Born to Be Together: The Constitutional Complexity of the EU

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In order to explain the specificity of the European Constitution, this work aims to analyse the latest constitutional trends of the European integration process in light of the idea of constitutional complexity.

This article is divided into two parts: in the first part, I introduce the general debate on the notion and the nature of the European Constitution. In the second part, I introduce my understanding of constitutional complexity by conceiving it as one of the possible constitutional theories of EU integration and describe the EU as a complex system that is characterised by some precise features: non-reducibility, unpredictability, non-determinism and non-reversibility. The perspective I adopt is that of the constitutional lawyer who is aware of some possible alternative readings of European integration but who, at the same time, conceives constitutionalism as a plausible, at least, key concept for understanding the latest trends of the EU integration process.

Afin d'expliquer la spécificité de la Constitution européenne, l'auteur analyse les dernières tendances constitutionnelles du processus d'intégration européenne eu égard à la conception de la complexité constitutionnelle.

Cet article est divisé en deux parties. Dans la première, l'auteur présente en peu de mots la discussion générale entourant la notion et la nature de la Constitution européenne. Dans la deuxième, l'auteur présente son interprétation de la complexité constitutionnelle, qu'il conçoit comme une des théories constitutionnelles possibles de l'intégration de l'UE. Il décrit l'UE comme étant un système complexe caractérisé par quelques traits précis : la non-réductibilité, l'imprévisibilité, le non-déterminisme et la non-réversibilité. Le point de vue adopté par l'auteur est celui d'un avocat en droit constitutionnel au courant de d'autres interprétations possibles de l'intégration européenne mais qui, en même temps, conçoit le constitutionnalisme comme étant un concept clé vraisemblable, au moins, favorisant la compréhension des dernières tendances du processus d'intégration de l'UE.

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Introductory Remarks

What is the "efficient secret"[1] of the European Constitution? In 1867 Walter Bagehot, the essayist and journalist, wrote one of the most important books in the history of Constitutional Law in Europe, *The English Constitution*, in which he attempted to "discover" what made the English government so "special." In order to do that, he devised the very well known formula of the "efficient secret." Bagehot identified it as "the close union, the nearly complete fusion, of the executive and legislative powers."[2] While the fusion described by Bagehot in these lines is a horizontal one connecting two different powers existing at the same level (focusing on the frame of government), I am going to argue that the secret of the European Constitution can be identified in a vertical fusion connecting national and supranational legal orders, a fusion that makes the EU an "interlaced" (i.e., complex) legal system. It is not a coincidence that this article started with the citation of a work devoted to the English legal system that is characterized, as is well known, by the absence of a written constitution. In order to explain the specificity of the European Constitution, this work aims to analyse the latest constitutional trends of the European integration process in light of the idea of constitutional complexity by arguing that the efficient secret of the European Constitution can be found in what I would call the "*constitutional synallagma*," conceived in this article as the first outcome of constitutional complexity. This is understood as the whole of the principles, practices and rules which circulate uninterruptedly from one

1 It is necessary to recall what Bagehot meant by "efficient": See Walter Bagehot, *The English Constitution* (Oxford: Oxford University Press, 1867). At page 44 he states that "[n]o one can approach to an understanding of the English institutions, or of others which, being the growth of many centuries, exercise a wide sway over mixed populations, unless he divides them into two classes. In such constitutions there are two parts (not indeed separable with microscopic accuracy, for the genius of great affairs abhors nicety of division: first, those which excite and preserve the reverence of the population—the dignified parts, if I may so call them; and next, the efficient parts—those by which it, in fact, works and rules. There are two great objects which every constitution must attain to be successful, which every old and celebrated one must have wonderfully achieved: every constitution must first gain authority, and then use authority; it must first win the loyalty and confidence of mankind, and then employ that homage in the work of government. There are indeed practical men who reject the dignified parts of government. They say, we want only to attain results, to do business: a constitution is a collection of political means for political ends, and if you admit that any part of a constitution does no business, or that a simpler machine would do equally well what it does, you admit that this part of the constitution, however dignified or awful it may be, is nevertheless in truth useless. And other reasoners, who distrust this bare philosophy, have propounded subtle arguments to prove that these dignified parts of old governments are cardinal components of the essential apparatus, great pivots of substantial utility; and so they manufactured fallacies which the plainer school have well exposed. But both schools are in error. The dignified parts of government are those which bring it force—which attract its motive power. The efficient parts only employ that power."

2 *Ibid* at 48.

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 of European Union (EU) law.

This article is divided into two parts: in the first part, I introduce the general debate on the notion and the nature of the European Constitution. In the second part, I introduce my understanding of constitutional complexity by conceiving it as one of the possible constitutional theories of EU integration and describe the EU as a complex system that is characterised by some precise features: non-reducibility, unpredictability, non-determinism and non-reversibility. The perspective I adopt is that of the constitutional lawyer who is aware of some possible alternative readings of European integration but who, at the same time, conceives constitutionalism as a plausible, at least, key concept for understanding the latest trends of the EU integration process.

I. In Search of a European Constitutional Law

Normally, authors[3] use the formula "constitutionalisation" of the EU legal order to mean the progressive shift of EU law from the perspective of an international organisation to that of a kind of federal polity.[4] A different meaning of the constitutionalisation process of the EU legal order can be found with regard to the progressive "humanisation" (i.e., the progressive affirmation of the human rights issue at supranational level) of the law of the common market.[5]

In this respect a great contribution was made by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[6]

3 See e.g. Joseph H H Weiler, "The Transformation of Europe" (1991) 100:8 Yale LJ 2403 [Weiler, "The Transformation"]; and Marta Cartabia & Joseph H H Weiler, *L'Italia in Europa* (Bologna: Il Mulino, 2000) at 73ff.
For the ambiguity of the notion of constitutionalisation in EC/EU Law, see Francis Snyder, "The unfinished constitution of the European Union: principles, processes and culture" in Joseph H H Weiler & Marlene Wind, eds, *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003) at 55.

4 "In a recent case, the European Court of Justice spoke matter-of-factly of the EEC Treaty as 'the basic constitutional charter' of the Community. On this reading, the Treaties have been 'constitutionalized' and the Community has become an entity whose closest structural model is no longer an international organization but a denser, yet non unitary 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 governmental structure defined by a constitutional charter and constitutional Principles." Weiler, "The Transformation," *supra* note 3 at 2407.

5 On this process, see Koen Lenaerts, "Fundamental Rights in the European Union" (2000) 25:6 Eur L Rev at 575ff.

6 On the interplay between ECHR and EC/EU law, see Xavier Groussot, *General Principles of Community Law* (Netherlands: Europa Law Publishing, 2006) at 63ff.

since it was crucial for the genesis of Article 6 of the EU Treaty (EUT) and for the dialogue between the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ).[7]

Another important step can be found in the proclamation of the *Charter of Fundamental Rights of the EU*,[8] which brought new blood to the debate about the writing of a European Constitution[9] and the possibility of a Bill of Rights at EU level,[10] since it attested the possibility of providing rights with a written dimension at supranational level, overcoming the ECJ's logic of *ius praetorium* in this field. Although this document was not immediately binding from a *stricto sensu* legal point of view, its proclamation encouraged an important debate among scholars, especially among the constitutional lawyers of continental Europe. Moreover, the ECJ had already begun to quote and use the *Charter*[11] despite the rejection of the Constitutional Treaty (CT) and before the coming into force of the Reform Treaty (RT), which has given it legally binding force (although the position of some Member States, like the

7 On this see: Sionaidh Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis", (2006) 43 CML Rev, 629.
Now, thanks to the Reform Treaty coming into force, the EU has acquired international legal personality and its accession into the ECHR system will be possible (although the process will be very long, as it implies the need to revise the system of the European Convention itself).

8 For commentary on this point, see Kim Feus, ed, *The EU Charter of Fundamental Rights—Text and Commentaries* (London, UK: Constitution for Europe, Federal Trust Series 1, Logan Page, 2000); Guy Braibant, *La Charte des droits fondamentaux de l'Union européenne; témoignage et commentaires* (Paris: Éditions du Seuil, 2001); Vaughne Miller, "Human Rights in the EU: The Charter of Fundamental Rights" *House of Commons Library: Research Paper 00/32* (20 March 2000), online: UK Parliament Website <http://www.parliament.uk/documents/commons/lib/research/rp2000/rp00-032.pdf>.
For a complete bibliography on the Charter of Fundamental Rights of the EU, see online: University of Oslo: ARENA Centre for European Studies <http://www.arena.uio.no/cidel/cwatch/bibliography.html>; Agustín José Menéndez, "Chartering Europe: The Charter of Fundamental Rights of the European Union", ARENA Working Paper 10/13 <http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2001/wp01_13.htm> .
For a very interesting introduction to the idea of European constitutional law, see Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Harlow: Longman, 2002) at 3–44, 515–530.

9 See Cesare Pinelli in Cesare Pinelli, *Il momento della scrittura* (Bologna: Il Mulino, 2002).

10 Dieter Grimm, "Il significato della stesura di un catalogo europeo dei diritti fondamentali nell'ottica della critica dell'ipotesi di una Costituzione europea" in Gustavo Zagrebelsky, ed, *Diritti e Costituzione nell'Unione Europea* (Laterza, Italy: Roma-Bari, 2003) 5 at 15ff; Franz Mayer, "La Charte européenne des droits fondamentaux et la Constitution européenne" (2003) 39:2 RTD eur 175 at 194–195; Vassilios Skouris, "La protezione dei diritti fondamentali nell'Unione europea nella prospettiva dell'adozione di una Costituzione europea" in Lucia Serena Rossi, ed, *Il progetto di Trattato-Costituzione, verso una nuova architettura dell'Unione europea* (Bologna: Il Mulino, 2004) 249 at 254ff.

11 Among the other cases, see ECJ, C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP,* [2007] ECR I-10779; and ECJ, C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet,* [2007] ECR I-11767.

UK and Poland, is not clear because of the so-called opt-out signed by these countries).[12]

By European Constitutional Law one can thus mean both the *corpus of fundamental principles*[13] devised by the ECJ in attempting to transform Europe[14] (this set of principles can be also understood as the European Constitution) and a field of studies that emerged after the ideal turning point represented by the *EU Charter of Fundamental Rights*. Starting from this double meaning, we could say that a *fil conducteur* in the recent history of European constitutional

12 Recently scholars have stressed the absurdity of the so-called "opting out of Poland and the UK" with regard to the EU Charter of Fundamental Rights and the exclusion of the Charter itself from the text of the Reform Treaty.
In fact, article 6 of the EUT states that: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." This article makes the Charter of Fundamental Rights part of the EU primary law. In order to escape the risk of being subject to such a document's provisions, the UK and Poland insisted on signing a specific protocol (n. 30) stating that:
"Art. 1:

> 1. The charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
> 2. In particular, and for the avoidance of doubt, nothing in Title IV of the charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law."

"Art. 2:

> To the extent that a provision of the charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom."

It has been said, and rightly so, that the goal of this protocol was to limit the effect of the Charter without saying that it is not binding on the UK and Poland (and it would have been impossible to say it was not binding, given article 6 of the EUT). See *e.g.* Barnard: "The opt-out is not an opt-out at all." Catherine Barnard, "The 'opt-out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?" (Paper delivered at the Conference of "The Lisbon Treaty and the future of European constitutionalism," 11–12 April 2008) in Stefan Griller and Jacques Ziller, eds, *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (New York: Springer, 2008) 257. To confirm this hypothesis, see also the House of Lords EU Select Committee: "The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol. The Preamble itself of the document does not use the qualification in terms of opt-out, its goal consists of the clarification of certain aspects of the application of the Charter." UK, HL, "The Treaty of Lisbon: an impact assessment," sess 10 in *European Union Committee*, vol 62:1 (2007–08) 1.

13 On constitutionalisation as a creation, development and impact of general principles of the EU law legal order, see Groussot, *supra* note 6 at 3.

14 See Joseph H H Weiler, "The Transformation of Europe" in Joseph H H Weiler, eds, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999) 10.

law is the continuous attempt to give the *Charter* a binding effect, the attempt to insert it in the body of the *acquis communautaire.* The failure of such a strategy was evident after the Dutch and French referenda, which imposed the transformation of the Constitutional Treaty (CT) into a more unpretentious Reform Treaty (RT).

At first glance, the rejection of the CT by the majority of the French and Dutch voters, and the Irish "No" to the Reform Treaty (RT), may give the impression of an inescapable constitutional crisis for Europe.[15] Although the RT does not include any reference to the word "Constitution," the substantial continuity between this document and the Constitutional Treaty is evident. As some scholars have stressed, a "constitutional substance" would have been "rescued" despite the elimination of some "dirty words" such as "Constitution," "Law," and "Minister" from the text of the Lisbon Treaty.[16] From this point of view, as Corthaut points out, "*the Reform Treaty looks more like the (evil?) twin of the Constitutional Treaty than its distant cousin.*"[17] Ziller argues that the possible major changes (the primacy clause's disappearance, for example) were just functional to overcome the risk of the Member States' refusal.[18] Despite this substantial relative continuity, other authors have stressed the sense of disappointment which would characterise the document, defining it as a "*Postconstitutional Treaty.*"[19]

According to such scholarship, the RT cannot be regarded as a Constitution since it limits itself to reflecting the problems without solving them: it seems to suffer the social forces rather than leading them. This point is crucial because a very similar criticism was expressed by Bast with regard to the CT:

15 This idea is also suggested by the Presidency Conclusions of the European Council of 23 June 2007: "The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution,' is abandoned. The Reform Treaty will introduce into the existing Treaties, which remain in force, the innovations resulting from the 2004 IGC, as set out below in a detailed fashion."

16 Jacques Ziller, *Il nuovo Trattato europeo* (Bologna: Il Mulino, 2008) at 127 [Ziller, *Il nuovo*]

17 Tim Corthaut, "Plus ça change, plus c'est la même chose? A comparison with the Constitutional Treaty" (2008) 1 MJECL 21 at 34.

18 Ziller, *Il nuovo, supra* note 16 at 27 ff.

19 According to Somek: "A postconstitutional ordering, by contrast, cannot settle contested issues, for it cannot find sufficient support for a clear solution. A postconstitutional norm does not speak with one voice. It is a document recording the adjournment of an ongoing debate. Maybe this is addressed by those talking about the Union's alleged lack of a *pouvoir constituant.* Ideally, a constitution is about channelling political dealings, not about postponing their resolution." Alexander Somek, "Postconstitutional Treaty" (2007) 8 German Law Journal 1121 at 1126–1127.

> Wading through the complete text—some 474 pages of reading material in the Official Journal—one experiences how far away the Constitutional Treaty is from the ideal of a concise, expressive constitutional document. This is not, or at least not primarily, an editorial deficiency. The structure and length of the constitutional text reflect the unsolved problems involved with fostering unity [...] The tension between—only partially "correct"—self-description (Part I) and normative reality (Part III) cannot, for the most part, be resolved by jurisprudence, but by constitutional politics. This confers on the Constitutional Treaty the status of a reflexive constitution. Such a constitution makes normative demands of itself, without (yet) fully accounting for them.[20]

The real issue thus concerns the nature of a potential Constitution for Europe: what kind of Constitution would it be? Would the idea of a Constitution as such be applicable to the European Union experience? Leonard Besselink makes a very good contribution to the debate on the notion and the nature of a Constitution for Europe.[21] In his view, the notion of Constitution itself as applied to the EU results in an ambiguous picture, with that of a fundamental law (*Grundgesetz* rather than *Verfassung*) being more suitable.

This seems to imply a sceptical approach to the issue of the European Constitution's formalisation, conceived as a real constitutional moment. The author himself reaches this conclusion after having distinguished between two categories of constitution: revolutionary and evolutionary ones:[22] "These revolutionary constitutions tend to have a blueprint character, wishing to invent the design for a future which is different from the past ... Old fashioned historic constitutions are, to the contrary, evolutionary in character."[23] When observing the evolutionary/historical constitutions one realises that "Codification, consolidation and adaptation are more predominant motives

20 Jürgen Bast, "The Constitutional Treaty as a Reflexive Constitution" (2005) 6 German Law Journal 1433 at 1438, 1449.

21 Leonard F M Besselink, "The notion and nature of the European Constitution after the Reform Treaty" (18 January 2008), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086189> [Besselink, "The notion and nature"].

22 On the evolutionary constitutional tradition, see Edmund Burke, *Reflections on the Revolution in France* (London: Longman 2006); and John A G Griffiths, "The Political Constitution" (1979) 42 Mod L Rev 1.
See also Bruce A Ackerman, *We the People: Foundations* (Cambridge, Massachusetts: Harvard University Press 1991) at 16–24; Hauke Brunkhorst, "A Polity without a State? European Constitutionalism between Evolution and Revolution" in Erik Oddvar Eriksen, John Erik Fossum & Agustin Jose Menendez, eds, *Developing a Constitution for Europe* (London: Routledge, 2004) at 87; John Erik Fossum & Agustín José Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (London: Rowman & Littlefield, 2010) at 39–41.

23 *Ibid.*

than modification. The constitution reflects historical movements outside itself."[24]

The semi-permanent revision process of Treaties[25] makes the attempt to transpose the idea of Constitution into a supranational level very difficult: the Constitution, in fact, should be the fundamental charter, that is, a document characterised by a certain degree of resistance and continuity. Against this background the European Treaties seem to be unable to lead the social forces: they can only "reflect the historical movements,"[26] thus seeming mere *snapshot constitutions.* This is precisely what Besselink argues, writing that "a formal EU 'constitution,' if ever realized, would only be a momentary reflection, no more than a snap-shot,"[27] hence the comparison with a *Grundgesetz.*

All these views emphasise what we could call the need for a "written dimension" in the European constitutional experience and for a genuine "constituent power"[28] and they neglect the current constitutional dynamics already existing in the EU.[29] Another reason to continue trusting in the existence of a European constitutional law (or, better, in its subject, the European Constitution) is the existence of a copious ECJ case law where the expression "constitution" is frequently used with regard to the Treaties.[30] In the follow-

24 *Ibid.*

25 Bruno de Witte, "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process" in Paul Beaumont, Carole Lyons and Neil Walker, eds, *Convergence and Divergence in European Public Law* (Oxford: Hart Publishing, 2002) 137 at 139–157.

26 Besselink, "The notion and nature," *supra* note 21.

27 *Ibid.*

28 On the idea of "constituent power," see Emmanuel Joseph Sieyès & Abbé Sieyès, *Qu'est-ce que le Tiers Etat?* (Paris: Éditions du Bouche, 2002): "[L]a constitution n'est pas l'ouvrage du pouvoir constitué, mais du pouvoir constituant."
For analysis of this concept and recent evolutions of the constituent power see: Martin Loughlin & Neil Walker, eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2008).

29 See also Joseph H H Weiler, "In defence of the status quo: Europe's constitutional Sonderweg" in Weiler & Wind, *supra* note 3, 7 [Weiler, "In defence of the status quo"].

30 See e.g. ECJ, 294|83, *Parti ecologiste "Les Verts" v European Parliament,* [1986] ECR 1339 at p. 23 "It must first be emphasized in this regard that the European Economic Community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty."
But see ECJ, Opinion 1/91, "Draft Agreement Relating to the creation of the European Economic Area," Legislative Comment on [1991] ECR I-6079: "The European Economic Area is to be established on the basis of an international treaty which merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up. In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law"; and ECJ, C-402/05 P, *Kadi v Council of the European Union and Commission of the European*

ing pages I specify what I mean by European Constitution, and outline its structure.

This idea of Constitution mentioned by the critics of the Constitutional Treaty and by that body of literature which defines itself as "pluralism" (distinguishing itself from what some authors mean by "constitutional pluralism")[31] implies a "constructivist" nature in every "real" constitutional moment, that is, "a conception which assumes that all social institutions are, and ought to be, the product of deliberate design."[32] The dualistic structure of Friedrich Hayek's thought links the idea of constructivism to that of order, which can be conceived in two different ways: order[33] as κοσμος (spontaneous order) and order as ταξις (constructed order). To be binding and normative (and not merely descriptive), constitutions are supposed to be "constructivist," since they are directed at the achievement of an ideal society characterised by those values deemed fundamental. According to this view, the "constitution" is always the product of a "revolution," understood as a genuine "constituent" moment.[34] For example, the concept of constitution (and constitutionalism)

Communities, [2008] ECR I-06351: "[*The*] European Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions."

For an account of the constitutional mission carried out by the ECJ over the years, see Loic Azoulai & Miguel P Maduro, eds, *The Past and the Future of EU Law* (Oxford: Hart Publishing, 2010).

31 Nico Krisch, *Beyond Constitutionalism: The pluralist structure of postnational law* (Oxford: Oxford University Press, 2010).

32 Friedrich A Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order* (Chicago: University of Chicago Press, 1978) at 5.

33 *Ibid* at 20: "the situation where one author could argue with regard to a given phenomenon that it was artificial because it was the result of human action, while another might describe the same phenomenon as natural because it was evidently not the result of human design." In this respect Hayek distinguishes between "human design" and "human action." On Hayek's view of law, see Guilherme Vasconcelos Vilaça, "From Hayek's Spontaneous Orders to Luhmann's Autopoietic Systems" (2010) 3 Studies in Emergent Order 50, online: <http://studiesinemergentorder.org/current-issue/sieo3-50/>.

34 See Anne Peters, "The Constitutionalisation of the European Union—Without the Constitutional Treaty" in Sonja P Riekmann & Wolfgang Wessels, eds, *The Making of a European Constitution Dynamics and Limits of the Convention Experience* (Wiesbaden: Verlag für Sozialwissenschaften, 2006) 35 at 51–52: "As just pointed out, the European Constitution was not 'given' in a specific constitutional moment by a single authority. There was no single event which created a European Constitution, but only an accumulation of steps of diverse legal character. Constitutionally relevant innovations were in part reactions to acute crises, in part the consequence of gradual changes in power constellation of the Union. Often, de facto arrangements were formalised only ex post... But who is the pouvoir constituant in that multi-dimensional process of constitutionalisation? Empirically, a number of actors can be discerned. There are first of all the Member States governments, which dominate the Treaty revision procedure and which agree on informal arrangements. We have the national parliaments which ratify the Founding Treaties and Treaty amendments. There are the European bodies and institutions which participate in the formal Treaty revision procedure and which may

inferred from Article 16 of the Declaration of the Rights of Man and of the Citizen,[35] pursuing the division of powers and the protection of rights, strives for change, addressing the social forces that lead to a common goal.

The constructivism that seems to accompany modern (continental, at least) constitutionalism seems to be oriented towards the *political sources of law*, which are the conclusive result of a debate where opposing political forces struggle to influence the manifestation of states' wills, represented by the *loi* (*legge*, *ley*, statute). In contrast, *cultural sources* are inferred from the experience of the past (customs, judicial precedent) or from the rational analysis of legal phenomena (the role of scholars, for example).

The *loi* resulting from political sources of law is an act characterised by abstractness and generality, and in this sense laws are the product of a rational legislator moved by a clear intent to build coherence, unity and order conceived as ταξις (constructed order). From this perspective, the (second) European Convention gave us the illusion of a strong and constructivist will at a supranational level, which has miserably failed. The consequence of this failure could have been the absence of legitimacy and unity, or, in other words, fragmentation, disorder and obscurity.

In my opinion, all of the above-mentioned sceptical theories have a common core: they ignore the possibility that a factual (as opposed to formal) constitution can be the gradual outcome of a long-lasting judicial activity that is affected by an evolving cultural background. These theories overlook the importance of the rationalising task performed by the judges, and that judicial dialogue can be effective in providing pluralistic and multilevel systems with a reliable structure, at least in procedural terms.

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also effect autonomous Treaty modifications. Finally, the European citizens elect the members of the European Parliament and the Member States' governments, represented in the European Council. The citizens also occasionally express their views in referendums on European issues. These empirical findings support the idea of a 'pouvoir constituant mixte' or even of multiple pouvoirs constituants. The concept of constitutional evolution (as opposed to punctual constitution-making) abandons the neat distinction between the pouvoir constituent (understood as the pre-constitutional power creating the constitution) and the pouvoir constitué (the legalised powers, notably the institutions which act within the constitutional system which may, inter alia, effect constitutional change). That classic distinction cannot be upheld when speaking of a process of constitutionalisation of the Union. In that process, all actors just mentioned, notably the Member States, are in a way both pouvoir constituant and pouvoirs."

35 France, Assemblée nationale constituante, *Declaration of the Rights of Man and of the Citizen* (26 August 1789) at Article 16: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all."

This point has been challenged by authors such as Miguel Maduro when he contextualised the activities of judicial actors, stressing that they are part of a political bargaining process: the "motives behind [judicial] transactions may vary greatly. Judicial criteria are not simply a result of judicial drafting but of a complex process of supply and demand of law in which the broader legal community participates."[36] Judicial actors contribute to the development of a new legal order, which is the outcome of co-ordination between national and supranational levels, providing interconnections and links between different legal cultures, mediating values (interpretation is derived from the Latin *interpretia*, i.e., intermediation among values), and comparing experiences—as has been the case, for instance, with the many seasons of the proportionality principle. In order to define the impact of judicial actors on the evolution of the EC/EU one may use the notion of *cultural sources of law*, which, as mentioned above, are not the result of an activity purposely aimed at the creation of law, and the acceptance of such sources is based on the idea that the law is not only the pursuance of the sovereign's will (the king, the people or the parliament) "but responds to the need for rationally determined justice."[37]

The ECJ's interpretative rulings are a cultural source of law and have played a fundamental role in pushing forward the process of European integration, while political sources (directives, regulations) have often been locked within intergovernmental mechanisms. Why? Quite simply, they are flexible, more adaptable to the changing aims of "functionalism," and less exposed to the attention of national governments, due to the "benign neglect"[38] described by Eric Stein.

Cultural sources of law renounce the constructivist aim in favour of a *spontaneous order* (κοσμος) that is the outcome of case-by-case judicial co-operation. This double dichotomy (political sources/constructivism versus cultural sources/evolutionism) gives a very different impression compared with a one-sided reading of the current phase of European constitutionalism, from the point of view of law in action (i.e., ECJ case law). More precisely, these judges play a fundamental role in the selection and exchange of constitutional materials between the different levels/poles of the European system, contrib-

36 Miguel P Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in Neil Walker, ed, *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 501 at 514 [Maduro, "Contrapunctual Law"].

37 Alessandro Pizzorusso, *Sistemi Giuridici Comparati* (Milano: Giuffrè, 1998) at 263–264. See also Alessandro Pizzorusso, "Fonti politiche e fonti culturali del diritto" in *Studi in onore di T Liebman* (Milano: Giuffrè, 1979) at 32ff.

38 Eric Stein, "Lawyers, Judges and the Making of Transnational Constitution" (1981) 75 AMJIL 1.

uting to what I call "constitutional synallagma" in the second part of this article.[39]

As we will see, the theoretical framework supporting the need for research that I am proposing can be linked to the existence of a multilevel constitutional legal order and of a constitution resulting from never-ending comparison and dialectic between "closely interwoven and interdependent"[40] levels of governance (states and EU). The interplay between levels gives the idea of the how difficult it is to distinguish neatly between the legislative *domaines* belonging to the various players involved.

As a matter of fact, one of the most relevant difficulties in the multilevel legal order is represented by the existence of shared legal sources, which make the attempt at defining legal orders as *self-contained regimes* very difficult. This is consistent with the attempt to provide an integrated and *complex* (i.e., interlaced)[41] reading of the various levels, and represents one of the most fascinating challenges for constitutional law scholars. At the same time, as a consequence of the lack of a precise distinction within the *domaines* of legal production, it is sometimes impossible to solve the antinomies between different legal levels on the grounds of the prevalence of a legal order (e.g., the national) over another (e.g., the supranational).

Moreover, in this context, because of the said inextricability, many legal conflicts present themselves as *conflicts of norms* (conceived as the outcome of the interpretation of legal provisions)[42] rather than *conflicts of laws*,[43] interpretative competition being the dynamic side of conflicts. I return to this point when presenting the idea of constitutional complexity.

39 Evidently both evolutionary and revolutionary constitutionalisms represent two ideal types hardly distinguishable in concrete historical experiences. In the economy of this article I trace the European integration process back to the evolutionary constitutional ideal type. However this choice does not imply the adoption of the Hayekean conception of "judge" (on this, see Vilaça, *supra* note 33) or the organicism frequently associated to Burke's thought.

40 Ingolf Pernice, "Multilevel Constitutionalism in the European Union" (2002) 5:27 Eur L Rev 511 [Pernice, "European Union"].

41 Giuseppe Martinico, "Complexity and Cultural Sources of Law in the EU Context: From the Multilevel Constitutionalism to the Constitutional Synallagma" (2007) 8 German Law Journal 205 [Martinico, "Complexity and Cultural Sources"].

42 On the distinction between statements (*disposizioni*) and norms (*norme*), see Vladimiro Crisafulli, "Disposizione (e norma)" in *Enciclopedia del diritto T. XIII* (Milano: Giuffrè, 1964) 195.

43 For a similar (although slightly different) conception, see Joost Pauwelyn, *Conflict of norms in public international law: How WTO law relates to other rules of international law* (New York: Cambridge University Press, 2003) at 6–8.

Introducing Complexity

Europe already has a constitution, the product of a constitutional evolution. But what kind of constitution is it? The idea of constitutional complexity starts from those reflections that have emphasised the interpenetration between constitutional entities as the real engine of the EU's progressive constitutionalisation (multilevel constitutionalism, for example)[44] and the dynamic nature of this constitution, which would be conceived as a process rather than a punctual document.

The European Constitution is thus conceived as a *monstrum compositum*, composed of constitutional principles developed at the European level and complemented by (common) national constitutional principles.[45] In this sense, one could conclude that in such a context national laws as well as European law partake in defining the European constitutional law.

The existence of multiple sites of constitutionalism and the absence of a clear interpretative sovereignty causes that form of interpretative competition that nourishes the relationship between the ECJ and the domestic courts (especially Constitutional Courts).[46] As we know, both the Constitutional Courts and the ECJ conceive of their own documents (the national Constitutions and the Treaties, respectively) as the highest law and claim ultimate authority for them. This context may be described as interpretative competition[47] and it represents the judicial and dynamic side of the struggle for sovereignty.

Confirmation of this interpretative competition can be seen in the endeavour of some Constitutional Courts to avoid the preliminary ruling through

44 Ingolf Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?" (1999) 36 CML Rev 703; Franz Mayer and Ingolf Pernice, "La Costituzione Integrata dell'Europa" in Zagrebelsky, *supra* note 10, 43 at 49; Pernice, "European Union," *supra* note 40 at 511ff.
See also Leonard Besselink, *A Composite European Constitution/Een Samengestelde Europese Constitutie*, (Groningen: Europa Law Publishing, 2007) [Besselink, *A Composite European Constitution*].

45 See e.g. Monica Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart Publishing 2006).

46 On the inter-court competition as a key to reading the relationship between judges, see Karen Alter, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration" in Anne-Marie Slaughter, Alec Stone Sweet & Joseph H H Weiler, eds, *The European Court and National Courts—Doctrine and Jurisprudence. Legal Change in its Social Context* (Oxford: Hart Publishing, 1997) at 227.

47 Miguel P. Maduro, "Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism" in Jeffrey L Dunoff & Joel P Trachtman, eds, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009) 356 at 358.

attempts to create a parallel and alternative way of communicating with the ECJ.[48] The national Constitutional Courts have traditionally preferred to level the playing field by avoiding the preliminary ruling (as the ECJ's domain) because this would have implied the loss of interpretative sovereignty, given the fact that the game within the ambit of the preliminary ruling is governed by the Treaties, which represent the competitors' fundamental charters (i.e., the ECJ). I return to constitutional pluralism when I come to specify why the idea of constitutional complexity is different from it.

II. Constitutional Complexity and the EU

The adopted notion of complexity stems from a comparison of the different meanings of this word as used in several disciplines (law, physics, mathematics, psychology, philosophy) and recovers the etymological sense of this concept (complexity from Latin *complexus* = interlaced). By applying the idea of complexity developed by Edgar Morin to the supranational context, I argue that the European Union legal order is a complex entity that shares some features with complex systems in natural sciences. The *mot-problème*[49] "complexity" is used in several ways. Eric Millard, for instance, recalls at least four different meanings of the word complex.[50] Complex, in fact, is often used as a synonym of "complicated" and in this sense an antinomy may be understood as complex given its difficulty in being solved because of the legal abundance caused by the co-existence of so many legislators in the EU and of the consequent difficult manageability of the several materials, languages and meanings present in the multilevel system. Secondly, complexity may refer « la situation d'un objet fragmenté, découpé. L'ensemble social n'est pas simple, au sens d'une théorie des ensembles : il résulte de l'addition ou de l'interaction entre une pluralité d'ensembles partiels, eux-mêmes sans doute entremêlés.[51] Thirdly, complex is understood as non-aprioristic/pragmatic; in this respect a reason is complex when it cannot infer choices and decisions from general, clear and abstract principles which were defined aprioristically. Finally, com-

48 Giuseppe Martinico, "Judging In The Multilevel Legal Order: Exploring The Techniques Of 'Hidden Dialogue'" (201) 21:2 King's Law Journal 257 [Martinico, "Judging"].

49 Edgar Morin, *Introduzione al Pensiero Complesso* (Milan, Sperling & Kupfer, 1993); and Edgar Morin, *Conoscenza della Conoscenza* (Milan: Feltrinelli, 1989).
For a discussion of Morin's view, see Marco Sandri, "La Complessità: Verità Acquisite e Falsi Miti" (2001) 7 Kéiron 98.
On Europe as a complex system, see Edgar Morin, *Pensare l'Europa* (Milan: Feltrinelli, 1988).

50 Eric Millard, "Eléments pour une approche analytique de la complexité" in Mathieu Doat, Jacques Le Goff & Philippe Pédrot, eds, *Droit et Complexité (Pour une nouvelle intelligence du droit vivant)* (Rennes : Presses Universitaires de Rennes, 2007) at 141.

51 *Ibid* at 143.

plexity is meant as interdependency of the objects with regard to their relative autonomy. In this article I focus on the relative autonomy of the legal orders (national, supranational and international) in the multilevel system.

From a preliminary and general comparison among 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.

The notion of complexity[52] does not deny the importance of diversity, but it permits, in my opinion, a distinction of the European phenomenon from the experiences, for example, of the multinational States. In this sense, I would like to link my reasoning to Joseph Weiler's suggestions,[53] which stress the difference between Europe (where the States accept the law of another institutional actor with an autonomous act of subordination and without the need for a reference to a common name of a people) and other instances (Weiler gives the example of Québec). Complexity describes well the multilevel situation where the legal orders are not only distinguishable, but are also "interlaced."

Complexity offers us another profile of distinction, which is the *constitutional synallagma*. All the disciplines have met this category and have attempted to apply it to several fields of knowledge. I am convinced that it is possible to extract a common notion of complexity from these different disciplines. My persuasion is confirmed by the fact that complexity is not only a particular concept but a general category that has caused a fundamental shift in the history of social and experimental sciences.[54] The notion of complexity is the re-

52 For a similar but also different attempt to apply the notion of complexity, see Mireille Delmas Marty, "Ordering Pluralism: A Conceptual Framework For Understanding The Transnational Legal World (Oxford and Portland, Oregon: Hart Publishing, 2009).

53 Weiler, "In defence of the status quo," *supra* note 29.

54 In mathematics a number is defined as compound (conceived as complex) when it is formed by a real number plus (or minus) an imaginary number (example: 3+2i is a compound number). In sociology "the complexity is the dilation of possibilities of experience and action of the subjects, caused by an evolutionary trend which increases the functional differentiation, the specification and autonomy of the primary subsystems of the social system, of the economy, of science, of policy, of family and personal relations." Danilo Zolo, "L'analisi sistemica del Welfare State" in Danilo Zolo, ed, *Complessità e democrazia* (Turin: Giappichelli, 1987) at 106.

For Jung, complex is "a structured and active set of representations, thoughts and remembrances partially or fully unconscious and with strong affective potential," (entry: "*Complesso*," in Umberto

sult of a crisis of the certainties of modern thought and expresses the relativity and the problematic nature of truth. It reflects the need to confront the "other" who forces us to share his destiny with us.[55] It is important to distinguish the notion of complexity from other concepts, for instance complex does not mean only complicated or composed of several elements. Rather complexity identifies a system whose behaviours cannot be foreseen in advance according to the behaviour of its components. One of the most important scholars of complexity, Edgar Morin,[56] also distinguishes complexity from completeness. According to him, on the one hand, the thought of complexity aims at multidimensional knowledge, but on the other hand it knows that it cannot aspire to complete knowledge. This category is obviously polysemous if related to the different disciplines, but what I am now interested in stressing is the common element of these definitions: complexity as *relational phenomenon* among *elements characterized by diversity* (conceived as the opposite of identical in the Aristotelian sense).[57] Starting with the physical meaning of complexity it is possible to identify the following features commonly accepted in the other disciplines:

- Non-reversibility;
- Non-reducibility;
- Unpredictability;
- Non-determinability (rectius, non-determinism).

Galimberti, *Dizionario di psicologia* (Turin: UTET, 1992) at 196–197. Among Jung's works on this topic, see Carl Gustav. Jung, "Considerazioni generali sulla teoria dei complessi" in *Opere Vol. 8* (Torino: Bollati Boringhieri, 1976) 118.

For the medieval logicians, a complex term is composed of different words (example: "white man" or "rational animal") while *incomplexum* means *isolated* (entry: "*Complesso*," in Nicola Abbagnano, *Dizionario di filosofia*, (Turin: UTET, 1968) at 134.

For a physicist, a system is complex if it is characterized by the following features: *non reducibility* to its parts, *unpredictability* of its dynamics, *non reversibility* and *non determinability*. Ilya Prigogine & Isabelle Stengers, *La Nuova Alleanza* (Turin: Einaudi, 1999).

For a jurist, an act is complex if it is the result of the expression of the wills of many subjects who have the same aim; their wills lose their individuality in this interpenetration. In this sense "complex" is different from "collective." Lina Bigliazzi Geri et al, *Diritto Civile*: *Vol. I Tomo II* (Turin: UTET, 2000) at 546–547.

55 Giovanni Widmann, "Identità e diversità" (2001), online: Il Margine <http://archivio.il-margine.it/archivio/2001/f4.htm>.

56 See Bagehot, *supra* note 1.

57 In the history of philosophy there are three main definitions of identity: identity as convention (F. Waismann), identity as unity of substance (Aristotle) and identity as substitutability (G. Liebniz). For a summary of these opinions, see Abbagnano, *supra* note 54 at 446-447.

Non-reversibility

For a complex system non-reversibility is the impossibility of returning to the *status quo* spontaneously and precisely. Unlike the reversible processes, in fact, where it is possible to return to the starting condition from the final condition, the complex systems are non-reversible due to the non-linearity of the evolution.

The EC/EU route has not been a linear process because of functional predominance and State resistance. Thanks to Article 267 TFEU, the Court has had a fundamental role: this provision allows the Court to manipulate the legal materials. Afterwards, the political legal sources (by revisions of the Treaty, constitutional amendments) attempted to adapt themselves to such interpretations. Today it is probably impossible to return to the initial condition because all the systems involved in the co-ordination have evolved and changed, thanks to mutual implications and influences. More generally, once in the EU all the Member States have acquired a set of duties and (legal, economic and political) obligations, a principle of *solidarity* that have affected in a decisive manner their sovereignty as pointed out, for instance, by Advocate General Mazák in his Opinion to the *Förster* case.[58] One could challenge such a conclusion relying on one of the most important novelties introduced by the Lisbon Treaty: Art. 50[59] governing the "right" of withdrawal from the Union

58 ECJ, C-158/07, *Förster v Hoofddirectie van de Informatie Beheer Groep*, [2008] ECR I-8507: "Thus, whereas rights to social benefits were originally linked to the pursuit of economic activities (in particular in the form of paid employment, which underpins the concept of a worker), they may now also be available to economically inactive citizens on the basis of the principle of non-discrimination. Whereas a Member State was previously required to assume full social responsibility and provide welfare for those who had already entered its employment market (26) and who thus made some contribution to its economy, such financial solidarity is now in principle to be extended to all Union citizens lawfully resident on its territory."

59 Art. 50 EUT:

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
>
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

(sometimes also called "secession clause").[60] From a technical point of view the situation of the Member State which decides to withdraw cannot be compared to the *status quo* properly understood for many reasons. For instance, because the wording of the provision seems to refer to an agreement devoted to the "future relationship" with the EU which will represent a sort of legacy of the previous membership of the European enterprise.

Non-reducibility

The result of the relationship among diversities does not present itself as a mere sum of the latter, but is something different.

Indeed, the European Constitution is not reducible to the sum of legal provisions at various levels. By this I mean that, for example, it is impossible to "find" the legal basis for the principles of supremacy and the direct effect in the letters of the Treaty or in the letters of the national Constitutions. In *Van Gend en Loos,*[61] and *Costa*[62] in fact, the ECJ found the roots of such principles in the "spirit" of the Treaties and, also, in the indirect will of the States signing the Treaties.[63]

A consequence of the impossibility of tracing these principles back to the wording of a univocal primacy clause,[64] for instance, has underscored the role of the judge. My assumption is that this context exalts the case-by-case ju-

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

60 Phoebus Athanassiou, "Withdrawal and Expulsion from the EU and EMU: Some Reflections" *Legal Working Paper Series* (December 2009), online: European Central Bank <http://www.ecb.int/pub/pdf/scplps/ecblwp10.pdf>.

61 ECJ, 26/62, *Van Gend en Loos v Nederlandse Administratis der Belastingen*, [1963] ECR 3 [*Van Gend en Loos*].

62 ECJ, 6/64, *Costa v ENEL*, [1964] ECR 1141.

63 *Van Gend en Loos, supra* note 62: "The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals."

64 Scholars have identified at least four different meanings for primacy/supremacy in ECJ case law. Moreover, the notion of primacy enshrined in Art I-6 of the Constitutional Treaty seems to be different from that used by the ECJ. See e.g. Monica Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart Publishing, 2006) at 100–1. In order to find a solution to this ambiguity, some scholars have devised a "law of laws"; see Tom Eijsbouts & Leonard Besselink, "Editorial: 'The Law of Laws'—Overcoming Pluralism" (2008) 4 European Constitutional Law Review at 395.

dicial approach to solving legal conflicts between rules. The impossibility of operating a distinction between legal orders implies the end of interpretative autonomy for these courts, showing the other side of the sovereignty crisis. The judicial dialogue thus represents a privileged perspective for studying the relations between interacting legal orders, especially when looking at the multilevel and pluralistic structure of the European constitutional legal order.[65]

Unpredictability

It is difficult to foretell or foresee the evolution of the system by looking at the starting position. In a deterministic system it is always possible to predict the final state if the initial state is known. In a complex adaptive system it is not possible to predict the final state of its evolution even if we know the initial state of the components.

It is very difficult to foresee the result of the co-ordination among levels by looking only at the formal provisions: the best example is given by the "constitutional tolerance" in those national legal orders that do not have a specific constitutional provision enabling the EC/EU to exercise their powers within national boundaries. When looking at the original Italian Constitution (Article 11 IC), it is very hard to understand how the guardians of the constitution have permitted the erosion of competences caused by EC/EU interferences. Article 11, in fact, "agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed."[66] This provision was conceived for participation in the UN or other limited-power organizations, but not for the EU. The latter imposes limitations of sovereignty for goals that go beyond the "peace and justice between nations" mentioned in Article 11. The Italian Constitutional Court was forced to "manipulate" the original meaning of Article 11 in order to allow such limitations. At the same time, when looking at Article 101 ("judges are only subject to the law"),[67] it is impossible to find the legal basis of the judge's power of non-application of the national rule contrasting with EU law. In conclusion, the knowledge of the starting (legal) condition does not allow us to foresee the development of the EU order.

When one bears in mind the original provision of national constitutions, how could one explain (*a posteriori*) or foresee (*a priori*) events like the acceptance of the *Simmenthal* mandate by national Constitutional Courts?

65 I developed these thoughts in Martinico, "Judging," *supra* note 48.

66 Italian Constitution, art. 11.

67 *Ibid* at article 101.

Non-determinability (rectius, non-determinism)

Complex systems do not follow necessary and univocal laws according to a linear concept of the evolution based on the dialectic of cause/effect.

Similarly, European integration does not follow a precise political project (the triumph of "functionalism") and the ECJ has not assumed an imperialistic approach in its interpretative function. In this sense it is possible to recall the famous dialectic between constitutional tolerance and judicial activism[68] in the activity of the ECJ and its effect on the coherence of ECJ case law: *Kalanke*[69] *v Marschall*,[70] *Grant*[71] *v P/S*.[72]

The non-determinability implies the non-manageability of constitutional complexity; in this sense the attempt of the Constitutional Treaty is an effort to "manage" complexity without good results. The best confirmation of this statement can be found in Art I-6, which aimed at crystallising primacy. The difficulty of this enterprise is also caused by the absence of a strong political power at the supranational level. It is not accidental that the most important sources of law in the building of the EU Constitution were the interpretative judgments of the ECJ and not EU directives or regulations. Judgments are flexible sources, and are more adaptable to the changing context and aims of the EC/EU, while directives or regulations imply a constructivist and linear policy.

Working on Complexity

In my opinion, the notion of complexity is useful to understand the "efficient secret" of the European Constitution.

Having said this, I argue that the European Union is a complex reality that is suspended on mutual diversities and that requires legal and constitutional interpenetration. It is the outcome of a co-ordination that demands the solution of some incompatible antinomies. As a consequence, it is impossible to understand the whole (the system) by starting from one of its parts.

If the EU as a complex system is characterized by the interlacing of differ-

68 See Oreste Pollicino, "Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint: Part One/Two" (2004) 5 German Law Journal 283.

69 ECJ, C-450/93, *Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3051.

70 ECJ, C-409/95, *Marschall v Land Nordrhein-Westfalen*, [1997] ECR I-6363.

71 ECJ, C-249/96, *Grant v South West Trains Ltd*, [1998] ECR I-2143.

72 ECJ, C-13/94, *P v S and Cornwall County Council*, [1996] ECR I-2143.

ent legal orders, the constitutional synallagma is the blood of its Constitution, which runs through the veins connecting constitutional levels. By this formula I mean the whole of the principles, practices and rules which circulate uninterruptedly from one level to another in a twofold direction (from top to bottom and vice versa). Constitutional synallagma conforms to the definition of a new kind of law which is not reducible to the legal provisions of the Treaty or of the national legislations. I try to clarify this formula with some examples below.

The most obvious symbol of this exchange among orders is the directive, which needs to be "completed" by the States, but I will focus on other types of complex sources: the common constitutional traditions in their relationship with the counter-limits (*controlimiti*). Common constitutional traditions represent another confirmation of the interlacing of orders (as previously described) since they are the outcome of the comparison and selection of the national constitutional "materials." In this sense it is curious to note the connection between the *counter-limits* (quoting the language used by the Italian Constitutional Court) and the common constitutional traditions as pointed out by some scholars.[73] The common constitutional traditions and the counter-limits are linked by means of the fundamental principles of the national legal order selected, compared and used as European sources of law by the ECJ.

Another example is related to the development of the EU principle of proportionality. The principle of proportionality was clearly "extracted" from the German legal tradition, although the classic three-step partition (*Geeignetheit, Erforderlichkeit, Verhältnismäßigkeitsprüfung im engeren Sinne*) elaborated by the German judges is rarely respected by the ECJ.[74] A broad distinction between the cases involving EU institutions and cases involving Member States can be found in the ECJ's activity. In the first case, the ECJ seldom declares the illegitimacy of the measures. Rather, with regard to the Member States, the Court seems to insist on the reasons of integration, declaring the violation of the "loyalty duty" to the Treaties. The translation of the German principle in the supranational context has also been enriched by the French experience of the *bilan avantages-coûts* (costs/benefit analysis) as elaborated in the case law of the *Conseil d'Etat*.

73 Antonio Ruggeri, "Tradizioni costituzionali comuni e 'controlimiti', tra teoria delle fonti e teoria dell'interpretazione" (2003) I Diritto Pubblico Comparato ed Europeo 102-120 [Ruggeri, "Tradizioni costituzionali"].

74 ECJ C-96/03 e C-97/03, *Tempelman* and *Coniugi THJM van Schaijk v Directeur van de Rijksdienst voor de keuring van Vee en Vlees*, [2005] ECR I-1895.

Such bottom-up flows (from the national traditions to the supranational level) induced the creation of a supranational principle. As I said above, the constitutional exchange among levels is continuous and implies a second constitutional flow, top-down, from the EU level to the national levels. Due to the diversification of the national legal orders we can distinguish different "spill-over" effects. Diana Galetta[75] has identified three examples of different reactions to this top-down flow. The first case is that of England where the judges refused to apply the proportionality test, preferring the so-called "*Wednesbury* test" until 1998, the year of the *Human Rights Act*. The shift represented a fundamental turn in this sense. Another example is represented by Italy, where national judges misunderstood the test of proportionality: clear proof of such a situation can be found in the confusion between reasonableness and proportionality.[76] Last but not least, the German case: here the same principle of proportionality comes back after the "supranational transformation" causing new evolutions in the judges' activity in order to adapt their case law to the supranational demands.[77]

From Shared Legal Norms to Multiple Loyalties: the Consequences of Complexity

As we know, national judges play a fundamental role in the multilevel system, being at the same time the guardians of the application of national law and the first defenders of the *Simmenthal* doctrine:[78] this is indeed one of the confirmations of the complex structure of the European legal order.

Since in this context national and supranational levels share "legal materials" (common constitutional traditions or general principles of European law are inferred from national legal principles), their judges present multiple loyalties: they have to be loyal to the ECJ and to their Constitutional Courts at the same time.

Now, if national judges are well aware of the necessity to acknowledge the precedence of EU law when it is in contrast with national law, it is more complicated to understand what they should do in the case of collision between

75 Diana Urania Galetta, "Il principio "Il principio di proporzionalità comunitario e il suo effetto di spill over negli ordinamenti nazionali" (2005) 4/5 Nuove Autonomie 541.

76 TAR Lecce, Bari, Sez. III, from 2483/2004 to 2493/2004, available at: <www.giustizia-amministrativa.it>.

77 *Gundesverwaltungsgericht*, BVerwG-Federal Administrative Court, *Deutsches Verwaltungsblatt* (DVBl) 613, 1993; *Gundesverwaltungsgericht*, BVerwG-Federal Administrative Court, *Deutsches Verwaltungsblatt* (DVBl) 68 1997.

78 ECJ, *Amministrazione delle finanze dello Stato / Simmenthal*, [1978] ECR 1978 629.

EU law provisions and some national constitutional provisions.

A good example of these kinds of antinomies is given by the *Federfarma* case[79] of the State Council (*Consiglio di Stato*).[80] The case concerned an Italian law (Law no. 362/1991) permitting pharmaceutical companies to own municipal pharmacies in Milan. The legislation was declared unconstitutional in part by the Italian Constitutional Court because of the violation of Article 32 of the domestic Constitution (the right to health), namely "in that section which did not envisage that a shareholding in companies managing municipal pharmacies is incompatible with all other operations in the sector including the production, distribution, intermediation and scientific information of medicines."[81] Having declared the provision unconstitutional, the Constitutional Court interpreted the remaining part of the law by offering a judgment that replaced the unconstitutional section with a new norm (a clear example of an additive judgement/*sentenza additiva*). The response of the European Commission was: "The Constitutional Court's interpretation not only discourages but makes it impossible for enterprises operating or linked to enterprises operating in the pharmaceutical distribution to purchase majority or minority holdings in companies managing pharmacies."[82] On this ground, in a subsequent case pending before it, the Italian State Council was asked to disapply the Italian provision as interpreted by the Constitutional Court because of its contrast with EU law. The State Council refused to do so.

In *Federfarma*, the State Council identified another exception to the *Cilfit* doctrine,[83] following a very eccentric reasoning: since a contested Italian regu-

79 Consiglio di Stato (Italian State Council), sez. V, n. 4207 del 2005. For commentary on this case, see Antonio Ruggeri, "Le pronunzie della Corte costituzionale come 'controlimiti' alle cessioni di sovranità a favore dell'ordinamento comunitario? (A margine di Cons. St., sez. V, n. 4207 del 2005)," online: Forum Constituzionale <www.forumcostituzionale.it/site/index3.php?option=com_content&task=view&id=350&Itemid=91>; Oreste Pollicino, "Il difficile riconoscimento delle implicazioni della supremazia del diritto europeo: una discutibile pronuncia del Consiglio di Stato" (2006), online: Forum Constituzionale <www.forumcostituzionale.it/site/index3.php?option=com_content&task=view&id=531&Itemid=91> [Pollicino, "Il difficile"].
The decision is available at the following link: <http://www.giustizia-amministrativa.it/webcds/frmRicercaSentenza.asp>.

80 Consiglio di Stato (Italian State Council), sez. V, sent. n. 4207/2005.

81 Giulio Itzcovich, "Fundamental Rights, Legal Disorder and Legitimacy: The *Federfarma* Case" *Jean Monnet Working Paper* (December 2008), online: Center for International and Regional Economic Law & Justice <http://centers.law.nyu.edu/jeanmonnet/papers/08/081201.html> at 16.

82 *Ibid* at 15, n 28.

83 The well known *Cilfit* case excluded the duty of the national judge of last instance to raise the question. See, ECJ, 283/81, *SRL Cilfit e Lanificio di Gavardo SPA v Ministero della Sanità*, [1982] ECR 3415. The court in *Cilfit* stated at p. 4 that when "previous decisions to the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those

lation had been interpreted by the Constitutional Court in a certain way, it had to be conceived as constitutional in nature since the interpretative judgment of the Italian Constitutional Court "had been issued by the Constitutional Court to safeguard the right to health, which amounts to a 'counter-limit' to European law insofar as it is situated in an area, that of fundamental rights."[84] As a result of this characterization, "it, therefore, made no sense to refer to the ECJ for a preliminary ruling 'which cannot be taken into account',"[85] i.e., which was immaterial to the case:[86] "If we cannot use the ECJ's decision, why refer to the ECJ?" This rhetoric seems to be the essence of the State Council's decision. The *Federfarma* case, however, is just one of many judgments based on an evident misunderstanding of the basic elements of EC/EU law by the Italian national judges: in *Federfarma*, the State Council confused the Charter of Fundamental Rights of the EU with the Nice Treaty.[87]

Another interesting case is represented by *Cordero Alonso*,[88] where the Spanish judge referring the question to the ECJ asked about the necessity to disapply a national statute (Art. 33 of the Workers' Statute) which had already been acknowledged as inconsistent with the EU principle of non-discrimination by the ECJ in a previous judgment[89] but which, after the first ECJ judgment on this matter, had also been interpreted in a way consistent with the constitutional principle of non-discrimination by the Spanish Constitutional Court:[90]

> Since the general principle of equality and non-discrimination is a principle of Community law, Member States are bound by the Court's interpretation of that principle. That *applies even when the national rules at issue are, according to the constitutional case-law of the Member State concerned, consistent with an equivalent fundamental right recognised by the national legal system.*[91]

In this case the national judge was not able to decide which court he should

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decisions, even though the questions at issue are not strictly identical". This point is further confirmed by: Art. 104, para. 3, of the ECJ Rules of Procedure, where no distinction can be traced (under this perspective) between the preliminary ruling and other proceedings. The State Council interpreted this case as a test of the utility/necessity of the decision of the Court.

84 Itzcovich, *supra* note 82.

85 Consiglio di Stato (Italian State Council) *supra* note 80.

86 Itzcovich, *supra* note 82.

87 See Pollicino, "Il difficile," *supra* note 79.

88 ECJ, C-81/05, *Cordero Alonso v Fondo de Garantía Salarial (Fogasa)*, [2006] ECR I-7569 [*Cordero Alonso*].

89 ECJ, C-442/00, *Rodríguez Caballero v Fogasa*, [2002] ECR I-11915.

90 *Judgment No. 306/1993*, [25 October 1993] (Tribunal Constitucional), online: Tribunal Constitucional de Espana <www.tribunalconstitucional.es>.

91 *Cordero Alonso*, *supra* note 88 at para 41.

follow (either the ECJ or the domestic constitutional judge) and, in order to avoid a decision which would have been seen as challenging the case law of the Spanish Constitutional Court, decided to refer an interpretive question to the ECJ about the meaning and the scope of the non-discrimination principle in EU law. The ECJ confirmed its previous interpretation, recalling how the *Simmenthal* doctrine and the principle of autonomy of EU law required the disapplication of national law contrasting with European legislation. In this way, the ECJ offered an interpretation of the same principle (principle of non-discrimination) that was very different from that provided by the Spanish Constitutional Court: although a provision is consistent with the national Constitution it has to be disapplied if it contrasts with the EU law as interpreted by the ECJ.

These kinds of conflicts, caused by the dual loyalty of national judges to the ECJ and to their own Constitutional Courts, have been nourished over the years by the progressive constitutionalization of the EU. The European Union is a complex legal order, since it stems from the interlacing existing between national and supranational legal systems.[92] This implies the existence of shared legal sources (see the common constitutional traditions that are inferred from the national constitutional materials) and many principles of EU law find their "roots" in the national legal traditions. Against this background the EU is indebted to national constitutional orders since they gave the Union new blood by favouring the circulation of principles and practices that have shaped and reshaped the substance of the Treaties. Such a situation is the outcome of a convergence between the starting positions held by the ECJ (monism) and the national Constitutional Courts (dualism) in the first years of European integration.

Over the years this purity was overcome and the Constitutional Courts began to talk about two "autonomous and separated, although coordinated" systems (the Italian Constitutional Court, for example, in case no. 170/1984). At the same time, the ECJ has demonstrated its appreciation of the efforts of these national actors by sometimes assuming a benign and tolerant attitude: some scholars have defined such a situation of partial convergence by using the formula of *(limited) flexibilisation of supremacies*.[93]

92 I attempted to develop this idea in Martinico, "Complexity and Cultural Sources," *supra* note 41.

93 Victor Ferreres Comella, "La Constitución española ante la clausola de primacia del Derecho de la Unión europea: Un comentario a la Declaración 1/2004 del Tribunal Constitucional 1/2004" in Antonio Lopez Castillo, Alejandro Saiz Arnaiz & Victor Ferreres Comella, eds, *Constitución Española y Constitución Europea* (Madrid: Centro de Estudios Políticos y Constitucionales, 2005) 77 at 80–89.

Progressively, the ECJ seemed to get the point by incorporating the concept of the fundamental rights as a premise of the primacy of EU law and new important provisions have been introduced in the Treaties, namely former Articles 6 and 7 of the EUT. Despite this convergence, tension between the ECJ and the Constitutional Courts has not been lacking because of the progressive expansion of the ECJ activity in national fields. Moreover, the product of this convergence gave birth to new kinds of conflicts among interpreters, conflicts that have their origin in the existence of legal sources (the principles concerning the protection of fundamental rights) that are now shared by the ECJ and the national constitutional Courts: such a scenario has produced dynamics of interpretive competition.

The referring judge in the *Cordero Alonso* case was just a collateral victim of the interpretive competition between Constitutional Courts and the ECJ, an interpretive competition that paradoxically increased with the progressive constitutionalization of the EU: the ECJ progressively started acknowledging an important role to the national constitutional materials in its decisions and this "partial" appropriation of the fundamental rights discourse by the ECJ emerges in a long series of judgments, and it is most evident in cases such as *Omega*[94] and *Dynamic Medien*.[95] As some authors have pointed out, by looking at those cases one can perceive a certain concern over the "*octroyée* methodology of construing common constitutional traditions."[96]

However, the *Cordero Alonso* case is just one of the examples of cases where the ECJ has challenged judgments given by national Constitutional Courts. Other recent examples are represented by the *Filipiak*[97] and the *Winner Wetten*[98] cases, while the ECJ seemed to show a great deference to the French *Conseil*

94 ECJ, C-36/02, *Omega Spielhallen-und Automatenaufstellungs GmbH v Bundesstadt Bonn*, [2004] ECR I-9609 [*Omega*].

95 ECJ, C-244/06, *Dynamic Medien v Avides Media*, [2008] ECR I-505.

96 Marco Dani, "Tracking Judicial Dialogue—The Scope for Preliminary Rulings from the Italian Constitutional Court" *Jean Monnet Working Paper* (October 2008), online: Center for International and Regional Economic Law & Justice <http://centers.law.nyu.edu/jeanmonnet/papers/08/081001.html>.

For commentary on and reactions to the Mangold case (ECJ, *Mangold v Rudiger Helm*, [2005] ECR I-9981), see Roman Herzog & Luder Gerken, "[Comment] Stop the European Court of Justice" (10 September 2008), online: EU Observer <http://euobserver.com/9/26714>. This article is the translation of a newspaper article originally published in German: See Roman Herzog, "Stoppt den Europäischen Gerichtshof" *Frankfurter Allgemeine Zeitung* (8 September 2008) online: Frankfurter Allgemeine Zeitung - FAZ.NET <http://www.faz.net/s/homepage.html>.

97 ECJ, C-314/08, *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu*, [2009] ECR I-11049. [*Filipiak*].

98 ECJ, C-409/06, *Winner Wetten* on line: <www.curia.europa.eu> [*Winner Wetten*].

Constitutionnel in the *Melki* case on the very hot topic of the dual preliminarity (*doppia pregiudizialità*).[99]

The *Winner Wetten* case originated from a preliminary reference raised by a German court. In 2006 the German Constitutional Court acknowledged that the legislation on the public monopoly on gambling on sporting competitions existing in some particular *Länder* violated Paragraph 12(1) of the Basic Law. At the same time, it decided not to declare the legislation in question unconstitutional and to maintain it in effect until 31 December 2007, thus sending a message to the legislature to push it to intervene by that date through the use of its discretionary power in order to amend the legislation to save it from being in breach of the Basic Law.

Despite this judgment, the ECJ decided to push the referring judge to disapply the legal provision and instead concluded that:

> By reason of the primacy of directly-applicable Union law, national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply during a transitional period.[100]

Filipiak is a very similar case originating from a preliminary question raised by a Polish judge with regard to proceedings on tax issues between Mr Filipiak, a Polish national carrying on an economic activity in the Netherlands (where he regularly paid the social security and health insurance contributions required by Dutch legislation), and the Director of the Poznań Tax Chamber. What is interesting to us is that before the judgment in the appeal against the refusal, the Polish Constitutional Tribunal ruled that the income tax law in question infringed the principles of equality and social justice codified in the Polish Constitution but, at the same time, by exploiting its powers ad hoc provided, decided to postpone the loss of validity of the legislation until 30 November

99 Marta Cartabia, "Il processo costituzionale: l'iniziativa. Considerazioni sulla posizione del giudice comune di fronte a casi di 'doppia pregiudizialità', comunitaria e costituzionale" (1997) Il Foro italiano 5 at 222.
For a very similar point of view about the dual preliminarity in English, see Marta Cartabia, "Taking Dialogue Seriously" *Jean Monnet Working Paper* (December 2007), online: Center for International and Regional Economic Law & Justice <http://centers.law.nyu.edu/jeanmonnet/papers/07/071201.html>.
See also *Corte Costituzionale*, ordinanza No. 536/1995 <www.cortecostituzionale.it> and *Corte Costituzionale*, ordinanza No. 319/1996 <www.cosrtecostituzionale.it>.

100 *Winner Wetten*, *supra* note 98.

2008. The ECJ concluded that "the primacy of Community law obliges the national court to apply Community law and to refuse to apply conflicting provisions of national law, irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force."[101]

Complexity as a Constitutional Theory of European Integration

Constitutional complexity is indebted to some scholarly views on the European Union, namely multilevel constitutionalism and constitutional pluralism.[102] From the former, it borrows the idea of the Constitution understood as the outcome of the dialectic between the national and the supranational legal systems, as a process whose shape depends on the mutual exchange between EU and national legal materials.[103] At the same time, constitutional complexity points out how the interlacing that exists between legal orders exalts interpretive competition, the importance of the constitutional conflicts, the role of the judges, and the case-by-case approach. All these aspects seem to be neglected by the theory of multilevel constitutionalism.[104] Unlike constitutional pluralism, complexity does not present a normative proposal for adjusting or neutralising constitutional conflicts[105] between constitutional supremacy and

101 *Filipiak*, *supra* note 97.

102 On constitutional pluralism, see Neil MacCormick, "Beyond the Sovereign State" (1993) 56 Mod L Rev 1.
See also Miguel P Maduro, *The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998) at 31; Neil Walker, "The Idea of Constitutional Pluralism" (2002) 65 Mod L Rev 317; Miguel P Maduro, "Contrapunctual Law," *supra* note 36; Miguel P Maduro, "Interpreting European Law: Judicial adjudication in a context of constitutional pluralism" (2007) 1:2 European Journal of Legal Studies 1 [Maduro, "Interpreting European Law"].
For a comparison between the different visions of constitutional pluralism, see Matej Avbelj & Jan Komarek, eds, "Four visions of constitutional pluralism" *EUI Working Paper* (28 November 2001), online: European University Institute: Department of Law <http://cadmus.iue.it/dspace/bitstream/1814/9372/1/LAW_2008_21.pdf>.
For a different concept of pluralism conceived as being in opposition to constitutionalism, see Nico Krisch, "Europe's Constitutional Monstrosity" (2005) 25:2 Oxford J Legal Stud 321; and Douglas-Scott, *supra* note 7 at 523–530.

103 This Constitution is the result of a steady coordination of two legal orders: national and supranational. From a dynamic point of view this interplay (as Pernice, "European Union," *supra* note 40, said at 514, the national and supranational legal systems are "closely interwoven and interdependent," thus one cannot be read and fully understood without regard to the other) is well represented by Article 6 of the Treaty of the European Union (EUT), which refers to the national constitutional traditions as a part of the European legal order. On the relationship between multilevel constitutionalism and constitutional complexity, see Martinico, "Complexity and Cultural Sources," *supra* note 41.

104 See Martinico, "Complexity and Cultural Sources," *supra* note 41 and Besselink, *A Composite European Constitution*, *supra* note 44.

105 I am referring to constitutional pluralism *à la* Maduro or *à la* Kumm. However, multilevel constitutionalism does not seem to pay attention to the horizontal diversity present at the national level and to

EU law primacy. Attempting to reduce complexity would mean killing it, especially taking into account the risk of holism present in these theories.[106]

Constitutional complexity cannot thus stand as a model, as a normative ideal; it just has an explanatory value: it attempts to describe how the authority of EU law impacts on the domestic constitutional systems and how the constitutional systems react by challenging a complete unification. In this respect, complexity conceives possible collisions among levels as the engine of new constitutional developments. In the *Solange* case, for example, a potential crisis of the European process which actually served as a turning point, opening a new season in the case law of the ECJ and the Constitutional Courts.

What was the essence of the German Constitutional *diktat* in *Solange*? In *Solange*—a judgment delivered a few years after the ambivalent judgment in *Internationale Handelsgesellschaft*[107]—the German Constitutional Court stated that "As long as [Solange] the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the *Bundesverfassungsgericht* in judicial review proceedings ... is admissible and necessary."[108] In other words,

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the issue of constitutional conflicts. Moreover, especially when referring to the works of Maduro and Kumm, constitutional pluralism is also characterised by a strong normative position aimed at neutralising possible constitutional conflicts. Going beyond its descriptive value, Maduro's view presents a strong normative character. It does not limit itself to describing what constitutional pluralism is, but attempts to provide some solutions for a better co-ordination among judges. Pluralism, consistency and vertical and horizontal coherence, universalisability and the principle of institutional choices, are at the heart of his view. All these principles should contribute to defining the judicial power as a rational and interactive power, and exalt the systemic role of the courts themselves, in a context of integrated and pluralistic constitutionalism. See Maduro, "Contrapunctual Law," *supra* note 36; Maduro, "Interpreting European Law," *supra* note 103. A similar observation may be made with regard to Mattias Kumm's works, especially his principle of "best fit." See Mattias Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty" (2005) 11:3 Eur LJ 262.

106 See Pavlos Eleftheriadis, "Pluralism and Integrity", *Ratio Juris* 23, 3, 2010, 365-389, 387: "The broader European legal imposes obligations of coherence across the whole range of national courts, irrespective of national differences in jurisdiction and procedure. It is clear that the leading role in this scheme of coherence will inevitably be played by the Court of Justice, which alone has an overview of EU law. It is easy to see that this is not a doctrine of pluralism at all. It is a doctrine of unity."

107 ECJ, 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermitte,* [1970] ECR 1125 [*International Handelsgesellschaft*]. I am referring to the very famous point in this case in which the ECJ argued at point 3 that: "The validity of a Community measure or its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure."

108 BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß.

the German Court asked for a Bill of Rights and a strong Parliament in a context of separation of powers, the two main ingredients of the most famous definition of Constitution present in the history of European constitutionalism: that of Article 16 of the Declaration of the Rights of Man and of the Citizen (1789). Such a chemistry was conceived as the right mix to overcome the democratic deficit characterising the European Communities.

The *Solange* judgment paved the way for a long-lasting comparison between the ECJ and the national Constitutional Courts. Over the years, the ECJ seemed to get the point by incorporating the concept of the fundamental rights as a premise of the primacy of EU law. For example, in *Omega*[109] the Court said that: "It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures." In this judgment the ECJ also acknowledged the necessity, for the EU law primacy, to stop in front of values codified in a national constitution:

> As the Advocate General argues in paragraphs 82 to 91 of her Opinion, the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right. Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services (see, in relation to the free movement of goods, *Schmidberger*, paragraph 74).
>
> However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures (see, in relation to the free movement of capital, *Église de Scientologie*, paragraph 18). It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. Although, in paragraph 60 of *Schindler*, the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing

109 *Omega*, *supra* note 95 at para 41.

> the proportionality of any national measure which restricts the exercise of an economic activity. (par. 34-47)

This statement should be read as the finishing line of a long run, which started after *Solange I.*

The *Omega* judgment intends to demonstrate (not by coincidence, before a German judge) the maturity of the EU legal system and, in general, the outcome of the constitutional dialogue with national interlocutors.

This process of convergence between the languages of the (national and supranational) courts has contributed to the creation of a common axiological field between the different (constitutional) legal orders. This common axiological field can be described as the "heart" of multilevel constitutionalism and as the most evident product of that constitutional exchange (synallagma) defined above as the efficient secret of the European Constitution.

The *rapprochement* between legal orders is confirmed by the structural continuity between common constitutional traditions and counterlimits. From a theoretical point of view, in fact, the counter-limits are related to the input of the Community legal materials in the inner order; the common constitutional traditions, instead, are related to the input of domestic legal materials in the European legal order. Apparently they both follow opposite routes and are inspired by different rationales: the former by the rationale of integration, the latter by the rationale of constitutional diversification. However, as stressed by Antonio Ruggeri,[110] thanks to the hermeneutical channel represented by the preliminary ruling, the constitutional principles of the domestic legal orders arise from their origin (national level) and become common sources of EU Law; these common constitutional traditions then return to their origin in a new form when they are applied by the ECJ.[111]

This progressive communitarisation of national fundamental principles can be seen as another limit to the primacy of EU law, as scholars have stressed from reading together Articles I-5[112] (Art. 4 of EUT after the Reform Treaty

110 Ruggeri, "Tradizioni costituzionali," *supra* note 73. The best example of such a dynamic is provided by the EU principle of proportionality, as we saw above.

111 Emblematically, the ECJ held in *Omega, supra* note 94 at p. 33: "The Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories."

112 Treaty establishing a Constitution for Europe, Art. I-5: "1. The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall

of Lisbon) and I-6 of the Constitutional Treaty[113] (omitted from the Reform Treaty of Lisbon). In Article 4 EUT, in fact, we can find the proof of the communitarisation of the counter-limits theory as a result of the judicial dialogue between the Constitutional Courts and the ECJ.[114]

A very long story of constitutionalisation of the EU, of reform of the system, started after a rebellious act of a national Court. One can see how a potential crisis was actually the starting point for a new constitutional season at supranational level and how important was a series of exchanges between national constitutional interpreters and the Luxembourg Court, which is exactly what I mean by constitutional synallagma in the previous pages. This reveals how even *prima facie* anti-systemic actions taken by an actor at the national level results, in the end, as characterised by a systemic impact, since they contributed to the development and change of the primacy principle.

As has been noticed, the concept of primacy in *Internationale Handelsgesellschaft*[115] differs from that in *Omega*, since in the latter judgment the ECJ shows an evident openness to the constitutional identity of the Member States. If multilevel constitutionalism seems not to pay attention to the issue of constitutional conflicts, and if constitutional pluralism attempts to neutralise or to adjust constitutional conflicts, one could say

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respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

2. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

113 Treaty establishing a Constitution for Europe, Art. I-6: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".

114 The model of: Art. I-5 (and of the current Art. 4 EUT) is undoubtedly represented by Art. 6 EUT ("previous" version), which efficaciously described the proximity between common constitutional traditions and national fundamental principles. In this Article, in fact, these two kinds of legal sources (common constitutional traditions and national fundamental principles) are mentioned in two subsequent paragraphs.

Here it suffices to recall the reference in para 2 of Art. 6 ("previous" version) to the common constitutional traditions, and the reference in para 3 of Art. 6 to the "national identities" of its Member States. I argue that within a legal context, by the formula "national identities," the European legislature was referring to the constitutional identities of the Member States, that is, the counter-limits as defined by national constitutional courts. In this sense, we can say that Art. I-5 of the CT has just expressly codified such an interpretation by speaking about a "constitutional structure," and in this way it delivers the interpretation of the counter-limits to the ECJ.

115 *Internationale Handelsgesellschaft, supra* note 107.

that complexity acknowledges to them a positive function in the development of the structure of the legal order, since they contribute to "breaking" the boundaries of the legal spaces and favour the exchange of legal materials (the constitutional synallagma), which, in this article, I have attempted to present as the efficient secret of the European Constitution.