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

(eds.)
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Democratic dialogue for a better constitutional synallagma: discussing Giuseppe Martinico’s ideas

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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 branches and actors (especially

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courts) – for shaping and constructing a rule of law, 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.

The silent integration, to use another expression employed by Martinico, 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. 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”. 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.

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)”. 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 process.

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According to Martinico, 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”. 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. 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.

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 issues presented by

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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://ius.com.br/artigos/23674 (August 11, 2015).

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.\textsuperscript{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”,\textsuperscript{15} and that one example of it is that international law regulates human behaviour incompletely and uses indeterminate and controversial terms.\textsuperscript{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’.\textsuperscript{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”.\textsuperscript{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 common sense


\textsuperscript{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.


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

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result in divergent conclusions. This does not necessarily mean that there is a conflict, 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”.

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”.

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’”. Many CC are

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claiming the prevalence of their national norms, especially the ones that ensure their system safety, until the EU system ensures an equivalent protection. 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, 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. 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”. 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 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.