

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

1



“THE TANGLED COMPLEXITY OF THE EU CONSTITUTIONAL PROCESS” A SYMPOSIUM

(eds.)
Giacomo Delledonne
Julio Pinheiro Faro Homem de Siqueira

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

The Tangled Complexity of the EU Constitutional Process: a book symposium

2

Editorial Introduction

*Giacomo Delledonne*¹

This issue of *Panóptica* is hosting an international symposium, entirely devoted to discussing an important scholarly contribution to European constitutional law – and, more generally, to constitutional theory. This book symposium has been jointly promoted within the framework of a long-standing partnership between the STALS project (www.stals.sssup.it) and *Panóptica* itself. I am very happy to introduce this book symposium, which is just another chapter in this fruitful cooperation.

The four following contributions revolve around Giuseppe Martinico's monograph entitled *The Tangled Complexity of the EU Constitutional Process* (Abingdon, Routledge, 2012)². Prof Martinico's monograph is part of a wider, still ongoing inquiry into the nature of European constitutional law. In particular, it focuses on the role of the European composite judiciary in dealing with *constitutional conflicts*. Doing so, it tries to discuss and criticise the idea that the European constitution – extensively shaped by the case law of the Court of Justice of the EU – has nothing to do with any notion of conflict. Conflict and revolutionary upheaval have played a defining role in the self-understanding of the Western (national) constitutionalism since the 18th century³. The European (small-c) constitution, on the other hand, does not seem to fit in with this line of thought. The alleged absence of a European *demos* – and, consequently, the impossibility of conceiving of a European constituent power –

¹ Postdoctoral research fellow, Institute for European Studies, Université Saint-Louis, Brussels. Email address: giacomo.delledonne@usaintlouis.be.

² See book reviews published in the *European Law Journal* (issue no. 2/2014, pp. 284–86), the *European Law Review* (issue no. 3/2015, pp. 460–61), the *European Journal of Risk Regulation* (issue no. 3/2013, pp. 422–24), the *Revista de Estudios Políticos* (issue no. 161, 2013, pp. 325–28), the *Revista de Derecho Comunitario Europeo* (issue no. 46, 2013, pp. 1270–72), and the academic blog *Diritti comparati* (<http://www.diritticomparati.it/2013/02/book-review-g-martinico-the-tangled-complexity-of-the-eu-constitutional-process-routledge-2012-xiv-19.html>, February 2013).

³ See e.g. R.C. van Caenegem, “Constitutional history: chance or grand design?”, in *European Constitutional Law Review*, issue no. 3/2009, pp. 447–63.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

and the perceived “irenic” flavour of some of the narratives about the European constitution are often seen as major theoretical and practical obstacles⁴. In other words, the European constitution seems to be at odds with some defining features of the tradition of Western constitutionalism.

Martinico tries to contradict these widespread ideas. Doing so, he argues that conflict has been a crucial component in the development of a supranational constitutional law. Building on his previous works on the EU as a complex and dynamic constitutional synallagma, the author claims that dominant ideas about the judiciary as a leading force in the supranational constitutionalisation process have much to do with the role of both the CJEU and national courts in coping with legal – and even constitutional – conflicts between supranational and national legal orders. Conflicts also generate cooperation between judicial actors, thereby enhancing the internal cohesion of a composite legal order.

In-depth analysis of some milestones in the history of European constitutional conflicts is followed by a theoretical insight into the notion of constitutional order applicable to the EU. This should be understood as spontaneous *κόσμος* rather than as *τάξις*. Some kind of order is part of the supranational process of constitutionalisation; on the other hand, this is different from the idea of order which is typical of (post-)revolutionary constitutional arrangements. Consequently, the European constitution in the making can properly be understood from the vantage point of courts and their rationalising function.

The main strength of the book lies in its rigorous method and in its committedly interdisciplinary flavour. Concepts and categories drawn from political philosophy or social sciences (Hayek’s writings on spontaneous orders, or the re-elaboration of Carl Schmitt’s categories of “the Political” by Chantal Mouffe) are an integral part of the legal analysis. Meanwhile, the conclusion of the book is quite realistic in underlining the emergence of further political and legal conflicts at the European level, the dubious fate of “mega-constitutional politics”, and the central role of courts. The *Gauweiler* judicial saga may be the latest example of this typical pattern. It reveals both a willingness to cooperate (think of the generous decision of the Court of Justice to admit the very peculiar reference from Karlsruhe) and the existence of radical constitutional conflicts. For instance, the Court of Justice has been quite evasive with regard to the respective roles of the European Central Bank and the Troika

⁴ See e.g. Massimo Luciani, “Costituzionalismo irenico e costituzionalismo polemico”, in *Giurisprudenza costituzionale*, issue no. 2/2006, pp. 1643–68.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

under the OMT (Outright Monetary Transactions) programme, thereby ignoring the preliminary conclusions drawn by the German Federal Constitutional Court in its reference⁵.

4

After a brief introduction by the author himself, the subsequent contributions focus on specific aspects in *The Tangled Complexity*. The final outcome is not just a discussion of this valuable monograph, but also an attempt of pointing out possible advancements in the light of subsequent events and different theoretical viewpoints.

Julio Pinheiro Faro Homem de Siqueira (Universidade Federal do Rio Grande do Norte) deconstructs the notion of judicial dialogue, which has enjoyed great fortune among legal scholars in the last decade or so⁶. Early analyses have possibly adopted a generic notion of dialogue which needs further scholarly attention – all the more so if you have in mind some major flaws in the European constitutional synallagma.

Pablo José Castillo Ortiz (University of Sheffield) argues that Martinico's monograph – as well as a great many EU law scholars – may have gone too far in assuming that the EU already has a Constitution. His paper re-evaluates the function of “no-Constitution theses” in boosting “a deeper and more democratic constitutionalism for the Union”. The underlying premise for this claim is a strong conception of democracy and a normative conception of constitutionalism, understood as a commitment to emancipation through law and to solid democracy.

Marco Goldoni (University of Glasgow) has written about supranational spaces as a proper forum for constitutional conflicts. His contribution considers the main arguments in the book as both a challenge and enrichment for the debate about constitutional pluralism. He also makes some points about the significance of legal reactions to the Euro crisis for the understanding of supranational constitutionalisation as an evolutionary process. Are real conflicts still possible within the framework of the new economic governance?

In his final rejoinder, Giuseppe Martinico argues that scholarly analyses of the EU Constitution have mainly focused on judicial actors so far. On the other hand, it is well possible to extend arguments raised in *The Tangled Complexity* e.g. to parliaments and to

⁵ German Federal Constitutional Court, order of 14 January 2014 – 2 BvR 2728/13, at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html; Court of Justice of the European Union, judgment of 16 June 2015, *Gauweiler* (C-62/14), at <http://curia.europa.eu>. Also see the Opinion of Advocate General Cruz Villalón, in which this specific issue is more explicitly addressed.

⁶ See comprehensive critical assessment in *Shaping Rule of Law Through Dialogue: International and Supranational Experiences*, jointly edited by Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

analyse the EU as “a compound parliamentary arena”. He also adds that current attempts of coping with the Euro crisis may also be a catalysing force for further constitutional conflicts. Martinico expresses a preference for the neutral notion of “judicial interaction”, of which dialogue may be just one possible *species*. With regard to Pablo Castillo’s points, Martinico defends the merits of a broader notion of constitutionalism and looks into the difference between Euro-scepticism and Euro-criticism.

5

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

Exploring the constitutional complexity of the EU. An introduction to a symposium

6

*Giuseppe Martinico*¹

I would like to express my deep gratitude to Julio Pinheiro Faro Homem de Siqueira and Giacomo DelleDonne - the special editors of this Symposium - for the attention paid to my book *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*, Abingdon, Oxon; New York, NY: Routledge, 2012, <http://routledge.com/books/details/9780415688192/>.

This means a lot to me and gives the present author the possibility of recalling some of the ideas included in the volume. To this aim I have been asked to present the main points of the book in order to ‘kick off’ the discussion. I would like to start by recalling what I wrote in the last chapter: in 2005, Nico Krisch opened his essay ‘Europe’s Constitutional Monstrosity’ (N. Krisch, ‘Europe’s constitutional monstrosity’, *Oxford Journal of Legal Studies*, 2005, 321-334) by recalling that in 1667 Pufendorf had described the Holy Roman Empire as *monstro simile*.

Starting from this anecdote, Krisch lingered on the mismatch between the classical constitutionalism and the European one, given the irregularities and inconsistencies that the supranational integration process displays when compared to the nation state model.

In those pages, however, the citation of Pufendorf slipped away too quickly without reflecting on the meaning to be attributed to the Latin word *monstrum*. Today ‘monster’ refers to one whose features are considered ‘unnatural’, this word having a mainly negative meaning.

However, in Latin *monstrum* stood for both ‘monster’ and ‘miracle’, so much so that *monstra* were the signs of God. Something similar happened with the Greek *téras*, which originally meant the first sign from God, a sign capable of inducing terror.

Trying to recover the etymology of the word, I could say that this book wants to be an essay on the ‘monstrosity’ of the EU, its ‘prodigiousness’ (which is expressed in its ‘non-regularity’ – i.e. not in perfect correspondence with the national model of constitutionalism),

¹ Associate Professor of Comparative Public Law, Scuola Superiore S. Anna, Pisa.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

attempting, at the same time, to show how it does not forbid the integration process to assume a constitutional nature.

This volume tries to offer a fresh view on the EU constitutionalisation process by presenting three main points: the idea of constitutional complexity, the tension between constitutional evolutionism and constitutional constructivism in the process of European integration, and the functional nature of conflicts in the evolution of the EU.

It is probably because of its ‘monstrosity’ that European law produces consternation among constitutionalists accustomed to traditional patterns of power. Yet, it offers the variety of a debate that is not limited to a few voices. This debate even attempts to answer the uncertainties highlighted by critics of European constitutional law, and can hardly be considered on the whole as ‘a naive reconstruction’ (M. Luciani, ‘Costituzionalismo irenico e costituzionalismo polemico’, 2006, www.rivistaaic.it/old_site_aic/materiali/anticipazioni/costituzionalismo_irenico/index.html).

What is the ‘secret’ (à la W. Bagehot, *The English Constitution*, Oxford University Press, 1867, reprinted 2001, 44) of the European Constitution? In order to provide this question with an answer, this book presented one of the possible constitutional interpretations of the EU integration process, introducing the idea of constitutional complexity and investigating some of the problematic consequences of the EU structural features. I described the EU as a complex legal order that is a product of the interaction among constitutional levels/poles and is characterised by some precise features: non-reducibility, non-predictability, non-determinism and non-reversibility. In the following pages I shall anticipate the structure of the volume, which is divided into five chapters.

The aim of the first chapter was to offer a brief overview of the international literature regarding the concept of European Constitution and European Constitutional Law.

When doing so, I insisted on the polysemy of some key terms in this debate: constitution, constitutionalisation and constitutionalism, limiting, of course, my attention to the particular meaning that they can acquire in this field of research.

In the second chapter I analyse the latest trends of the European integration process in light of the notion of complexity (relying on Morin’s works rather than on those by Luhmann), conceived as a bilaterally active relationship between diversities.

This notion of complexity comes from a comparison between the different meanings of this word as used in several disciplines (law, physics, mathematics, psychology, philosophy)

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

and recovers the etymological sense of this concept (complexity from Latin *complexus* = interlaced).

I argued that the EU legal order is a ‘complex’ entity that shares some features with complex systems in natural sciences: non-reducibility, unpredictability, non-reversibility and non-determinability. To present my argument, I understood by ‘complex’ a system composed of several interconnected or interwoven (as the etymology of the word ‘complex’ suggests) constitutional levels/poles. Their interactions create a kind of additional information which is not visible by an external observer (in this sense one could say that in complex systems there is no Laplace’s demon). New properties that cannot be explained from the properties of individual elements emerge as a result of the interactions among levels/poles. Such features are usually called emergent properties and correspond to those constitutional principles that cannot be entirely reduced to the national or supranational levels. In this sense a complex system should not be understood as a mere sum of its components, but as something characterised by an added value which is the product of all the interactions among them, what I called the constitutional synallagma.

The aim of that chapter was to contribute to the theoretical debate on EU integration by completing some points that may have been neglected by the main constitutional theories of EU integration (multilevel constitutionalism, constitutional pluralism).

As scholars have pointed out, the peculiar structure of the EU favours interactions between the interpreters of the constitutional levels/poles and the continuous exchange of legal materials among them: this is precisely at the heart of what I called ‘constitutional synallagma’, understood as one of the consequences of constitutional complexity.

Scholars have been focusing their attention on judicial dialogue and judicial cooperation while I tried to pay attention to some borderline phenomena that are not univocally classified in literature. The idea of emergent properties refers to those entities that “‘arise” out of more fundamental entities and yet are “novel” or “irreducible” with respect to them’ (T. O’Connor, H. Y. Wong, ‘Emergent Properties’, *The Stanford Encyclopedia of Philosophy* (Spring 2012 Edition), E. N. Zalta (ed.), <http://plato.stanford.edu/entries/properties-emergent/#EmeSub>). The emergence of these properties is frequently associated to evolutionary dynamics which shape and reshape the natural order stemming from the different types of interactions possible among actors operating at the different levels/poles.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

Starting from these considerations in the third chapter, I linked the idea of complexity to an evolutionary understanding of order and, borrowing Hayek's distinction between constructivism and evolutionism, read the last 20 years of constitutional politics (from 1992 to 2012) at EU level in light of this dichotomy.

My idea is that the last 23 years have been dominated by the constructivist attempts at reducing the EU constitutional complexity, with the specific aim of giving the EU a constituent process resembling the revolutionary and continental idea of a constituent process. Rarely have these constructivist efforts worked, and the vulgate on the constitutional failure is the product of the frustration induced by the impossibility of dominating (completely, at least) the constitutional complexity of the EU.

In the fourth chapter, I moved to the consequence of complexity on the actors operating in the complex legal system. The reasoning behind that is as follows: a complex (i.e. interlaced) legal system forces actors operating at different levels to interact with each other. These 'interactions' may assume different dynamics: they can be cooperative, merely competitive, or even conflicting.

As I argued in Chapter III, the constructivist attempts have not (always, at least) produced the desired effects and the issue of constitutional conflicts has not gone away. On the contrary, conflicts are still crucial in the constitutional life of the EU and sometimes they can play a systemic role in the economy of the constitutional life of the EU, by favouring the transformation of its basic principles (I described the *Solange* saga as an example of this, but other recent cases might be found).

The bridge between complexity and literature on conflicts is offered by non-reductionism and non-apriorism, and consistent with this there is no criterion for identifying a priori conflicts provided with systemic influence.

Sometimes conflicts among levels are only apparent (virtual conflicts), sometimes they are fully fledged conflicts which expose judges to a sort of 'constitutional dilemma' (on the concept of 'constitutional dilemma' see: L. Zucca, *Constitutional Dilemmas - Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford: Oxford University Press: 2007), the interpreters being forced to renounce one of the two constitutional norms at stake.

This confers a key role on those actors that operate at all levels (national, supranational, international), in particular the national judges.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

They pay the price of complexity every day, trying to solve those antinomies that complexity may produce.

In this part of the volume (Chapter IV) I tried to show how the nature of the antinomies in such a context, presents its own peculiarity by providing concrete examples taken from the national or supranational case law.

However, sometimes there are antinomies that present a particular – a constitutional – tone involving the necessity of establishing a priority of one of the constitutional levels over the other, in other words, involving a clash between the constitutional supremacy and the primacy of EU law (to borrow the language employed by the Spanish Constitutional Court, *Tribunal Constitucional*, declaración 1/2004, www.tribunalconstitucional.es).

In Chapter IV I also tried to identify some types of constitutional conflicts and to show how they may sometimes have a systemic impact on the life of the EU by causing a change in their fundamental principles.

The final chapter attempted to offer a reflection upon the destiny of constitutional conflicts in the future of the EU, by listing a series of factors that, in my view, will feed a new season of constitutional conflicts, confirming the ‘polemical’ spirit of European law (the possible accession of the EU to the ECHR, the EU economic and financial crisis, the progressive enlargements of the EU and, finally, the consequences - one might say, the aftermath - of the roar of the mega-constitutional politics of the season of the Conventions).

Democratic dialogue for a better constitutional synallagma: discussing Giuseppe Martinico's ideas

*Julio Pinheiro Faro Homem de Siqueira*¹

The secret of a profitable dialogue can be identified in a multiple complementarity that connects different instances of power, branches, actors, and legal orders. In terms of a more interlaced (or complex) legal system, this connection process can be regarded as a kind of fusion between multilevel orders that captures the main idea of an integration process, allowing the emergence of a multiply-integrated legal system.

Many scholars have been researched on the idea of dialogue. What most of them usually demonstrates is that, besides an intra-forum (horizontal) dialogue, an inter-forum (vertical) and an extra-forum dialogue are also necessary not only among the judiciaries (courts, tribunals) of different legal orders, but also among instances of power, branches and actors which could influence an integration process.

This paper intends to deal with two ideas developed by Giuseppe Martinico in order to discuss how a democratic dialogue can produce better legal orders. The first idea is the *hidden dialogue*, which “demonstrates how even actions and behaviours conceived with competitive spirit can have a systemic impact, resulting in a contribution to the modification of some of the fundamental principles of the system (here understood as the multilevel legal order”.² The second idea is the *constitutional synallagma*, that is, “the whole of the principles, practices and rules which circulate uninterruptedly from one constitutional level to another in a twofold direction (from top to bottom and vice versa) and which permits the genesis and the reshaping of the structural principles”² of a legal system.

I believe that both ideas considered together can explain the failure of the EU constitutional process. Viewing the constitutional synallagma as the constitutive contract for the EU, formed by a *corpus* of basic norms and practices derived from a process of democratic dialogue among autonomous constitutional orders – including their respective

¹ Researcher on Public Law at Universidade Federal do Rio Grande do Norte, and on Law, Society and Culture at Faculdade de Direito de Vitória, both in Brazil. E-mail: julio.pfhs@gmail.com

² MARTINICO, Giuseppe. *The tangled complexity of the EU constitutional process: the frustrating knot of Europe*. London: Routledge, 2012, p. 138.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

branches and actors (especially courts) – for shaping and constructing a rule of law,³ I believe that a better constitution of the EU can be extracted from a profitable dialogue.

Thus the better conception and result of the constitutional synallagma seems to depend directly on the hidden dialogue, since its general idea involves sharing legal rules, principles and practices, that is, common constitutional traditions for constructing not only a rule of law, but also supranational and international communities, in a way that it needs cooperative work among the interpreters and the appliers at different levels.⁴

The *silent integration*, to use another expression employed by Martinico,⁵ makes the European Court of Justice (ECJ) play an important role in the construction of the constitutional synallagma, once it is the competent interpreter of the European community legal order, and also responsible for permitting the cooperation with the national courts to a better shaping of the rule of law.

Through this better shaping, the hidden dialogue *leads* to a better constitutional synallagma, understood as the efficient secret of the European Constitution.⁶ As Martinico writes: “it is clear that EU constitutional law is not an exhaustive phenomenon, it does not aim at replacing (completely at least) national constitutionalism: on the contrary, EU constitutionalism needs the constitutional materials of the Member States in order to perform its rationalizing function”.⁷ These words seem to imply an exchanging, through cooperation, of different constitutional traditions, permitting an interpenetration between constitutional entities for the EU’s progressive constitutionalisation.⁸

Giuseppe Martinico argues that the national constitutional courts are in the process of progressive acceptance of the “cooperative mechanism set up by art. 234 of the European Community Treaty (now art. 267 TFEU after the coming into force of the Lisbon Treaty)”.⁹ Since this provision the dialogue is technically and legally possible, but the process is slow and silent, specifically because of many practical difficulties faced during this dialogue

³ MARTINICO, Giuseppe. Op. cit., 2012, p. 4, 5, 103, 104.

⁴ MARTINICO, Giuseppe. Op. cit., 2012, p. 105.

⁵ MARTINICO, Giuseppe. *L'integrazione silente: la funzione interpretativa della Corte de giustizia e il diritto costituzionale europeo*. Napoli: Jovene, 2008.

⁶ MARTINICO, Giuseppe. Op. cit., 2012, p. 2.

⁷ MARTINICO, Giuseppe. Op. cit., 2012, p. 9.

⁸ MARTINICO, Giuseppe. Op. cit., 2012, p. 19.

⁹ MARTINICO, Giuseppe. Preliminary reference and constitutional courts: are you in the mood for dialogue? In: FONTANELLI, Filippo; MARTINICO, Giuseppe; CARROZZA, Paolo (eds.). *Shaping rule of law through dialogue: international and supranational experiences*. Groningen: Europe Law Publishing, 2009, p. 223.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

13

process. According to Martinico,¹⁰ the ECJ plays an important role in the multilevel constitutionalism, being the competent interpreter of European Union Law (EUL), and is also responsible for permitting the cooperation with the national courts towards a better shaping of the rule of law. Being responsible does not mean that there is a hierarchy between the ECJ and the Constitutional Courts (CC), but that the ECJ must demonstrate to the CC that they will not lose their “interpretative power” through the multilevel dialogue, because it establishes a positive collaboration towards better interpreting rule of law provisions. Collaborating in this sense means playing part of the rule of law amelioration.

The dialogue is not for outward travel only. Not only must the CC must recognise the ECJ authority, but the ECJ must demonstrate a kind of respect towards the national court’s authority too. The dialogue must be democratic and take into account the different priorities and concerns of the supranational and national courts. . Then one can observe that “the ECJ has recently started to quote the constitutional materials of the national judges or finding exceptions to obligations under EC law in national (rather than common) constitutional traditions”.¹¹ For this reason, it is possible to talk about an acknowledgement by the ECJ of the authority of the CC.

The dialogue is then a return ticket; not only because of both acknowledgements, but also because the ECJ is paying more attention to the impact of CC decisions, the CC are quoting the ECJ decisions, and both are trying to use the comparative interpretation of law tools to make better decisions.¹² However, there are some decisions on both sides that do not pay attention to the peculiarities of an EU Member State (EUMS) or do not observe the precedents set by the ECJ. The most complicated problem seems to be with the enlargement of the competences of the ECJ, especially in jeopardising the national *res iudicata* to ensure the interpretation uniformity.¹³

Two difficulties emerge at once. First, there must be comity for cooperation to exist. Second, many “loyalties” of the judges in each sphere must be put aside. These questions mean, in other words, that the dialogue among the CC and the ECJ comes both from the cooperation and the competition between them, once both sides accept the arguments on the

¹⁰ MARTINICO, Giuseppe. Op. cit., 2008.

¹¹ MARTINICO, Giuseppe. Op. cit., 2009, p. 238.

¹² It is employed here the expression “comparative interpretation of law” instead of “comparative law”, because it seems to be more exact. See, for example: SIQUEIRA, Julio Pinheiro Faro Homem de. Natureza do direito comparado, 2013. Available at <http://jus.com.br/artigos/23674> (August 11, 2015).

¹³ MARTINICO, Giuseppe. Op. cit., 2009, p. 245-249.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

issues presented by each other, in an attempt to find the best way to interpret the questions raised with no damage to the presupposed national court's competence.¹⁴

14

Ernst-Ulrich Petersmann argues that “in terms of rules, principles, state-centered treaty regimes, legislative authorities, executive and judicial institutions, and communities of citizens, the international legal system continues to be fragmented and anarchic”,¹⁵ and that one example of it is that international law regulates human behaviour incompletely and uses indeterminate and controversial terms.¹⁶ In this sense, the dialogue needs both cooperation and comity, if the objective is protecting the rule of law, shaping it to contemporary issues. As Petersmann affirms, there is a widely shared view according to which “the ‘coherence of the judicial system of the European Union does not rest solely on the Community courts, but rather on the interlocking system of jurisdiction of the Community courts and the national courts which is cemented together by the principle of upholding the ‘rule of law’ in the Union legal order’”.¹⁷ Thus, it is clear that the Community courts, as ECJ, cannot survive alone, and that their decision-making process must feature dialogue, when necessary, with the CC. Only with this perception can a better constitutional synallagma be constituted and operate.

It is widely known, for example, that rules cannot specify every condition under which they are applied. The existence of rules whose content is indeterminate or is being contested is also very common. In both examples people will recur to the judiciary in an attempt to obtain clarification by the judges on the meaning or extension of the rule, since “the application of every rule requires interposition of an authority determining what the rule should mean in a particular situation, and whether applying the rule might be better than resorting to an exception”.¹⁸ However, when this process involves multilevel rules or a conflict among multilevel rules, the decision certainly will be better in order to deliver justice if there is a dialogue among courts.

Even if there is an acknowledgement in both directions, the courts must respect the decisions, jurisdictions and constitutional foundations, cooperating regularly, achieving a

¹⁴ See, for example: MARTINICO, Giuseppe. Op. cit., 2008, chapter 6.

¹⁵ PETERSMANN, Ernst-Ulrich. Multilevel judicial governance as guardian of the constitutional unity of international economic law. *Loyola International and Comparative Law Review*, vol. 30, p. 367, 2008.

¹⁶ PETERSMANN, Ernst-Ulrich. Op. cit., p. 368-369, 2008.

¹⁷ PETERSMANN, Ernst-Ulrich. “Constitutional justice” requires judicial cooperation and “comity”. In: FONTANELLI, Filippo; MARTINICO, Giuseppe; CARROZZA, Paolo (eds.). *Shaping rule of law through dialogue: international and supranational experiences*. Groningen: Europe Law Publishing, 2009, p. 10.

¹⁸ PETERSMANN, Ernst-Ulrich. Op. cit., 2009, p. 9.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

common sense result to solve the issues, and clarifying the application of the rules to every situation they are deciding, bringing legal safety to every person.¹⁹ This is what can be called the protection of rule of law shaped through democratic dialogue, strengthening it beyond state borders,²⁰ and improving the constitutional synallagma.

Strengthening democratic dialogue for a better constitutional synallagma means that mutual acknowledgment of authorities contributes to the interchange of arguments and knowledge among the courts. That is, a familiarisation process from CC to ECJ, and vice-versa; a familiarisation which is an open bar for the *improvement* of constitutional synallagma. However, it will not be such a surprise if there are courts or judges on both sides that tend to leave the cooperation process, employing the argument that CC and ECJ serves different normative purposes,²¹ contributing to the constitutional synallagma *failure*.

If European States really want to form an interlaced Union of States they must follow the path that the constitutional synallagma seems to prescribe: *that the national and European courts will perceive national, supranational and international peculiarities and understand them*. According to the interests that prevail in each situation, the arguments that are taken into account by a court tend to better achieve the peculiarity of the case, culminating in a more precise and fair decision. This does not mean that the exchange of arguments and even norms is not necessary: on the contrary, it allows that the courts apply foreign (national, supranational or international) conclusions in order to solve their cases.

Therefore, the dialogue is possible, especially if the courts (and the others actors that get involved) are in the mood for cooperation, and put aside their old-fashioned arguments on loyalties or losing interpretative power. The dialogue permits a kind of improvement of the interpretation of the national law, and also of the ECL, updating, developing them, and making them more compatible. This leads to the construction of an EU rule of law and allows for a better constitutional synallagma.

However, dialogue, in fact, is not as simple as it seems to be. It features many actors and has to observe many norms and their hierarchy. Moreover, even respecting the hierarchy of norms, it is common that the application of the same rule by two distinct courts in very similar

¹⁹ PETERSMANN, Ernst-Ulrich. Op. cit., 2009, p. 12.

²⁰ PETERSMANN, Ernst-Ulrich. Op. cit., 2009, p. 13.

²¹ SHANY, Yuval, Dédoublement fonctionnel and the mixed loyalties of national and international judges. In: FONTANELLI, Filippo; MARTINICO, Giuseppe; CARROZZA, Paolo (eds.). *Shaping rule of law through dialogue: international and supranational experiences*. Groningen: Europe Law Publishing, 2009, p. 34.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

cases result in divergent conclusions. This does not necessarily mean that there is a conflict,²² but that it is necessary to establish – if possible – an interpretation that better reaches the spirit of the law, or the better spirit of the rule of law. Of course this cannot be done at all costs, because “trying to acquire coherence at all costs between tribunals that have different jurisdictions might only be possible by violating basic principles of law”.²³

As said, for a better constitutional synallagma there must be dialogue between all the involved actors. In this respect, it is necessary to remember that the EU judicial system is not only made up of supranational courts, but also for national courts. As Jan Komárek points out, “too often national judges are only reminded of their Union mission when obligations in the name of effective application of EU law are imposed upon them. But this mission must also entail more trust in them, as well as a consideration of problems which these obligations may cause to national judicial processes. National and Union judicial processes are connected vessels and problems at one level inevitably cause problems at another”.²⁴

This reflection is truly important; the fact is that even though there is no legal hierarchy between supranational and national courts, the practice creates one by means of the nature of each of them. The terms employed can also take anyone to the conclusion that *supranational* courts are hierarchically *superior* to the national ones – the prefix *supra* indicates ‘above something’. To avoid this problem the national courts must be considered as parts of the EU judicial system, especially because the decisions made by these courts will affect the European Community and the Member State.

By the way, it is never too much to say that the EUMS only partially accepted the EUL supremacy: “it is well known that a number of constitutional courts in the EUMS have accepted the supremacy of EU law only with the reserve of some ‘counter-checks’”.²⁵ Many CC are claiming the prevalence of their national norms, especially the ones that ensure their

²² In the same way: RAFFAELLI, Rosa. The relationship between the ICC and other international tribunals: an analysis of the Lubanga confirmation of charges. In: FONTANELLI, Filippo; MARTINICO, Giuseppe; CARROZZA, Paolo (eds.). *Shaping rule of law through dialogue: international and supranational experiences*. Groningen: Europe Law Publishing, 2009, p. 315.

²³ RAFFAELLI, Rosa. Op. cit., 2009, p. 315.

²⁴ KOMÁREK, Jan. In the Court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure. In: FONTANELLI, Filippo; MARTINICO, Giuseppe; CARROZZA, Paolo (eds.). *Shaping rule of law through dialogue: international and supranational experiences*. Groningen: Europe Law Publishing, 2009, p. 92.

²⁵ FABBRINI, Federico. Judicial review of United Nations counter-terrorism sanctions in the European multilevel system of human rights protection. In: FONTANELLI, Filippo; MARTINICO, Giuseppe; CARROZZA, Paolo (eds.). *Shaping rule of law through dialogue: international and supranational experiences*. Groningen: Europe Law Publishing, 2009, p. 170.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

system safety, until the EU system ensures an equivalent protection.²⁶ This, in my opinion, explains why the EU has no Constitution yet, and why the constitutional synallagma (if it really exists) is a weak one.

The *lack* of Constitution and the *weak* constitutional synallagma reveal that the EU has failed, until now, to create a European rule of law.

Understanding rule of law as the essence of the contemporary model of democratic states,²⁷ it can be said that the constitutional synallagma is a very important step in forming a more solid Union. The hidden democratic dialogue plays an important role, especially when it appears to be common sense to establish in the EU case the basic norms which will prevail over any other norms in every EUMS. These norms seem to include, *a priori*, the liberty and the democratic principles, and the respect and the protection of the fundamental rights.²⁸ It is also essential to ensure, in specific situations, the prevalence of the national norms over certain norms in the supranational or international level, as shown by Art. 4(2) TEU.

Having established these hierarchy issues, it would be very useful to determine how to interpret the norms, or better: how the supranational courts will interpret national norms, and how the national courts will interpret the supranational norms. The problem with the fair interpretation of a norm by an “alien” court “concerns the ‘rule of law’ and its use”.²⁹ This occurs because this kind of interpretation was unusual until recent years, and, maybe mainly, the decisions of the courts may have insurmountable reflections at the national or at the supranational levels. Thus, the imposition of a decision by any court over another is not consistent with a supranational rule of law. It is necessary to have a true cooperation and coordination among the actors involved. That is to say, national and supranational courts must act together, in convergence, not as divergent courts.

To construct a *strong* constitutional synallagma, the challenge is abandoning the traditional way of constructing a *constitutional* order, using as reference the state, or a paradigmatic

²⁶ FABBRINI, Federico. Op. cit., 2009, p. 170.

²⁷ See, for example: STEIN, Robert. Rule of law: what does it mean? *Minnesota Journal of International Law*, vol. 18, p. 303, 2009.

²⁸ See: ADAM, Stanislas. Overcoming dissonance to reshape coherence: the European Court of Justice, terrorist lists and the rule of law. In: FONTANELLI, Filippo; MARTINICO, Giuseppe; CARROZZA, Paolo (eds.). *Shaping rule of law through dialogue: international and supranational experiences*. Groningen: Europe Law Publishing, 2009, p. 206-207.

²⁹ PALOMBELLA, Gianluigi. Global threads: weaving the rule of law and the balance of legal software. In: FONTANELLI, Filippo; MARTINICO, Giuseppe; CARROZZA, Paolo (eds.). *Shaping rule of law through dialogue: international and supranational experiences*. Groningen: Europe Law Publishing, 2009, p. 419.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

authority. The crucial challenge knocking on the EU's door is to construct something that seems to be entirely new in the current world: a kind of Union in which each State maintains its sovereignty, observing a *common corpus of laws and directives*, and, much more importantly, cooperates with the other Members of the EU.

18

The contested ‘Constitution’ of the EU and the quest for ever-democratic constitutionalism

*Pablo José Castillo Ortiz*¹

1. Introduction

When Giuseppe Martinico published his piece ‘The Tangled Complexity of the EU Constitutional Process’ (Martinico, 2012), the Spanish *Revista de Estudios Políticos* honoured me asking me to write a short review of the book. In my review (Castillo, 2013), I called the book by the prolific Martinico an excellent piece of research. No doubt, it is so. However, at the end of the review I ventured some critical comments, and among them I suggested the idea that maybe European Union law scholars –including Martinico - had gone too far in taking for granted that the European Union has a ‘Constitution’. When Prof. Martinico read my review, instead of complaining about my comment, he thanked me for my words and, in particular, he enthusiastically asked me to develop my critique in further detail. Soon after this I received an invitation by the journal *Panóptica* and STALS to write an article using Martinico’s work as a starting point.

Given the nature of this invited contribution, the political character of the ideas I am to develop, and the limitations of space, I think that the most reasonable option is to slightly deviate from the usual style of academic writing. Instead of aiming at the drafting of neutralistic, positivist paper, I shall defend in the following pages an academic stance which is admittedly political, in the sense that is both politically and normatively motivated. This article starts with one premise and then develops two basic claims. The premise is that the word ‘Constitution’ should be defined in normative terms and with reference to core democratic values. The first claim of this article is that the European Union is at some point in its unfinished process of constitutionalization. The second claim is that, paradoxically, some critiques to the European integration process have boosted a deeper and more democratic constitutionalism for the Union.

¹ Lecturer in Law at the University of Sheffield. I want to thank Paul Cardwell for his useful comments on an earlier version of this manuscript. All omissions and mistakes are of the sole responsibility of the author.

*In: DELLEDONNE, Giacomo; SIQUEIRA, Julio Pinheiro Faro Homem de (ed.). “The tangled complexity of the EU constitutional process. A Symposium”. *Panóptica*, vol. 10, n. 1, Jan./Jun. 2015*

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

To develop my argument, this article is structured as follows. Following this introduction (1), in the second section I will summarize Martinico's concept of 'EU constitutionalism' (2). Subsequently, I will analyze the relationship between democracy and the tradition of constitutionalism, and I will suggest that we should require legal systems to meet high democratic standards before calling them 'constitutional' (3). In this light, in the next section, I will engage with Martinico's approaches by analysing the EU legal system and re-assessing its constitutional nature (4). I will end by offering some brief conclusions in which I will suggest that some sceptic approaches to the EU 'constitution' should be taken seriously by anyone who wants the EU to become a fully-fledged constitutional system (5).

20

2. The concept of EU Constitution in the work of Martinico

Martinico is well aware of the implications of the debate over EU constitutionalism. Far from assuming EU constitutionalism as an implicit premise of the analysis, he makes explicit and justifies his choice at the very beginning of his book. In the most exhaustive definition of the concept that he provides, he relies on Claes' (2011:4) definition of a European Constitution as:

the set of EU norms, rules and principles constituting the polity and its legal order, establishing the institutions, attributing competences to the EU and dividing them among its institutions, governing the relationship between the EU and its Member States, limiting the exercise of its competences and guaranteeing the rights of the individuals governed under it.

Against this background, Martinico (2012:9) finds that the European Constitution is composed of written and unwritten materials codified either in the treaties, in national constitutions or in the case law of the Court of Justice, thus suggesting the existence of a composite, multidimensional and pluralistic constitutional frame in which none of the two constitutional levels –the national and the European- has a clear predominance over the other (Martinico, 2012:8). Apart from Claes' reference to 'the rights of individuals' and 'limiting the exercise of power', which could be deemed as having a solid normative dimension, Martinico's definition of the EU Constitution seems very much concerned with the performance of two related practical functions: the organisation of the exercise of public power by the institutions of the EU, and the interconnection between the European and national 'constitutional' levels into a coherent narrative.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

Martinico discusses the question of the democratic legitimacy of the European legal edifice and of what he calls its ‘Constitution’. Although he also devotes attention to the state of *substantive* democracy in the EU and to the issue of the democratic deficit, Martinico is especially concerned with the debates about the democratic legitimacy of the *formal* process of constitution-making in the EU. He (2012:61) analyses the approach to constitutionalism according to which the constitution is the product of the will of a pre-existing people, which legitimizes the constitution and conceives it as the outcome of a democratic process. However, according to him, many European constitutions would not fit this ‘revolutionary’ model of constitutionalism (2012: 62) and, instead, he would propose the idea of ‘evolutionary constitutionalism which renounces the idea of “constituent power”’ (2012: 066). In his critique, Martinico seems to have in mind the famous –and often criticized- writing by Grimm (1995) in which the author held that there was no such a thing as an European *demos*, and that thus a European Constitution neither existed nor should be created. Martinico seems to be in line with MacCormick (1997), who responded to such assertions by pointing to the US example to show that not all Constitutions had to be created after a deliberate, concrete and explicit act of the *pouvoir constituant*. In my view, however, Grimm’s account of the ‘no-Constitution’ thesis is not the only possible version of such idea, and other more interesting approaches to it could help us to fine-tune our debate about EU’s constitutionalism.

21

3. Democracy as a constitutive element of the concept of ‘Constitution’

In order to develop my former assertion that some sophisticated forms of the no-Constitution thesis should be taken seriously, it is necessary to enter into the debate whether the term ‘Constitution’ should have a merely technical meaning –i.e. a set of superior rules of the legal system- or rather a normative meaning: a set of superior rules which are democratic themselves and which organize a society in a democratic way. I would like to use as a starting point the classical writing of Sartori (1962) ‘Constitutionalism: a Preliminary Discussion’.

According to Sartori (1962:855) the defining feature of constitutionalism during its climax in the 19th Century was its *telos*, summarized in the idea of *garantisme*: the Constitution meant ‘a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary government and ensure a “limited government”’. He quotes the paradigmatic example of the 1776 Constitution of Virginia according to which a Constitution should have two elements, a bill of rights and a plan of

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

government (Sartori: 1962:856). Thus, for Sartori the words ‘constitutionalism’ and ‘Constitution’ meant much more than a set of rules which occupy the highest position in the hierarchy of a legal system: ‘the definition of constitution which has an objective worth is the one that appears to be the outcome of a long and painstaking process of trial-and-error concerned with the question: How can we be governed without being oppressed?’ (Sartori, 1962: 858).

Of course, Sartori’s conception of constitutionalism can be –and has been- criticized. More in general the rather liberal conceptions of freedom like the one he seems to defend have been contested from different angles: from republicanist to feminist, from deliberative to social conceptions of democracy and/or constitutionalism (see *inter alia* Pettit, 1997; Binion, 1991; Fabre, 2000; Habemas, 1995; Scheppele, 2004). However, all of these traditions share something in common with Sartori’s original definition: their emphasis in freedom from oppression. While all of these traditions of thought point at the need to rise and further the sometimes thin democratic standards of liberal constitutionalism, I do not think that any of them would be content with the strategy of de-politicization that underlies to the transit from normative to merely technical definitions of a Constitution. As Sartori himself (1962:855) put it:

legal terminology (...) tends to be abused and corrupted. (...) In our minds, constitution is a “good word”. It has favourable emotive properties, like freedom, justice or democracy. Therefore, the word is retained, or adopted, even when the association between the utterance “constitution” and the behavioural response that it elicits (...) becomes entirely baseless.

Maybe this is why one of the striking elements in classic doctrinal articles about European Union law has been the willingness of scholars in calling the EU a ‘constitutional’ polity. The qualifications of the EU as a constitutional system can be found not only in more recent literature (see *inter alia* McCormick, 1997; Craig, 2001; Kumm, 2006), but even in the pre-Maastricht scholarship. It is not difficult to have the sensation that there has been an excessive hurry in using the term ‘constitutional’, especially as the history of European integration has showed how incomplete the European political edifice was at the time of such writings. One good example is Weiler. His ‘The Transformation of Europe’ piece was published in June 1991. At this time, the Maastricht Treaty was not only still not in force, but even the European Council which would draft it had not met –it would do so only some

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

months later, in December that year. This meant that at that time the concept of ‘European citizenship’ had not been created and the Union lacked a written, positive catalogue of rights. And still, Weiler (1991:2407) did not hesitate in asserting the constitutional nature of the EU law, as developed by the Court of Justice:

On this reading [by the ECJ] the Treaties has been “constitutionalized” and the Community has become an entity whose closest structural model is no longer an international organization but a denser, yet nonunitary polity, principally the federal state. Put differently, the Community’s “operating system” is no longer governed by general principles of public international law but by a specified interstate government structure defined by a constitutional charter and constitutional principles.

But Weiler had not been the first example. Mainstream literature in European Community law had been asserting the constitutional character of the integration process at least from 1981, when Eric Stein published his ‘Lawyers, Judges, and the Making of a Transnational Constitution’. At that time, in addition to the democratic deficiencies mentioned above, the powers of the European Parliament were severely limited. However, for Stein it was clear that the European experiment was a constitutional one, as the very title of his article clearly suggests. In the famous opening paragraph to his article, Stein (1981:1) considered that:

the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe. From its inception a mere quarter of century ago, the Court has constructed the European Community Treaties in a constitutional mode rather than employing international law methodology.

It is easy to see how similar these two passages are. First, they emphasise the role of the Court in the development of EC law, which no-one can neglect at this stage. But secondly, they seem to suggest that as the European Community was moving away from international law, it was becoming some sort of constitutional, federal-like polity. And this second idea is questionable, not only because still nowadays it is not clear that the European Union is something different from a creature of international law (De Witte, 2012), but also because even if one accepted that premise for the sake of argumentation, it would not automatically transform the European Union into a ‘constitutional’ polity. To continue with the reasoning made above, a ‘Constitution’ is not just something negative –for instance, the opposite of international law- but something positive –a set of institutional arrangements intended at

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

ensuring freedom and limited government. Many States remain in the world that, without being mere creatures of international law, cannot be called ‘constitutional’ in a normative sense, as they lack the most basic guarantees against political oppression.

24

Recently, Schütze (2009:1096) tried to summarize some of the critiques of the idea that the European Union has a Constitution. According to him:

Under the doctrine of popular sovereignty, only a “people” can formally “constitute” itself into a legal sovereign. A constitution is regarded as a unilateral act of the “pouvoir constituant”. Thus, “it is inherent in a constitution in the full sense of the term that it goes back to an act taken by or at least attributed to the people, in which they attribute political capacity to themselves”. This normative – or better: democratic – notion of constitutionalism is said to have emerged with the American and French Revolution and to have, since then, become the exclusive meaning of the concept.

Quoting –again- mainly the work by Grimm (1995), Schütze depicts the ‘no-Constitution’ thesis as an idea according to which the European Union has no Constitution because there is not such a thing as a European ‘people’, with European Union law remaining dependent on Member States. If in the future there were a European ‘people’ to bestow on the Union competence to decide on competences, then the European Union would have a Constitution. But, according to the author, in that case the European Union would cease being a supranational entity to become a Federal State. The problem with this critique by Schütze is that, in my view, it oversimplifies the no-Constitution thesis by pushing it towards either the no-demos thesis or to the statist conception of sovereignty. Both poles are however troubling: the no-demos thesis because it is close to nationalist, ethnic conceptions of the demos as a culturally homogeneous and nation-bounded set of individuals, and the statist conception of sovereignty because it would fail to understand the superseding of the Westphalian paradigm and the need to update our concepts and theories to the new era of globalization (and thus the no-constitution thesis would be something of old-fashioned).

However, I can think of a no-Constitution thesis which is based neither in ethnic conceptions of the demos nor in state-centered conceptions of democracy, but simply on a strong conception of democracy and on a normative, not merely nominal, conception of constitutionalism. This thesis could not only concede but rather celebrate McCormick’s (1997:341) proposal that the *demos* could be conceived in civic rather than cultural terms, but it would be quite more cautious than him in calling the EU a ‘constitutional system’.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

Following Habermas (1992), such thesis would assert the de-coupling of democracy from its ethnic and statist elements. But at the same time, it would preserve what I see as the most precious element of classical constitutional theory: its commitment to human emancipation through law, to solid democratic standards. Understood in this way, the ‘no-Constitution’ thesis is actually, then, a tool for the achievement of a fully democratic and constitutional European Union

25

4. Is European Union law constitutional?

If our premise is that democracy and human emancipation are the defining elements of constitutionalism, then the whole reflection on the ‘EU Constitution’ must be dramatically rethought. In order to assess whether the European Union has a ‘Constitution’ or not we must not ask –at least not only- ‘is EU law supreme over national law?’, or even less ‘has EU law elements resembling those of a State Constitution?’, and the so. The questions we should be asking resemble more to this: ‘has European Union law met or raised the democratic standards of Member States’ constitutionalism?’.

The question of the democratic standards of the so-called ‘Constitution of the European Union’ can be approached from a double perspective: from the perspective of the democratic legitimacy of the formal process of constitution-making, and from the perspective of the democratic legitimacy of its substantive content. As we said above, both these two dimensions are present in the work of Martinico to different extents.

- *The democratic standards met by the process of “constitution-making”*. Classical constitutionalism, especially in contractualist theories, conceived the legitimacy of the legal-political edifice in terms of the consent of the governed (Rosenfeld, 2001:1311). De Raadt (2009) admits that in contemporary research there is a widespread idea that popular involvement and inclusiveness in the process of constitution-making is essential to foster legitimacy, even if he shows that this is not always the case in empirically observed constitution-making processes. The author refers to Juan Linz and Alfred Stepan’s (1996:83) ‘optimal’ constitution-making model in which a Constitution drafted by a democratic constituent assembly is approved in a popular referendum. Assessing European Union law against this background raises two important critiques.

a. The first is that, if we compare it with constitutionalism in the Member States, European Union law has substantially lowered the democratic standards in ‘constitution-

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

making'. Treaty-making processes are the most similar scenarios to constitution-making processes that the European Union knows, and however they are far from complying with the requirements of Linz and Stepan's 'optimal model'. Although there is usually parliamentary ratification of the treaties in the Member States, these are not drafted by a constituent assembly deliberately elected with the goal of constitution-making in mind, but actually by executives. In addition, referendums on EU Treaties in Member States are not a common practice. In fact, these are sometimes deliberately avoided, and when they take place and show a negative outcome they might be repeated until the preference of political elites is satisfied, as the Irish case shows. A further critique, treaty-making in the European Union is many times marked by scarce public awareness and debate. It is true that a good number of European constitutions do not comply with the requirements of the 'optimum model' either (see De Raadt, 2009:328), but the European Union deviates from such model to a larger extent than most of them, at a time in history in which a higher democratic input in constitution-making is technically feasible and socially expectable.

b. The second is the rejection by the very European citizens, when they had the chance to do so, of the proposal of Constitutional Treaty. MacCormick (1997:335) said that although a 'whole compendious measure had not been put to the European people as such' democratic assent had been 'achieved State-by-State' in processes of Treaty ratification. Some years later, however, the Constitutional Treaty was submitted to referendum, not of the whole European people, but at least of some of the peoples of Europe. And France and the Netherlands rejected the Treaty. The question is then not only whether we can accept as a Constitution a set of rules which have not been submitted to the consent of the people, but also whether we can accept them as a Constitution when they actually have been submitted to popular vote and deliberately rejected (in some instances). It is important to note that, in saying that the closest thing that we have to a popular consultation about the EU Constitution was the rejection of the Constitutional Treaty, we are not saying that we should congratulate ourselves for that outcome, but simply that we have to acknowledge the implications of such rejection.

- *The democratic standards met by the substantive content of the "Constitution"*. Regarding its substantive content, the higher laws of the EU have undergone an important evolution since the beginning of integration, which seems to have accelerated in the last decades. There is, however, ongoing debate regarding the democratic credentials of the EU.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

a. Fundamental Rights. The field of fundamental rights is probably that in which the EU has registered a greatest improvement. While insufficient protection of fundamental rights has been often criticized by academics and legal operators –see specially the rulings of the German Federal Constitutional Court-, after the process of ratification of the Lisbon Treaty the situation seems to have radically changed. The new Art.6 TUE gives treaty status to the Charter of Fundamental Rights of the European Union, states that the EU shall accede the ECHR, and recalls that fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States constitute general principles of EU law. While the relations between all these systems for the protection of rights are complex and have given rise to abundant literature (*inter alia* Weiß, 2011; Eeckhout, 2013), it seems clear that the standard of rights protection in the EU is at the moment at least similar to that of most Member States.

b. Democratic legitimacy of decision-making. There has been also significant improvement in the ways in which EU citizens can participate in the life of the Union. Although the Lisbon Treaty does not explicitly provided for this, the 2014 elections are the first in which the major groupings of political parties in the European Parliament presented a candidate for the Presidency of the Commission, which should increase clarity and democratic accountability. This could potentially solve one of the most important deficiencies suggested by the critical literature (Hix and Follesdal, 2004). In this regard, the EU could be finally reaching, or at least coming sufficiently close to, the democratic standards of most Member States. However, some deficiencies remain. To recall some important ones, the Parliament lacks a general right of legislative initiative and its approval is not required in some significant policy areas; it lacks authority to censor or exercise control over the Council and cannot dismiss individual Commission members (Siebersson, 2007: 455-456).

c. Separation of powers and limited government. Although there has been some improvement in this area in the last decades, ‘the EU’s unusual blend of legislative and executive functions’ did not ‘meaningfully change under the Lisbon Treaty’ (Siebersson, 2007: 450). The traditional distinction between Executive-Legislative-Judicial branches of government is not always clear in Member States either, but in the EU it is deeply blurred. The Commission acts as the executive of the Union but it also enjoys a quasi-monopoly of legislative initiative, the democratically elected Parliament has no general legislative initiative and its vote is unnecessary in some policy areas, and the Council –composed by members of

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

MS executives and with a rather remote democratic legitimacy- acts as a legislative chamber, and secrecy and lack of transparency govern the life of many of these organs (see Sieberson, 2007). The institutional design of the EU seems more focused on ensuring an institutional balance between supranational and inter-State elements of the EU than on creating an effective and transparent system of check and balances that can be scrutinized by citizens.

28

5. Conclusions. *Apocalittici e integrati*

All in all, the EU seems to be immersed in an unfinished process of ‘constitutionalization’, of transition towards some form of constitutionalism. I think Martinico would agree with this. This process has surely accelerated in the last decades through the improvement of some of the democratic elements of its higher law. However, at present time the EU has not only not raised the democratic standards of old 20th Century State-based constitutionalism, but unfortunately in many regards falls short from them.

If we accept the premise that ‘Constitution’ and ‘constitutionalism’ should be defined with reference to a set of democratic, emancipating rules and institutional arrangements, then the perspective of the debate radically changes. Of course, even accepting the former premise the question of which should be the concrete threshold at which a political system can be called constitutional is open to discussion. What can be enough for some might be insufficient for many, as paradoxically a democratic society accepts different views of how democracy and constitutionalism should be understood.

The process of integration is probably at some point of its evolution in which controversy about its current degree of ‘constitutionalisation’ is reasonable from the viewpoint of many of the different existing conceptions on democracy. *Integrati*² those who are optimist regarding the constitutional nature of EU law, might argue that criticisms regarding the EU’s democratic deficit could make sense some decades ago, but not any longer, after intense transformations in the last years. But things are not so easy. *Apocalittici*, those who are not satisfied with the democratic standards met by the EU, could counter-argue that their rivals were already asserting the constitutional nature of the European political edifice, precisely, many decades ago, when the democratic deficiencies of the EU were still overwhelming. Furthermore, they could speculate with the idea that it has been precisely the

² I am borrowing here the terminology of Eco’s (1964) suggestive piece on theory of mass culture.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

existence of a critical narrative regarding integration which has fueled some of the improvements which allow *integrati* to develop now a renewed discourse on EU constitutionalism. In his piece, Sartori (1962) considered that concepts such as ‘Constitution’ should be constructed from historical experience. In the European Union, what history tells us is that it is dissatisfaction, much more than complacency, the engine of constitutionalization.

29

References

Binion, Gayle. ‘Towards a Feminist Regrounding of Constitutional Law’, *Social Science Quarterly*, Vol.72, issue 2, pp.207-220.

Castillo, Pablo (2013) ‘Giuseppe Martinico: The Tangled Complexity of the EU Constitutional Process. The Frustrating Knot of Europe’, *Revista de Estudios Políticos*, vol.161, pp.311-339.

Claes, Monica (2011) ‘The emergence of a European Constitution: European and National Law in a European constitutional space’, paper presented at the III EUNACON Workshop, University of Maastricht, 19-20 May 2011.

Craig, Paul (2001), ‘Constitutions, Constitutionalism and the European Union’, *European Law Journal*, vol.7, n.2, pp.125-150.

De Raadt, Jasper (2009), ‘Contested Constitutions. Legitimacy of Constitution-making and Constitutional Conflict in Central Europe’, *East European Politics and Societies*, vol.23, n.3, pp-315-338.

De Witte, Bruno (2012), ‘The European Union as an international legal experiment’ in De Búrca, Gráinne and Weiler, Joseph H.H. *The Worlds of European Constitutionalism*, USA: Cambridge University Press, pp.19-56.

Eco, Umberto (1964), *Apocalittici e integrati: comunicazioni di massa e teorie della cultura di massa*, Milano: Bompiani.

Eeckhout, Piet (2013), *Human Rights and the Autonomy of EU law: Pluralism or Integration?*, *Current Legal Problems*, doi: 10.1093/clp/cut009

Fabre, Cécile (2000) *Social Rights Under The Constitution: Government and the Decent Life*, US: Oxford U.P.

Follesdal, Andreas and Simon Hix (2004), ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, *Journal of Common Market Studies*, Vol.44, n.3: 533-562.

In: DELLEDONNE, Giacomo; SIQUEIRA, Julio Pinheiro Faro Homem de (ed.). “The tangled complexity of the EU constitutional process. A Symposium”. Panóptica, vol. 10, n. 1, Jan./Jun. 2015

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

Grimm, Dieter (1995), 'Does Europe Need a Constitution?', *European Law Journal*, Vol.1, n.3: 282-302.

Habermas, Juergen (1995), 'Reconciliation Through the Public Use of Reason – Remarks on Rawls, John Political Liberalism', *Journal of Philosophy* Vol.92, issue 3, pp.109-131.

Habermas, Juergen (1992), 'Citizenship and national identity: some reflections on the future of Europe', *Praxis International*, Vol.12, pp.1-19.

Martinico, Giuseppe (2012), *The Tangled Complexity of the EU Constitutional Process. The frustrating knot of Europe*, USA/Canada: Routledge

Kumm, M. (2006), 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly so Called', *The American Journal of Comparative Law*, Vol.54, pp.505-530.

Linz, Juan and Stepan, Alfred, (1996) *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-Communist Europe*, Baltimore and London: John Hopkins University Press

McCormick, Neil (1997) 'Democracy, Subsidiarity and Citizenship in the "European Commonwealth"', *Law and Philosophy* Vol.16, n.4: 331-356.

Pettit, Philip (1997) 'Republicanism: A Theory of Freedom and Government', US: Oxford U.P.

Rosenfeld, Michael (2001), 'The Rule of Law and the Legitimacy of Constitutional Democracy', *Southern California Law Review*, vol.74: 1307-1352

Sartori, Giovanni (1962), 'Constitutionalism: A Preliminary Discussion' *The American Political Science Review*, Vol56, n.4: 853-864.

Scheppele, Kim Lane (2004) 'A Realpolitik Defense of Social Rights', *Texas Law Review*, Vol.82, pp.1921-1962

Schütze, Robert (2009), On "Federal" Ground: The European Union as an (Inter)National Phenomenon, *Common Market Law Review* 46: 1069-1105.

Sieberson, Stephen C. (2007), The Treaty of Lisbon and its impact on the European Union's democratic deficit, *Columbia Journal of European Law* 14: 445-465.

Stein, Eric (1981), Lawyers, Judges, and the Making of a Transnational Constitution, Vol.75, n.1: 1-27

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

Weiß, Wolfgang (2011), Human Rights in the EU: Rethinking the Role of the European Convention of Human Rights After Lisbon, *European Constitutional Law Review*, Vol.7, issue 1, pp. 64-95.

Weiler, Joseph (1991), The Transformation of Europe, *The Yale Law Journal*, 100:2403-2483.

31

Staging conflicts in the context of constitutional complexity

Marco Goldoni¹

One of the most common criticisms leveled against European constitutionalism (and European legal scholars) is to be prone to a peaceful representation of the European legal system as a multi-level structure where rational actors kindly discuss intra- and between levels in search for proper solutions in a complex institutional environment.² *The Tangled Complexity of the EU Constitutional Process* claims that this is at best a caricature of European constitutionalism and it provides a challenging re-interpretation of European constitutional integration as a complex conflict-driven evolutionary process. Martinico points at the dialogues or clashes between courts which have marked the development of the European Union as the leverage which has allowed a robust European constitutionalism to flourish thanks to (and not despite) major constitutional struggles. Accordingly, at the core of the volume lies the intuition that the clashes between courts, and in particular between the ECJ and national constitutional courts, have not weakened the normative appeal of European constitutionalism. To the contrary, Martinico's idea is to show how the space for a peculiar kind of supranational constitutionalism was opened up precisely by these judicial interactions and sometimes disagreements. Martinico stresses the central position of constitutional conflicts when he notes that they 'are physiological and that they can play a systemic role, favoring the changing nature of the EU legal order. In other words, constitutional conflicts are functional to the development (not to be understood in a deterministic manner) of the EU legal order' (p. 51). This repeats an old republican insight (Machiavelli), the commonwealth's health is preserved through internal struggle among factions.

From a constitutional perspective, the volume reacts against two trends and by doing so it stands firmly within the field of constitutional pluralism. On the one side, Martinico argues against those reconstructions of European constitutionalism which are too lenient toward a

¹ Lecturer in Legal Theory at the University of Glasgow. References to pages from G. Martinico, *The Tangled Complexity of the EU Constitutional Process*, Routledge, Abingdon, 2012, will be between parentheses in the main text.

² In the Italian debate, see M. Luciani, 'Costituzionalismo irenico e costituzionalismo polemico', *Giurisprudenza costituzionale*, 2006, pp.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

congratulatory account of the history of integration.³ These constitutional narratives do miss the point of EU constitutional developments and tend to forget how difficult the affirmation of foundational principles like supremacy and direct effect has been in European history. In other words, these narratives overlook the pluralist dimension of the European legal order, which finds legal recognition in principles like the protection of national constitutional identities.⁴ The European constitutional order, suggests the author, is the outcome of a piecemeal process, but not of an irenic progress. If constitutional conflicts are the engine of European constitutional transformation, then the main point of both the admirers and the critics of a reductive understanding of the nature of European constitutional process loses its force. On the other side, the author criticizes the decoupling of the ideas of constitutionalism and pluralism, as recently advocated, for example, by Nico Krisch.⁵ Martinico does not accept the idea that these two terms are mutually exclusive: they are rather complementary and mutually supportive. The key point for avoiding this decoupling is to separate the concept of constitution from the concept of constitutionalism. The latter does not need to impose a hierarchy, but simply to tackle in a specific and limiting manner with political power, a requirement which pluralism alone cannot meet. In this regard, Martinico buys into Miguel Maduro's conception of constitutionalism as 'fear of the many' and 'fear of the few'. But given the nature of European constitutionalism, pluralism is also necessary for ensuring the respect of the basic units of the whole constitutional order. Behind these criticisms emerges Martinico's support for supranational constitutionalism, that is, a constitutionalism that does not belong by definition only to the national State level, but thanks to the openness of the post WWII constitutions, can be extended beyond (or, sometimes, below) it.⁶

The underlying assumption is that supranational spaces can also provide a forum for constitutional conflicts. This brings to the pivotal section of the volume, where the author reconstructs a typology of constitutional conflicts in the history of European constitutionalism and how they have affected and shaped the interpretation of the principle of primacy. The conflicts that concern Martinico have their own grammar, which, in this case, is constituted by the recognition of fundamental rights as norms shared by the common constitutional

³ I. Pernice, 'Multilevel Constitutionalism in the European Union', in *European Law Review*, 2002, pp. 511-529.

⁴ Cf G. Jacobsohn, *Constitutional Identity*, Harvard University Press, Cambridge Mass., 2010.

⁵ N. Krisch, *Beyond Constitutionalism*, Oxford University Press, Oxford, 2010.

⁶ For an excellent overview of this debate see M. Loughlin, P. Dobner (eds), *The Twilight of Constitutionalism*, Oxford University Press, Oxford, 2010.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

traditions. In other terms, there is an overlapping legal zone within the European legal orders which represents the premise for conflicts. The author pinpoints four kinds of judicial conflicts: 1) conflicts over the interpretation *stricto sensu* on a shared and accepted principle (*Rodriguez Caballero, Cordero Alonso*); 2) conflicts generated by the double role that ordinary courts are asked to perform (*Winner Wetten, Filipiak, Federfarma*); 3) conflicts generated by decisions threatening the monopoly over national constitutional interpretation (*Mangold, Küçükdeveci*); 4) conflicts generated by antinomies between European law (as interpreted by the ECJ) and national constitutional provisions (*Kreil, Michanicki*). As the reconstruction of these kinds of constitutional conflicts shows, the ‘dialogue’ between courts has indeed produced many consequences, some of an uncertain nature, other of a more positive outcome. But where its impact is mostly visible is in the re-definition to which the very principle of primacy has been subjected since the inception of the first conflicts. As it is interpreted after *Omega* and *Schmidberger*, the concept of primacy now recognizes two exceptions: the first is foundational, meaning that fundamental rights in the common constitutional traditions become the premise of the principle of primacy; the second exception, confirmed by article 4 TEU, concerns the non-shared principles of a single constitutional order.

The point of this excursus is to show that these conflicts are at least potentially capable of producing systemic changes in the European constitutional order. These changes are also functional to the protection of two important goods, which can be connected to the author’s peculiar style of constitutional pluralism. Conflict serves as a strategy for protecting rights from power, discharging in this way the accusation that European constitutionalism is not really constitutionalism since it does not tackle with the limitation of power. Conflict also protects pluralism because it works according to dialectic logic. In other words, it implies a perspectival account of human interaction. When one actor is aggressively challenging an interpretation of a fundamental principle or right, other actors are called to react and reach for a balance. From this perspective, even acute forms of judicial activism may be cunningly understood as rational. The adjective cunningly is justified because, as it will be noted below, Martinico does not read the constitutional dimension of European integration as a full-fledged intentional plan, but rather as the unpredictable outcome of constitutional conflicts.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

The arguments presented in support of this interpretation are challenging and they certainly enrich the debate on constitutional pluralism.⁷ The attempt to stress the active role of conflict in the European Union is to be praised because it introduces an original perspective which is rarely taken up even by constitutional pluralists. However, the key role played by constitutional conflicts appears as problematic once two essential tenets of Martinico's argument are taken into account. On a first level, the volume does not address the properties and methodology which make conflict valuable. In fact, Martinico claims that within a certain framework, a harsh conflict taking place in the judicial realm can be beneficial for the whole Union. But no explicit criteria are given in order to draw a distinction between good or bad conflicts. One might ask: Can any argument advocated by a constitutional court be opposed to other interpretations of the principles of European constitutionalism? And does this confrontational logic require the proliferation of conflicts for the sake of the polity? Nonetheless, an implied answer can be found by reading between the lines of the volume. In light of the author reference to Mouffe's conception of conflicts in her idea of agonistic democracy,⁸ it seems that conflicts ought to be tackled with in a constitutional way in order both to manage them and to render them productive: 'Conflict, in Mouffe's view, is not a violent clash but dissent respectful to the other and to the democratic institutions; conflict is not necessarily subversive but loyal to a context which shares some values without being necessarily homogenous [...] but which composes a common symbolic framework' (115).

This is a precious insight because it is supposed to prove that conflicts ought not to be concealed and, by their political staging, they should prove that society is not reconciled.⁹ From this point of view, constitutional conflict is the 'efficient secret' of the European constitution because it creates a common symbolic framework to which European constitutional judges can make reference when adjudicating conflicts between rights. Clearly, this common framework allows for interpretive disagreements which, in the author's intention, should reproduce conflict at the judicial level. A common symbolic framework is the precondition for productive constitutional conflicts. However, on a second, and perhaps most important level, the institutional translation of conflict as presented in the volume does

⁷ For a useful overview of the debate see J. Komarek, M. Abelj (eds), *Constitutional Pluralism in the European Union and Beyond*, Hart, Oxford, 2012.

⁸ C. Mouffe, *On the Political*, Routledge, London, 2005; cf. A. Schaap (ed.), *Law and Agonistic Politics*, Ashgate, 2009.

⁹ The role played by conflicts distinguishes Martinico's brand of constitutional pluralism from Mattias Kumm's: see 'The Jurisprudence of Constitutional Conflict:

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

36

not ensure that conflict will produce social and political integration because the ‘dialogue’ between courts does not seem able to make visible the positions involved in the conflict.¹⁰ Resorting again to an old republican insight, conflict can produce social integration if it makes public why and how the positions involved in the clash are visibly opposed. The underlying interests and their re-shaping as part and parcel of the common interest need to be articulated from different perspective. By staging dissent in a public way, which can be either deliberative or representative,¹¹ participants in the conflict feel that their positions and ideas have been treated fairly and that their claims were taken into account.¹² For this reason, in order to stage conflict and make it visible, claims need to be voiced publicly and to be put in a connection with the underlying societal structure.¹³ Even though it is difficult to group all forms of judicial review within the European space in one single form of rationality, it is still counterintuitive to presuppose that, for example, an adversarial style of adjudication where individual rights are pitted against the public interest would represent an ideal staging for constitutional conflicts. Paraphrasing the expression that the author coined in a series of previous works,¹⁴ what is really described here is something closer to a ‘hidden conflict’, where one of the actors involved is a – at least for most of the European public – remote institution located in Luxembourg.

Another problematic feature connected to the absence of publicity in this conception of constitutional conflicts lies in the gap between the idea of constitutional change and the intentions moving the actors involved. Martinico claims that since these conflicts take place in the evolutionary mode of constitutionalism, they are based on actions, but not on deliberate planning. This means that conflicts are still actively produced by agents, but their actions are not necessarily undertaken with a view of producing a legal or constitutional change. One may wonder, then, whether a conflict brought about by agents that do not intentionally look

¹⁰ It should also be noted that the majority of the literature on constitutional pluralism concentrate on constitutional courts as if they were present in all Member States’ constitutional orders. For an example of different style of judicial review see J. Husa, ‘Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective’, in *American Journal of Comparative Law*, 2008, pp. 345-388.

¹¹ See the reconstruction by S. Rummens, ‘Staging Deliberation’, in *Journal of Political Philosophy*, 2008, pp.

¹² This is the core intuition behind the central role of disagreement in J. Waldron, *Law and Disagreement*, Oxford University Press, Oxford, 1999. Waldron concedes too much to the idea of reasonableness. For a more radical perspective, see J. Rancière, *Disagreement*, University of Minnesota Press, 2008; E. Christodoulidis, ‘Against Substitution’, in N. Walker, M. Loughlin (eds), *The Paradox of Constitutionalism*, Oxford University Press, Oxford, 2007, pp. 228-245.

¹³ Cf N. Urbinati, *Representative Democracy*, Chicago University Press, Chicago, 2006.

¹⁴ See, for example, G. Martinico, ‘Judging in the Multilevel Legal Order: Exploring the Techniques of Hidden Dialogue’, in *King’s Law Journal*, 2010, pp. 257-281; id., *L’integrazione silente*, Jovene, Napoli, 2008.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

for legal change is still normatively attractive. But in the economy of the argument, this is a critical tenet: ‘the action and the role of the agent would not be excluded from the constitutional dynamics but these actions are not performed with the intent of producing a legal change’ (p. 71). In other words, what is at stake here is a peculiar dynamic of evolutionary constitutionalism, where human action is still relevant, but there is no recognition of institutional design and planning. This is the main difference, for example, between the idea of constitutional synthesis and Martinico’s understanding of evolutionary constitutionalism.¹⁵ To explain this crucial point, Hayek’s distinction between spontaneous and constructed orders is conjured up. Indeed, Hayek states that ‘spontaneous orders are the result of human action but are not the result of deliberate design’.¹⁶ As it is known, Hayek postulates that courts are the institution of spontaneous orders and Martinico seems to accept this view as a premise of his reconstruction. At this stage, in order to understand Martinico’s point one has to look at the other key notion introduced in the book: constitutional complexity. Introducing the idea of complexity in the debate on the European constitution is indeed a rather original and unprecedented move. Complexity is actually the most helpful notion for describing the process of European integration. A distilled conception of complexity (not to be confused as a synonym of complicated) is defined in the book in the following terms: ‘from a preliminary and general comparison between the different meanings of ‘complexity’, as used in several disciplines, it is possible to ‘extract’ a common meaning of complexity as a bilateral and active relationship between diversities. This definition is very generic but it has also two merits: it recovers the etymological sense of this concept and, at the same time, it acknowledges the importance of a multidisciplinary approach to ‘capture’ the hidden dimension of the European process’ (p. 37). Complexity best describes the secret of the European constitution because it accounts for a ‘multilevel situation where the legal

¹⁵ Cf A. Menéndez, J. Fossum, *The Constitution’s Gift*, 2011 (‘Constitutional synthesis is different from evolutionary constitutionalism in the sense that there is always an agent [be it the legislature or the judiciary] behind the process of fleshing out the concrete implications of the regulatory ideal of a common constitutional law’). Martinico seems closer to Anne Peters’ approach; in fact, he quotes the following passage in an approving way: ‘That idea of constitutional evolution is a highly suitable explanation for the legal events on the European level. They may be characterized as ‘creeping constitutionalisation’ in contrast to ‘constitutional engineering’. In terms of political theory, it is an evolutionary, not a revolutionary occurrence: Constitution by evolution [...] The concept of constitutionalisation implies by necessity that this process is a continuing one’: A. Peters, ‘The Constitutionalisation of the European Union’, in W. Wessels, P. Riekmann (eds), *The Making of a European Constitution. Dynamics and Limits of the Convention Experience*, VS Verlag für Sozialwissenschaften, Wiesbaden, 2006, p. 47.

¹⁶ F. Hayek, *Law, Legislation and Liberty*, Routledge, London, 1973, p. 37.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

orders are not only distinguishable but also ‘interlaced’ (p. 38).¹⁷ The relational and diversity-based character of the ‘complex’ European constitution is grounded on four features which seem to be compatible only with a form of evolutionary constitutionalism: non-reversibility; non-reducibility; unpredictability; non-determinability. These features also show why constitutional conflicts might provide a channel for the formation of spontaneous orders since they (1) build on previous traditions and customs, (2) they allow, through judicial dialogue, to take into account the multilevel nature of the European constitution, (3) they cannot anticipate the outcome even if the initial state of the components of the conflict are known, (4) they cannot be explained away according to a deterministic logic of cause/effect. Yet, the connection between complexity and constitutional conflicts might also be seen from another perspective which undermines the value of evolutionary constitutionalism and judicial dialogue. The emergence of a spontaneous order might be re-interpreted against the working of a multi-level form of governance whose main objective is not the staging of constitutional conflicts but the transformation of States’ constitutions and political systems.¹⁸ The constitutional dimension of European integration might be read not as an evolutionary achievement stemming out of constitutional conflicts, but as a way to hamper the emergence of these conflicts by undercutting the preconditions which make the latter possible. More specifically, constitutional conflicts are harnessed to the underlying logic of budgetary constraints and financial austerity. The risk is that the openness of national constitutions is exploited as a way to obtain further integration and centralization in a way which will neutralize the political dimension of future conflicts.¹⁹ The provisions enacted to cope with the financial and economic crises of 2008 (the so-called new economic governance)²⁰ do seem to point toward this direction and, while they are bringing about an important change in the EU constitutional development, they are everything but unintentional and direction-less.²¹

¹⁷ An example of the synallagma generated by constitutional complexity is the doctrine of the common constitutional traditions ‘since they are the outcome of the comparison and selection of the national constitutional materials’ (p. 44).

¹⁸ See, for this interpretation, C. Bickerton, *European Integration*, Oxford University Press, Oxford, 2012.

¹⁹ An interesting piece of case law for Martinico’s argument could be provided by the recent preliminary reference of the German Federal Constitutional Court to the ECJ on the case of Outright Monetary Transactions (for a first series of comments, cf the special issue of the German Law Journal 2/2014).

²⁰ M. Adams, F. Fabbrini, P. Larouche (eds), *The Constitutionalization of European Budgetary Constraints*, Hart, Oxford, 2014.

²¹ W. Streeck, ‘Markets and Peoples: Democratic Capitalism and European Integration’, in *New Left Review*, 2012, p. 70.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

Despite these concerns, Martinico's contribution is extremely relevant for at least two reasons. The first is that it invites to shed light (in a literal sense) over the hidden dynamics of constitutional conflicts. Enhancing the understanding of what is at stake in constitutional conflicts and unpacking the actors' behavior within the conflict itself represent an important first step toward the demystification of irenic views of European constitutionalism. This work represents also an invitation to further develop the analysis of these dynamics beyond judicial interactions. Second, the field of constitutional conflicts is far from being exhausted. To the contrary, as the author rightly notes in the last chapters, constitutional conflicts will predictably increase in the future because of four factors: 'the accession to the European Convention of Human Rights, the enlargement to the East, and the financial crisis and the consequences (one might say, the aftermath) of the roar of the mega-constitutional politics of the season of the Conventions' (pp. 164-165). The opportunities (and the urgency, it must be added) for further exploring the nature and the logic of constitutional conflicts won't be missing. In light of the new economic governance of the Eurozone and the foreseeable reactions coming from national constituencies, it is easy to predict that this is only the beginning of a lasting debate.

Taking complexity seriously. A rejoinder

*Giuseppe Martinico*¹

It is impossible to do justice to the richness of the points raised by Julio Pinheiro Faro Homem de Siqueira, Marco Goldoni and Pablo José Castillo Ortiz. Indeed, while reading their generous reflections on my book I was tempted to modify substantially huge parts of my volume. This is perhaps inevitable since three years have already passed from its publication (and this is another reason to thank my colleagues for the attention paid to it).

This brief rejoinder will deal with some of the questions that emerged in the symposium, trying at the same time to confirm the main claims of the book.

The first element shared by all the contributions is undoubtedly the attention that I paid to courts and judges in the origin and evolution of the complex constitution of the EU.

As I wrote in one of the last chapters of the volume, this choice reflects the very “court-centric” nature of the debate in this area, an element stressed, among others, by Komárek (J. Komárek, “Institutional dimension of constitutional pluralism”, *Eric Stein Working Paper*, 3/2010, <http://www.ericsteinpapers.cz/images/doc/eswp-2010-03-komarek.pdf>).

This is true, but in spite of what recent scholarship argued about the “diminishing importance of courts” in the current phase of the European integration process (N. Scicluna, *European Union Constitutionalism in Crisis*, Routledge, 2015, 135), courts still play a major role. It is sufficient here to think of the important decisions given by both constitutional courts and the Court of Justice with regard to the financial crisis.

However, the importance given to judges in the volume does not exclude the possibility to extend the considerations made therein to institutional actors other than courts.

Parliaments offer a spectacular example of this: what I wrote in the book about judges can be recovered with regard to Parliaments as well. Parliaments have similar incentives to interact in a complex system and this has been explained by Manzella and Lupo who employed the formula “euro-national parliamentary system” to refer to the progressive construction of a compound parliamentary arena (“that is to say, being it constituted both by the EU Treaties and by the Constitutions of the Member States”, A. Manzella and N. Lupo

¹ Associate Professor of Comparative Public Law, Scuola Superiore S. Anna, Pisa.

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

[eds.], *Il sistema parlamentare euro-nazionale. Lezioni*, Giappichelli, 2014, 270—271). The EU Treaties, especially after the coming into force of the Lisbon Treaty, are rich in provisions referring to the role of national Parliaments and this offers further proof of the complex scenario in which Parliaments have to act nowadays and I dealt with this fascinating topic in a piece which is forthcoming in a collective book (G. Martinico, “Interjudicial dialogue and interparliamentary dialogue, in the Constitution of the Union”, in N. Lupo and C. Fasone (eds.), *Interparliamentary cooperation in the composite European Constitution*, Hart Publishing, 2016).

The second point, raised above all by Julio Pinheiro Faro Homem de Siqueira in his article, concerns the debated concept of judicial dialogue.

Although my book is not about judicial dialogue, this concept is largely used therein. I defend this choice: judicial dialogue is something serious and should be treated accordingly.

The metaphor of dialogue has been widely used by the literature and this concept is variously understood in different meanings; a vehicle for transplants, an informal means of communication between judicial and political bodies, or a new paradigm of judicial relations between actors not belonging to the same legal order. More recently some authors have attempted to define the essence of the idea of “dialogue” better by identifying some key elements that should be present when talking about a proper dialogue. However, this notion is still considered by many authors to be misleading and foggy (G. de Vergottini, *Oltre il dialogo fra le Corti*, Il Mulino, 2010).

I am fully aware of this debate and for this reason, in the book, I adopted more neutral language, writing of “judicial interactions”, i.e. episodes of contact (intentional or casual) between courts that may differ in their degree of intensity, results and typology. Against this background, dialogue does not exhaust all the forms of judicial interactions: even ‘conflicts’ (and constitutional conflicts in particular) can be traced back to the idea of judicial interactions. Within this macro-group it is possible to distinguish between cooperative and competitive judicial interactions, by specifying the particular features of the second typology.

”Dialogue” can be thus conceived as a *species* of the *genus* ”judicial interaction”, characterised by the presence of some specific features, namely the existence of differing viewpoints, symmetry between the interlocutors (i.e. lack of complete authority over the other), mutual recognition and respect, equal opportunity to participate, and continuity over

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

time (A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, Oxford University Press, 2009, 118 et seq.).

42

Complexity is about interaction not only about dialogue and this point has been emphasised by Marco Goldoni as one of the most important claims of the book. I opted for this terminological distinction because it offers a selective notion which excludes other forms of interactions and which helps scholars understand the very essence of dialogue. At the same time, it underlines the crucial importance that conflicts can also play in forging and reshaping the interdependence characterising the complex constitution of the EU.

A very intriguing point has been made by Marco Goldoni concerning the relationship between evolutionism and conflicts and this deserves some lines to clarify how it is possible to acknowledge the importance played by conflicts without falling into constructivism. In my view, this can be explained relying, once again, on Hayek.

Hayek distinguished between “action” and human “design” and recovering this distinction one could argue that only the latter is deeply present in the very idea of constructivism.

In this scheme, in fact, the action and the role of the agent would not be excluded from the constitutional dynamics but these actions are not performed with the intent of producing a legal change. Usually scholars interested in sources of law explain, this way, the origin of customary law which emerges from the repetition of some conducts that are not characterised by the specific intent to produce an *erga omnes* effect but, rather, that can be explained in light of other contingent reasons. The same often happens with conflicts, they are usually inspired by egoistic reasons and without the intention to contribute to the change of that set of values and principles characterising the relationship with other actors.

I think that the current phase of the EU integration process still confirms the importance paid by conflicts and I do not agree with Marco, according to whom “The provisions enacted to cope with the financial and economic crises of 2008 (the so-called new economic governance) do seem to point toward this direction and, while they are bringing about an important change in the EU constitutional development, they are everything but unintentional and direction-less”. What I see is rather an increasing explicit involvement of political actors. From a formal point of view, this has resulted in a series of deliberate efforts to produce legal

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

changes out of the realm of EU law understood *stricto sensu*, as the recourse to instruments of public international law shows but this is just a portion of the complex Constitution of the EU.

43

Last but not least, Pablo José Castillo Ortiz in his article stresses that “some sceptic approaches to the EU ‘constitution’ should be taken seriously by anyone who wants the EU to become a fully-fledged constitutional system” and that the “‘no-Constitution’ thesis is actually, then, a tool for the achievement of a fully democratic and constitutional European Union”. I took his point; it is true that even theories denying the existence of a real Constitution at EU level can serve as a *stimulus* to give new blood to the necessary public debate on how to make the EU more democratic. However, to confirm the reasons why I do not embrace sceptic approaches in my book I would like to recall two counter-arguments.

First of all, sceptics often accept to label a given community as “constitutional” only under certain circumstances that - and this is my main point - at a closer look sometimes are not even present at national level.

Here comparative law helps a lot. Many other legal orders that share some similar difficulties to those that have been seen by the EU can be labelled unequivocally as constitutional, for instance Canada, which has been experiencing “constitutional odysseys” (P. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, University of Toronto Press, 1992) in recent years, or Switzerland, which has been suffering from a semi-permanent constitutional revision.

In this respect Fossum (J.E. Fossum, “The Transformation of the Nation-state: Why Compare the EU and Canada” 2004, <http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/mid-term/fossum/CanEU38.pdf>) compared what Russell called “mega constitutional politics” with the semi-permanent Treaty revision process described by de Witte (B. de Witte, “The closest thing to a constitutional conversation in Europe: The semi-permanent treaty revision process”, in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence and divergence in European Public Law*, Hart Publishing, 39 et seq.), by showing their common features: lack of legitimacy, constitution making processes driven from the top, and exclusion of some actors from the constitutional dynamics.

These constitutional processes thus display similarities: the necessity to involve citizens and national parliaments in order to overcome the democratic deficit of the Union, the difficulty of finding “a satisfactory and comprehensive constitutional settlement” (R. S. Kay,

PANÓPTICA

PANÓPTICA/STALS INTERNATIONAL BOOK SYMPOSIUM

“Book Review Essay: Canada's Constitutional Cul De Sac”, *American Review of Canadian Studies*, 2005, 705 et seq.), the important role played by courts in reshaping the relation between centre and periphery, intergovernmentalism and asymmetry.

My second point is connected to an important distinction: that between euro-scepticism and euro-criticism. Arguing that the EU is a constitutional phenomenon does not exclude the possibility to criticise the current EU or to ask for more democratisation at EU level. Likewise, studying the constitutional function performed by national and supranational judges does not imply accepting the *status quo* or denying the democratic concerns related to the lack of involvement of the national and supranational political actors, being here the explanatory and normative levels distinguishable.

Complexity offers an alternative theoretical proposal able to understand the origin and the current version of supranational constitutionalism or, in other words, able to explain how it works without identifying a model to be followed or the final destination of the European journey (confirming its non-apriorism).

In conclusion, I am really grateful to Julio Pinheiro Faro Homem de Siqueira, Marco Goldoni and Pablo José Castillo Ortiz and to the editors of this special symposium for permitting me to add a rejoinder. While addressed to different aspects of the book, their critical comments helped me clarify or rethink some ambiguous points present in the book.