee' *Giornale di diritto amministrativo*, 373-383 (2018); N. Lupo, 'Con quattro pronunce dei primi mesi del 2019 la Corte costituzionale completa il suo rientro nel sistema "a rete" di tutela dei diritti in Europa' *federalismi.it*, 17 July 2019, 1-28.

be viewed, at least as a matter of hypothesis, as a meta-criterion, that is as a criterion capable of shaping the specific principles and rules through which the administrative system of a given order gives execution to its policies by sector.

In particular, we might hypothesize that such meta-criterion is functional to allow administrations to recognize inter-legality situations in all their complexity and richness. This means, first of all, to acknowledge that inter-legality situations are not characterized by purely structural features. Indeed, they are not simply characterized by the composite law, made up of norms laid down by diverse but functionally overlapping and inter-connected regimes, that an administration is called to manage in the implementation of a sectoral policy. Rather, they should be understood as situations in which the composite law may be relevant in a plurality of ways, each reflecting a specific (and changing) model of recognition of the policy delivery techniques available in the same field in other legal orders. Second, it should be acknowledged that 'cases' are a key component of this type of inter-legality situations. While such situations occur in the process of implementation of policies by sector, administrative action still focuses on cases, that is concrete situations shaped not only by the (public and private) interests at stake, as defined by the applicable law, but also by particular facts, contexts and demands of justice.[23] The case, in other terms, is not a situation which manifests itself in judicial litigation only, but one occurring, as stressed also by Palombella and Scoditti,[24] in the different context of the regulatory cycle and, in particular, of its executive phase, as exemplified by the obvious case of individualized decision-making, where administrative measures are not generally applicable rules, but are aimed at a particular individual or at a set of individuals. Third, inter-legality requires administrations to recognize and give value to the normative complexity of the case, as a composite set of norms is usually sustained and oriented by several co-existing normativities, not necessarily consistent or coherent with one another. Finally, administrations should distinguish between the various possible combinations of the relevant norms, opt for an intentionally plural approach, and identify, between the available combinations, the option best capable of ensuring a balance between the different normative claims underlying the case. In line with the overall ethos of the inter-legality theory, in any case, inter-legality should not be meant as a precept requiring administrations to endorse and apply some kind of theory of justice. More modestly, the objective of avoiding injustice or limiting unjust outcomes represents the moral horizon within which the recommendation to set aside exclusively unilateral perspective operates, together with the call to take into account the plurality of norms that are relevant in the case.

As a meta-criterion, inter-legality might inform some principles and rules

[23] On the notion of 'case' in the inter-legality theory, see A. di Martino, 'The Importance of Being A Case. Collapsing of the Law upon the Case in Interlegal Situations', in this symposium.

[24] G. Palombella and E. Scoditti, n 2 above, chapter 1.

of administrative action more open to recognize the normative complexity of the issue and capable of translating it into operational practices. This is the case, for example, of the principle of reasonableness and that of proportionality: the latter significantly and crucially requiring to consider whether a measure is necessary to reach a desired objective or whether such objective has been achieved by the least intrusive method, less impinging on the rights or interests of a private party. It is the case, again, of some instruments that are functional to make administrative action more reasoned, justifiable and predictable *vis à vis* equally entitled normative interlocutors, starting with the traditional triptych of procedural guarantees, transparency and duty to give reasons, largely consolidated in all western legal orders.

The hypothesis proposed above should be, of course, tested and developed in two different directions. The first is strictly normative: does the theory of inter-legality allow to develop a series of criteria of action that administrations may use to handle the multiplicity of potentially relevant norms? Does it provide concrete indications, as it seems to be the case for judicial action, or it should be further articulated? In particular, in which way can we identify and define the exigencies of recognition and valorisation of the normative richness of the case in the specific context of the implementation of hyper-complex policies as those at work in contemporary western polities? Second, research should engage in a reconstructive exercise: to which extent can inter-legality be said to be already present in the concrete practice and actual ways of functioning of the administrative systems of national orders? Which legal arrangements and techniques support and operationalize inter-legality?

V. Conclusions

This article has discussed the possible relevance of inter-legality in the process of implementation of public policies. We have first observed that inter-legality emerges, both as a situation and as a prescriptive criterion, not only in the context of judicial disputes, where it finds a highly fertile ground, but also in the policy cycle. We have then focussed on the implementing phase of the policy cycle, with a view to examining the manifestations of inter-legality as a situation and the ways in which it may operate as a prescriptive criterion.

The analysis has led to three main conclusions. First, inter-legality situations are, in the implementing phase of the regulatory process, diverse and changing. Inter-legality always requires that a composite body of principles and rules is potentially relevant. Yet, the rationale for the relevance of such composite law in the implementation of a sectoral policy depends on the overall model of recognition chosen by a legal regime in order to take into account the policy delivery techniques available in the same field in other legal regimes. Second, such rationale is dynamic and mobile: it varies according to the evolution of

regulatory choices and reflects their ambiguities and contradictions. It is thus appropriate to represent (and analyse) inter-legality situations as in constant movement between the three macro-poles of joint responsibility, co-ordination of responsibilities and conflict of responsibilities. The third and final conclusion is a hypothesis: the hypothesis according to which inter-legality might operate as a meta-criterion allowing administrations to recognize and manage the complexity of inter-legality situations, in particular by informing a number of principles and rules of administrative law common to most contemporary polities.