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COMPLEXITY AS THE “EFFICIENT SECRET” OF THE
EUROPEAN CONSTITUTION: AN ALTERNATIVE
(EXPLANATORY) PROPOSAL

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an Alternative (Explanatory) Proposal*

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Abstract

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.

It is divided into three parts: in the first part I introduce briefly the general debate on the notion and the nature of the European Constitution. In the second part I discuss the most important “constitutional theories” of EU integration and, finally, in the third 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. Obviously 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.

Keywords

Complexity, European integration, European Constitutional Law, constitutional synallagma

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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 paper 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 paper as the first outcome of constitutional complexity. This is understood as the whole of the principles, practices and rules which circulate uninterruptedly from one constitutional level to another in a twofold direction (from top to bottom and vice versa) and which permits the genesis and the reshaping of the structural principles of EU law.

This paper is divided into three parts: in the first part I introduce briefly the general debate on the notion and the nature of the European Constitution. In the second part I discuss the most important “constitutional theories” of EU integration and, finally, in the third 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. Obviously 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.

¹ It is necessary to recall what Bagehot meant by “efficient”: “... No 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 divide 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”, Walter Bagehot, *The English Constitution*, Oxford University Press, 1867, reprinted 2001, 44.

² Bagehot, *The English Constitution* cit, 48.

Part I: In Search of a European Constitutional Law

Normally by the formula “constitutionalisation” of the EU legal order, authors³ mean the progressive shift of EC law from the perspective of an international organisation to that of a federal state. A different meaning of the constitutionalisation process of the EC 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.⁴

In this respect a great contribution was made by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁵ 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 and the Court of Justice of the European Union (ECJ).⁶

Another important step can be found in the proclamation of the Charter of Fundamental Rights of the EU⁷, which brought new blood to the debate about the writing of a European Constitution⁸ and the possibility of a Bill of Rights at EU level⁹, 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 Charter¹⁰ despite the rejection of the Constitutional Treaty (CT) and before the coming into force of the Reform

³ For example, M. Cartabia and J. H. H. Weiler, *L’Italia in Europa*, Bologna, Mulino, 2000, pp. 73 ff. About the ambiguity of the notion of constitutionalisation in EC/EU Law see: F. Snyder, “The unfinished constitution of the European Union”, in J. H. H. Weiler and M. Wind (eds.), *European constitutionalism beyond the state*, Cambridge University Press, 2003.

⁴ On this process, see K. Lenaerts, “Fundamental rights in the European Union”, *European Law Review*, 2000, 575 ff.

⁵ On the interplay between ECHR and EC/EU law, see X. Groussot, *General principles of Community Law*, Europa Law Publishing, 2006, 63 ff.

⁶ Case T-112/98, *Mannesmannröhren-Werke AG v Commission* [2001] ECR, 729. See also *Matthews v UK* [1999] R.U.D.H. 263.

Now, thanks to the entrance into force of the Reform Treaty the EU has acquired international legal personality and its accession to the ECHR system will be possible (although the process will be very long, as it implies the revision of the system of the European Convention itself).

⁷ For a commentary, see K. Feus (ed.), *The EU Charter of Fundamental Rights. Text and commentaries, Constitution for Europe*, Federal Trust Series 1, Logan Page, London, 2000; G. Braibant, *La Charte des droits fondamentaux de l’Union européenne. Témoignage et commentaires*, Paris 2001; UK House of Commons, Human Rights in the EU: The Charter of Fundamental Rights, Research Paper 00/32, March 20, 2000; see the special issues of the following journals: *Revue Universelle des Droits de l’Homme*, Volume 12, Issues 1 and 2 (with contributions from Benoit-Rohmer, Jacqué, Fischbach, Dietmar, Wachsmann, Simon, Sudre, De Schutter and Tulkens) and *Maastricht Journal of European and Comparative Law*, Volume 8, Issue 1, 2001 (with contributions from Wouters, Willem, Verhey, Gijzen, Lemmens, Besselink, de Witte, de Smijter and Lenaerts, van Ooik and Curtin); *European Review of Public Law*, Vol. 13, No. 3, 2001. For a complete bibliography on the Nice Charter, see <http://www.arena.uio.no/cidel/cwatch/bibliography.html>; A. J. Menéndez, “Chartering Europe: The Charter of Fundamental Rights of the European Union”, Arena Working Paper 01/13, http://www.arena.uio.no/publications/wp01_13.htm.

For a very interesting introduction to the idea of a European constitutional law, see: S. Douglas-Scott, *Constitutional law of the European Union*, Harlow, Longman, 2002 (especially 3-44 and 515-530).

⁸ See the image by C. Pinelli, *Il momento della scrittura*, Bologna, Il Mulino, 2002.

⁹ D. Grimm, “Il significato della stesura di un catalogo europeo dei diritti fondamentali nell’ottica della critica dell’ipotesi di una Costituzione europea”, in G. Zagrebelsky (ed.) *Diritti e Costituzione nell’Unione Europea*, Rome and Bari, 2003, 15 ff.; F. Mayer, “La Charte européenne des droits fondamentaux et la Constitution européenne”, *Revue trimestrielle de droit européen*, 2003, 194-195; V. Skouris, “La protezione dei diritti fondamentali nell’Unione europea nella prospettiva dell’adozione di una Costituzione europea”, in L.S. Rossi (ed.), *Il progetto di Trattato-Costituzione, verso una nuova architettura dell’Unione europea*, Bologna, Il Mulino, 2004, 254 ff.

¹⁰ Among the other cases, see: C-438/05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union* [2007] ECR, I-10779, and C-341/05, *C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR, I-11767.

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Treaty (RT) which has given it legally binding force (although the position of some Member States, like the UK and Poland, is not clear because of the so-called opt-out signed by these countries¹¹).

By European Constitutional Law one can thus mean both the *corpus of fundamental principles*¹² devised by the ECJ in attempting to transform Europe¹³ (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 Charter of Nice European constitutional law as an autonomous discipline. Starting from this double meaning we could say that a *fil conducteur* in the recent history of European constitutional law is the continuous attempt to give the Charter a binding effect, trying 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. 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 Treaty¹⁴. From this point of view, as Corthaut points out, “*the Reform Treaty looks more like the (evil?) twin of*

¹¹ 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.

As we know, in fact, art. 6 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, rightly, that the goal of this protocol consisted in limiting the effect of the Charter without saying – and it would have been impossible under art. 6 EUT – that it is not binding on the UK and Poland.

“The opt-out is not an opt-out at all ” (C. Barnard, “The ‘opt-out’ for the UK and Poland from the Charter of Fundamental Rights: Triumph of rhetoric over reality?”, paper presented at the Conference “The Lisbon Treaty and the future of European constitutionalism”, 11-12 April 2008, EUI, Fiesole) and a confirmation of this hypothesis could be found in the words of 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”* House of Lords EU Select Committee, “The Treaty of Lisbon: an impact assessment”,

¹² On constitutionalisation as a creation, development and impact of general principles of the EU law legal order, see Groussot, *General, cit.*, 3.

¹³ See J. H. H. Weiler, “The transformation of Europe”, in J.H.H. Weiler, *The Constitution of Europe*, Cambridge University Press, 1999, 10-101.

¹⁴ J. Ziller, *Il nuovo Trattato europeo*, Bologna, Il Mulino, 2008, at 127.

*the Constitutional Treaty than its distant cousin*¹⁵. Ziller¹⁶ 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. Despite this substantial relative continuity, other authors have stressed the sense of disappointment which would characterise the document, defining it as a "*Postconstitutional Treaty*"¹⁷.

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, as follows:

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.¹⁸

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 Europe¹⁹. 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, “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.”²⁰ When observing the evolutionary/historical constitutions one realises that, “Codification, consolidation and adaptation are more predominant motives than modification. The constitution reflects historical movements outside itself.”²¹

The semi-permanent revision process of Treaties²² 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.

¹⁵ T. Corthaut, “Plus ça change, plus c'est la même chose? A comparison with the Constitutional Treaty”, *Maastricht Journal of European and Comparative Law*, 2008, 21-34, at 34.

¹⁶ Ziller, *Il nuovo Trattato*, cit., at pp. 27 ff.

¹⁷ 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”. A. Somek, “Postconstitutional Treaty”, *German Law Journal*, 2007, 1121-1132, at 1126-1127.

¹⁸ J. Bast, “The Constitutional Treaty as a Reflexive Constitution”, *German Law Journal*, 2005, 1433-1452, at 1438 and 1449.

¹⁹ L. Besselink, “The notion and nature of the European Constitution after the Reform Treaty”, Working Paper, 2007, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086189.

²⁰ *Ibid.*

²¹ *Ibid.*

²² B. de Witte, “The closest thing to a constitutional conversation in Europe: The semi-permanent treaty revision process”, in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence and divergence in European Public Law*, Oxford, Hart, 2002, 39-57.

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Against this background the European Treaties seem to be unable to lead the social forces: they can only “reflect the historical movements”²³, 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”²⁴, 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 they neglect the current constitutional dynamics already existing in the EU. 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 Treaties²⁵. In the following 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”²⁶) 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”²⁷. The dualistic structure of Hayek’s thought links the idea of constructivism to that of order, which can be conceived in two different ways: order²⁸ as *κόσμος* (spontaneous order) and order as *τάξις* (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. For example, the concept of constitution (and constitutionalism) inferred from Article 16 of the Declaration of the Rights of Man and of the Citizen²⁹, is to pursue the division of powers and the protection of rights, strive for change and address 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).

²³ Besselink, “The Notion”, *cit.*

²⁴ *Ibid.*

²⁵ The first case is *Les Verts*: C-294/83, *Parti ecologiste “Les Verts” v European Parliament* [1986] ECR 1339, 39: “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 also Opinion 1/91 on the EEA Agreement [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”. C-402/05 P, *Kadi v Council and Commission*, not yet published: “[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 L. Azoulay and M. P. Maduro (eds.), *The past and the future of EU law*, Oxford, Hart, 2010.

²⁶ N. Krisch, *Beyond constitutionalism. The pluralist structure of postnational law*, Oxford University Press, Oxford, 2010.

²⁷ A. Hayek, *Law, Legislation and Liberty*, vol. 1, *Rules and Order*, Routledge, 1973, 5.

²⁸ “... 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.” *Ibid.*, 20.

²⁹ Declaration of the Rights of Man and of the Citizen, Art 16: “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.”

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 *ταξίς* (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 abovementioned 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.

This point has been already challenged by authors such as 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.”³⁰ 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 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 their acceptance 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”³¹.

The ECJ’s interpretative rulings are a cultural source of law and played a fundamental role in pushing forward the process of European integration, while political sources (directives, regulations) were often 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”³² 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, contributing to what I call “constitutional synallagma” in the second part of this essay.

As we will see, the theoretical framework supporting the need for research that I am proposing can be linked to the existence of a multi-level constitutional legal order and of a constitution resulting from never-ending comparison and dialectic between “closely interwoven and interdependent”³³ 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 system is represented by the existence of shared legal sources, which make the attempt at defining legal orders

³⁰ M. P. Maduro, “Contrapuntual law: Europe’s constitutional pluralism in action” in N. Walker, *Sovereignty in transition*, Oxford, Hart, 2003, 501-537, at 514.

³¹ A. Pizzorusso, *Sistemi giuridici comparati*, Giuffrè, 1998, 263-4. See also A. Pizzorusso, “Fonti politiche e fonti culturali del diritto” in *Studi in onore di T Liebman*, I, Giuffrè, 1979, 32 ff.

³² E. Stein, “Lawyers, judges and making of transnational constitution” *American Journal of International Law*, 1981, 1.

³³ I. Pernice, “Multilevel constitutionalism in the European Union”, Working Paper, 5/02, available at: www.rewi.hu-berlin.de/WHI/papers/whipapers502/constitutionalism.pdf.

as *self-contained regimes* very difficult. This is consistent with the attempt to provide an integrated and *complex* (i.e., interlaced³⁴) 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 provisions³⁵) rather than *conflicts of laws*³⁶, interpretative competition being the dynamic side of conflicts. I return to this point when presenting the idea of constitutional complexity.

Part II: Looking at Two Examples of Constitutional Theories of European Integration: Multilevel Constitutionalism and Constitutional Pluralism. An Overview.

The common core of the massive body of literature regarding the notion of the European Constitution³⁷ undoubtedly rests on the idea of diversity, conceived as the ultimate value which is to be preserved in all the phases of the EC/EU integration process. Confirmation of the correctness of this approach can be found in the continuous reference to the notion of diversity contained in the Preambles of the Constitutional Treaty, especially the Preamble of the Charter of Nice:

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels.

In these statements, Europe is described as suspended on cultural and historical diversities that are conceived as a factor of spiritual richness rather than a danger for the common path. This “tension” is highlighted in the main works devoted to European integration which find a common core (leaving their different starting perspectives out of consideration) in the acceptance of this phenomenon as *novum*.

Having said this, within the literature there are some specific scholarly positions that, in my view, go beyond the reading of the EU as the chemistry of coexisting diversities. These approaches – that I call “constitutional theories” in this paper – conceive the interpenetration among actors characterised by different values and concerns as the “quiddity” of the EU.

By constitutional theories I do not refer to what Ward³⁸ means when writing about an *EU legal theory*. Rather, I mean an intellectual effort that does not limit itself to the analysis of the legal data but which attempts to catch – by using the formula proposed by Bagehot³⁹ – “the efficient secret” of the European Constitution, and to read, as far as possible, the whole of the European dynamics (for instance, Weiler’s theory understands constitutional tolerance as the secret of the European Constitution). Theories such as multilevel constitutionalism and constitutional pluralism aim at studying the efficient secret of the European Constitution by going beyond the mere description of the

³⁴ G. Martinico, “Complexity and cultural sources of law in the EU context: From multilevel constitutionalism to constitutional synallagma” *German Law Journal*, 2007, 205.

³⁵ On the distinction between statements (*disposizioni*) and norms (*norme*), see V. Crisafulli, entry “Disposizione (e norma)”, in *Enc Dir*, XIII, Giuffrè, 1964, 195.

³⁶ For a similar but also slightly different conception, see: J Pauwelyn, *Conflict of norms in public international law: How WTO law relates to other rules of international law*, Cambridge University Press, 2003, 6-8.

³⁷ For a literature survey see: M.Kumm, “Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called”, *American Journal of Comparative Law*, 2006, pp. 505-30; G.Martinico, “From the Constitution for Europe to the Reform Treaty: A Literature Survey on European Constitutional Law,” *Perspectives on Federalism*, Vol. 1, Single Issue, 2009, pp. R 13-41.

³⁸ Ward, *A Critical introduction to European Law*, Butterworths, 1996.

³⁹ Bagehot, *The English Constitution*, Oxford University Press, 2001, 48.

legal and institutional evolutions of the main political actors of the EU.

Multilevel Constitutionalism

The idea of cooperation between actors characterized by different values and concerns is supported by those theories which emphasize the interpenetration between constitutional entities as the real engine of the EU's progressive constitutionalization. Multilevel constitutionalism⁴⁰ is exactly that: a vision which captures the dynamic aspect of integration between legal orders and stresses the idea of complementarity between national and supranational levels. According to Pernice – the inventor of this formula – it is possible to conceive of the European Constitution as a process rather than a specific document⁴¹.

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 said, the national and supranational legal systems are “closely interwoven and interdependent”, one cannot be read and fully understood without regard to the other)⁴² 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.

This idea of the interpenetration between levels deserves attention: since the “national level” is far from being homogeneous⁴³ (because of the several differences existing between the Member States' legal orders) and starting from the idea that compatibility between constitutional levels facilitates coordination, one can argue that – from a theoretical point of view – whereas the European Constitution is the result of the coordination between legal orders, the outcome of this process will depend on the national legal order taken as a parameter of coordination.

Due to the Member States' different legal traditions such a comparison between these two levels cannot be described as typical: on the contrary, different kinds of coordination can be observed. A good example of such a horizontal diversity is represented by the coordination between national administrative legal systems and the supranational principles of European administrative law.

There have been different reactions to the European principle of proportionality, due to the characteristics of the various national orders: “resistance” in the UK, “adaptation” in Italy and “mutation” in Germany⁴⁴. Another case is represented by the national resistance to the European economic constitution, sometimes causing the Treaties to be forced to interact with more compatible legal orders (for example, the UK) or, in other cases, with less liberal orders (such as Italy)⁴⁵

Why am I dwelling on this point? Because what seems to be neglected in Pernice's reasoning is the concrete consequence of the horizontal diversity which characterizes the national constitutions as such.

Another weakness of this approach is its carelessness towards the international level, in spite of the frequent reference to the international covenants of fundamental rights made by the EU

⁴⁰ I. Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?”, *Common Market Law Review*, 1999, 703-750.

⁴¹ F. Mayer and I. Pernice, “La costituzione integrata dell'Europa”, in G. Zagrebelsky (ed.), *Diritti e Costituzione nell'Unione Europea*, Rome and Bari, Laterza, 43-68, 49.

⁴² I. Pernice, “Multilevel Constitutionalism in the European Union”, *European Law Review*, 2002, 511 ff.

⁴³ We can also find some confirmation of this lack of national uniformity in the Treaties. Art. 295 ECT (now Art. 345 TFUE), for example, reads: “The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”. Similarly the Charter of Nice always makes a reference to the national legal orders by dividing rather than unifying them (see, for example, Art. 34, 35, 36). All these provisions imply the acknowledgment of the horizontal diversity of the national level.

⁴⁴ D. U. Galetta, “Il principio di proporzionalità comunitario e il suo effetto di spill over negli ordinamenti nazionali”, *Nuove autonomie*, 2005, 541-557.

⁴⁵ The Italian case is paradigmatic because of the heavy impact of negative integration which caused the substantial abrogation of entire provisions of the Constitution.

documents and by the ECJ case law⁴⁶. The exclusion of the international level implies the lack of consideration of the European Convention on Human Rights which was instead fundamental in the legal reasoning of the ECJ in cases such as *Rutili*⁴⁷, *Ert*⁴⁸ and *Hauer*⁴⁹.

Returning to the ambiguities of Pernice’s view, Leonard Besselink⁵⁰ presents a criticism of the notion of multilevel constitutionalism on the following grounds. First of all, according to Besselink, “thinking in terms of ‘levels’ ... involves inescapably the concept of hierarchy”, because levels imply “by definition the existence of ‘higher’ and ‘lower’ levels, super-ordination and sub-ordination, superiority and inferiority”⁵¹. Secondly, “even if the dynamics between the ‘levels’ are emphasized – the higher level influences the lower one and the lower one tries to influence the higher one – the implicit point of departure is that these are separate levels”. In a word, the author contests the fact that Pernice describes the “levels” as autonomous legal orders. On the contrary, by “composite constitution” Besselink means a constitution “whose component parts mutually assume one another’s existence, both *de facto* and *de iure*”⁵².

In Besselink’s perspective, the “levels” are seen as incomplete and interlaced and the dimension of the European Constitution’s heteronomy seems to prevail: merely looking at the Treaties, in fact, it is not possible to appreciate the important contributions offered to European constitutional law by elements which are formally external to the treaties (such as the national constitutional traditions and the European Convention on Human Rights). The idea of mutual relationship is therefore central in this perspective.

After having explained the grounds of his criticism of the notion of multilevel constitutionalism, Besselink moves on to deal with the burning issue of primacy. Does the primacy principle represent a counter-argumentation to the idea of composite constitution? Does primacy imply a hierarchical vision of the relationship between legal orders? Given the absence of a perfect impermeability between the EU and national constitutions, the primacy principle as a rule of precedence is construed as a norm conceived with the purpose of solving conflicts.

The relation between the EU and Member States is not a two-level junction, they do not operate on different levels; on the contrary, they meet “each other on the same level” (this way Besselink once again opposes the idea of a multilevel constitutionalism). Furthermore, Besselink argues that the hierarchical approach is not adequate to explain the relationship between the EU and national constitutions, by reason of the increasing sensitivity shown by the ECJ with regard to the significance of national constitutional identities. The best instance of such a statement is provided by the comparison between the *Internationale Hadesgesellschaft* doctrine and the recent ECJ case law in the field of human rights (see, for example, *Omega*⁵³ or *Dynamic Medien*⁵⁴).

The example is not coincidental, because the field of human rights represents the best example of EU law’s constitutional heteronomy, and “the content of human rights norms within EU Law is largely derived from constitutional sources outside the EU sources in a strict sense: from the point of view of content, the protection of human rights by the EU institutions is heteronomous”⁵⁵.

⁴⁶ Although the author seems to “touch on” this level in some papers: for example, I. Pernice and R. Kantiz, *Fundamental Rights and Multilevel Constitutionalism in Europe*, WHI paper 7/2004.

⁴⁷ C-36/75, *Roland Rutili v. Ministre de l’intérieur*, 1975 E.C.R. 1219.

⁴⁸ C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 1991 E.C.R. I-2925.

⁴⁹ Case C-44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727.

⁵⁰ L. Besselink, *A Composite European Constitution/Een Samengestelde Europese Constitutie*, Groningen, Europa Law Publishing, 2007.

⁵¹ *Ibidem*, 6.

⁵² *Ibidem*.

⁵³ C-36/02, *Omega*, 2004, E.C.R., I-9609.

⁵⁴ C-244/06, *Dynamic Medien*, 2008, E.C.R. I-505.

⁵⁵ Besselink, *A Composite European*, *cit* at 15.

Concluding this section and reviewing the debate, we can therefore say that the ultra-state dimension of such a constitutional entity implies the absence of the classic cultural and constitutional homogeneity which characterized the usual national constitutional dimension. The European Constitution is thus conceived as a *monstruum compositum*, composed of constitutional principles developed at the European level and complemented by (common) national constitutional principles⁵⁶. 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. Against this background, multilevel constitutionalism offers a strong but static basis for the identification of the essence of the European Constitution, understood as an interplay among levels; it recognizes the diversification of the national legal systems towards EU penetration but does not care to specify the implications of such a diversification in the coordination. In short, it does not pay attention to the national constitutional variety (the horizontal diversity I stressed above) or to the possible existence of conflicts among levels.

Constitutional Pluralism

The view of constitutional pluralism⁵⁷ seems to pay much more attention to the importance of judicial actors and to the burning issue of constitutional conflicts. This can be seen especially when looking at the idea of contrapuntual law proposed by Miguel Poiares Maduro⁵⁸, or at the writings by Mattias Kumm⁵⁹. Both these positions then can be inferred from that of constitutional pluralism as expressed by Neil MacCormick⁶⁰ and Neil Walker⁶¹.

In its simplest version the idea of constitutional pluralism refers to a situation of the co-existence of several constitutional sites, each claiming authority. Moving from the description of such a situation to a possible solution of the conflict caused by constitutional heterogeneity, Maduro tries to identify some procedural (that is, *prima facie* neutral from an axiological point of view) principles that should lead the behaviour of the actors involved in the constitutional-pluralistic background. According to Maduro:

These meta-methodological principles aim to secure those values in a context where you do not have an ultimate authoritative source to do that. But certainly, I do not see it necessarily as a post-modern project. To the contrary, since my conception of constitutionalism is deeply embedded by a concern with the rationalisation of the democratic process.⁶²

⁵⁶ See, among others: M. Claes, *The National Courts' Mandate in the European Constitution*, Oxford, Hart, 2006.

⁵⁷ On constitutional pluralism, see: N. Walker, "The Idea of Constitutional Pluralism", *Modern Law Review*, 65, 2002, 317-359; Maduro, "Contrapuntual Law", *cit.*; M. P. Maduro, "Interpreting European Law: Judicial adjudication in a context of constitutional pluralism", *European Journal of Legal Studies*, 2, 2007, available at:

<http://ejls.eu/index.php?mode=htmlarticle&filename=../issues/2007-12/MaduroUK.htm>. For a comparison between the different visions of constitutional pluralism, see A. Avbelj and J. Komarek (eds.), "Four visions of constitutional pluralism", EUI Working Paper No. 28/2001, available at:

http://cadmus.iue.it/dspace/bitstream/1814/9372/1/LAW_2008_21.pdf. For a different concept of pluralism conceived as in opposition to that of constitutionalism, see N. Krisch, "Europe's constitutional monstrosity", *Oxford Journal of Legal Studies*, 25(2), 2005, 321-334. See also: Douglas-Scott, *Constitutional Law*, *cit.*, 523-530.

⁵⁸ Maduro, "Contrapuntual Law", *cit.*, 501-537.

⁵⁹ M. Kumm, "The jurisprudence of constitutional conflict: Constitutional supremacy in Europe before and after the Constitutional Treaty", *European Law Journal*, 11(3), 2005, 262-307.

⁶⁰ N. MacCormick, "Beyond the sovereign state", *Modern Law Review*, 56, 1993, 1-18. In this article MacCormick, after adopting Hart's concept of "rules of recognition", notes that "*national and European legal orders could well have different rules of recognition, without the different rules necessarily clashing with each other...Conflicts will be contingent since each legal order, and institution thereof, perceives and avoids conflicts the cost of which would be higher than a compromise*", M. P. Maduro, *The European Court of Justice and the European Economic Constitution*, Oxford, Hart, 1998, 31.

⁶¹ Especially in: N. Walker, "The idea of constitutional pluralism", *Modern Law Review*, 2002, 317-359.

⁶² M.P. Maduro in Avbelj and Komárek (eds.), "Four Visions", *cit.*

The system these authors describe in fact does not present itself as merely plural but also as characterised by a strong constitutional pluralism, and the need for interpretive uniformity against the danger of axiological fragmentation is the real challenge for actors in this system. Another importance difference between constitutional pluralism and multilevel constitutionalism is given by the conception of the role of the judges in this context: Pernice’s pattern seems not to pay sufficient attention to the gap between the letter of each level’s fundamental charter and its material enforcement by the courts, thus presenting another ambiguity.

This is evident with regard to the principle of primacy, which was extracted from the spirit (and not from the letter) of the Treaties, but it is also confirmed by the national constitutional experience where the national Constitutional Courts have integrated the formal European national clauses in their case law by identifying, for example, some impenetrable barriers to European integration despite the absence of an explicit constitutional provision limiting European integration itself (see the Italian, French and Spanish cases according to the doctrine of counter-limits [*controlimiti*] of the Italian *Corte Costituzionale*⁶³).

On the contrary, the view of constitutional pluralism (especially Maduro’s vision) maintains due consideration of the role that the judicial dialogue has had in building and supporting such a pluralistic (and multilevel) constitutional structure. Maduro acknowledges that the decisions of courts have a crucial role in the context he describes but, at the same time, the judicial actors are pieces of a bigger puzzle because “the language of courts in defining what the law is does not become their exclusive property. It is taken over and used by a broader legal community with meanings that may be different from those originally intended”⁶⁴. In other words, the courts play a fundamental systemic function and the judicial dialogue is a privileged perspective for studying the relationship between legal orders without exhausting the subject.

The existence of multiple sites of constitutionalism and the absence of a clear interpretative sovereignty causes that form of interpretative competition which nourishes the relationship between the ECJ and the domestic courts (especially Constitutional Courts)⁶⁵. 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 competition⁶⁶ 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 attempts to create a parallel and alternative way of communicating with the ECJ⁶⁷. 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

⁶³ This formula was introduced into the Italian scholarly debate by Paolo Barile: P. Barile, “Ancora su diritto comunitario e diritto interno”, in *Studi per il XX anniversario dell’Assemblea costituente*, VI, Florence, 1969, 49.

⁶⁴ And then: “...courts may sometimes end up saying more than they wanted to say or being interpreted more broadly than they wanted to be interpreted. Judicial decisions are not the property of courts but of the legal community and this includes other legal actors whose preferences for judicial activity may vary from those of courts.”, Maduro, “Contrapuntual Law”, *cit.*, 514. On the political implications of the judicial decisions, see: M. Shapiro, *Law and politics in the Supreme Court. New approaches to political jurisprudence*, New York, Sage, 1964; C. Sunstein, *Legal reasoning and political conflict*, Oxford University Press, 1996. With regard to the ECJ, see Weiler, “The Transformation of Europe”, *cit.*

⁶⁵ On the inter-court competition as a key to reading the relationship between judges, see the fundamental work by K. Alter, “Explaining national court acceptance of European Court jurisprudence: A critical evaluation of theories of legal integration”, in A. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds), *The European Court and national courts – doctrine and jurisprudence. Legal change in its social context*, Oxford, Hart, 1997, 227-252.

⁶⁶ M. P. Maduro, “Courts and pluralism: Essay on a theory of judicial adjudication in the context of legal and constitutional pluralism”, in J. L. Dunoff and J. P. Trachtman, *Ruling the world? Constitutionalism, international law, and global governance*, Cambridge, Cambridge University Press, 2009, 356-379, 358.

⁶⁷ G. Martinico, “Judging In The Multilevel Legal Order: Exploring The Techniques Of ‘Hidden Dialogue’”, *King’s Law Journal*, 21.2, 2010, 257-281.

game within the ambit of the preliminary ruling is governed by the Treaties, which represent the competitor's 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.

Going beyond its descriptive value, Maduro's view on constitutional pluralism presents a strong normative character since it does not limit itself to describing what constitutional pluralism is but attempts to provide some solutions for a better coordination among judges: pluralism⁶⁸, consistency and vertical and horizontal coherence⁶⁹, universalisability⁷⁰ and the principle of the institutional choices⁷¹ are at the heart of his view. All these principles should contribute to define 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.

A similar observation may be made with regard to Mattias Kumm's works, especially paying attention to his principle of best fit:

But how should national courts go about making a positive choice between competing conflict rules, assuming that the adoption of both NCS (National Constitutional Supremacy) and ECS (European Constitutional Supremacy) fulfills the threshold criterion of fit that defined the limits the court's institutional role? Is there anything to guide the choice of national courts? Judges dealing with constitutional conflicts cannot look either to their respective national constitution or to the Constitutional Charter of the European Union as their ultimate point of reference without committing a *petitio principii*. Does that mean that their choice is necessarily legally unguided? ... Instead of being constrained by *neither* national or European constitutional law, when choosing the right rule, national courts ought to seek guidance from *both*. *The task of national courts is to construct an adequate relationship between the national and the European legal order on the basis of the best interpretation of the principles underlying them both. The right conflict rule or set of conflict rules for a national judge to adopt is the one that is best calculated to produce the best solutions to realise the ideals underlying legal practice in the European Union and its Member States.* Just as the constraints that judges face are not appropriately defined exclusively by reference to a rule of recognition, the resources that are available to guide their decision-making are not ultimately defined by an ultimate legal rule, but by legal practice seen as a whole. The relevant question is, therefore: what is the interpretation of the relationship between national constitutions and the EU constitution that *best fits and justifies legal practices in the European Union, seen as a whole*? Or alternatively: what makes national and European constitutional practice in Europe appear in its best light?⁷²

Concluding this second part of the paper, one can see how both views – multilevel constitutionalism and constitutional pluralism – go beyond the binomial of European Constitution-no European *demos* (a binomial which dominated all the previous scholarly positions in this field⁷³) when describing the constitutional dynamics of the European integration, by conceiving of the European Constitution as the outcome of the relationship existing between constitutional levels or poles. At the same time while multilevel constitutionalism does not seem to pay attention to the horizontal diversity present at national level and to the issue of the constitutional conflicts, these are at the heart of the constitutional

⁶⁸ According to Maduro, pluralism is mutual respect for the identity of the other legal orders and promotion of the broadest and most equal participation achievable.

⁶⁹ In his own words: “When national courts apply EU law they must do so in such a manner as to make to these decisions taken by the European Court of Justice but also by other national courts”, *Ibid.*, 528.

⁷⁰ According to Maduro, every judge in the multilevel system should be obliged to argue and justify his or her decisions so that the national courts have to justify their decisions “in a manner that could be universalisable”, *Ibid.*, 530.

⁷¹ The institutions of each legal order must “be fully aware of the institutional choices involved in any request for action in a pluralist legal community”, *Ibid.*, 530.

⁷² Kumm, “The jurisprudence of constitutional conflict”, *cit.*, 286.

⁷³ See the debate between Habermas and Grimm on this point: J. Habermas, “Una costituzione per l’Europa? Osservazioni su Dieter Grimm”, in J. Luther, P.P. Portinaro and G. Zagrebelsky (eds), *Il futuro della costituzione*, 1996, 339-367, 369-375; D. Grimm, “Una costituzione per l’Europa?”, *Ibid.*, 339-367.

pluralists’ vision. 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. I return to this point in the final part of the paper when I stress the systematic role that constitutional conflicts might play in the complex legal order.

Part III: 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 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*⁷⁴ “complexity” is used in several ways. Millard, for instance, recalls at least four different meanings of the word complex⁷⁵. 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 coexistence 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 “à la situation d’un objet fragmentée, découpée. 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 s’entremêlés”⁷⁶. 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, complexity is meant as interdependency of the objects with regard to their relative autonomy: in this paper 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 (complexity from Latin *complexus* = interlaced) 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 complexity⁷⁷ 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 Weiler’s suggestions, 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 well describes the multilevel situation where the legal orders are not only indistinguishable but 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

⁷⁴ E. Morin, *Introduzione al pensiero complesso*, Milan, Sperling & Kupfer, 1993, and idem, *Conoscenza della conoscenza*, Milan, Feltrinelli, 1989. On Morin: M. Sandri, “La complessità: verità acquisite e falsi miti”, *Kéiron*, 7, 2001, 98 ff. On Europe as a complex system see: E. Morin, *Pensare l’Europa*, Milan, Feltrinelli, 1988.

⁷⁵ E. Millard, “Éléments pour une approche analytique de la complexité”, in M. Doat, J. Le Goff and P. Pédrot (eds.), *Droit et complexité (Pour une nouvelle intelligence du droit vivant)*, Rennes, Presses Universitaires de Rennes, 2007, 141-153.

⁷⁶ *Ibidem*, 143.

⁷⁷ For a similar but also different attempt to apply the notion of complexity, see: M. Delmas Marty, “Can We Facilitate the Transitions between Horizontal Cooperation and Vertical Harmonisation Necessary to Create a Universal Legal Order?”, 2007, http://www.axess.se/english/2006/04/theme_delmasmarty.php.

category which has caused a fundamental shift in the history of social and experimental sciences.⁷⁸ The notion of complexity is the result 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.⁷⁹ It is important to distinguish the notion of complexity from other concepts: “[C]omplex does not mean only complicated or composed of several elements. Complex is a system with non-determinable collective behaviour starting from the behaviour of its components.”⁸⁰ One of the most important scholars of complexity, Edgar Morin,⁸¹ 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).⁸² Starting with the physical meaning of complexity it is possible to identify the following features commonly accepted in the other disciplines:

- **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 from the final condition it is possible to return to the starting condition, the complex systems are non-reversible due to the non-linearity of the evolution
- **Non-reducibility:** the result of the relationship among diversities does not present itself as a mere sum of the latter but it is something different
- **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 if we know the initial state of the components

⁷⁸ 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” (D. Zolo, “L’analisi sistemica del Welfare State”, in D. Zolo (ed.), *Complessità e democrazia*, Turin, Giappichelli, 1987, 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 U. Galimberti (ed.) *Dizionario di psicologia* 1992, 196-197). Among Jung’s works on this topic: C.G. Jung, “Considerazioni generali sulla teoria dei complessi” (1934) in *Opere*, 1976, Vol. III, 1976). For the medieval logicians a complex term is composed of different words (example: “white man” or “rational animal”) while *incomplexum* means *isolated* (entry: “Complesso”, N. Abbagnano (ed.), *Dizionario di filosofia*, 1968, 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* (I. Prigogine and I. 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” (L. Bigliuzzi Geri, U. Breccia, F.D. Busnelli and U. Natoli, *Diritto civile*, Vol. I Tomo II, Turin, UTET, 2000, 546-547).

⁷⁹ G. Widmann, “Identità e diversità”, *Il Margine*, 4, 2001,
<http://archivio.il-margine.it/archivio/2001/f4.htm>.

⁸⁰ V. Loreto, “Non equilibrio e complessità”, <http://www.mosac.com>.

⁸¹ See footnote n. 74.

⁸² 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. Leibniz). For a summary of these opinions: N. Abbagnano (ed.), *Dizionario di filosofia*, 1960, 446-447,.

Complexity as the “efficient secret” of the European Constitution

- **Non-determinability (rectius, non-determinism):** the complex system does not follow necessary and univocal laws according to a linear concept of the evolution based on the dialectic of cause/effect

In my opinion, the notion of complexity is useful to understand the “efficient secret” of the European Constitution. First of all, the European Constitution is not reducible to the sum of legal provisions at various levels. I mean that, for example, it is impossible to “find” the legal basis for the principles of supremacy and direct effect in the letters of the Treaty or in the letters of the national Constitutions. In *Van Gend en Loos*,⁸³ and *Costa*⁸⁴ 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 Treaties⁸⁵.

Second, it is very difficult to foresee the result of the coordination among levels by looking only at the formal provisions: the best example is given by the “constitutional tolerance” in those national legal orders which 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”⁸⁶. 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 “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”⁸⁷), 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.

Third, European integration does not follow a precise political project (the triumph of “functionalism”) and consequently the ECJ did not assume an imperialistic approach in its interpretative function. In this sense it is possible to recall the famous dialectic between constitutional tolerance and judicial activism⁸⁸ in the activity of the ECJ and its effect on the coherence of ECJ case law: *Kalanke*⁸⁹ versus *Marschall*,⁹⁰ *Grant*⁹¹ versus *P/S*⁹². The non-determinability implies the non-manageability of the 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 the attempt of crystallization of the primacy clause (I-6). 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. The judgments are flexible sources, more

⁸³ Case C-26/62, *Van Gend en Loos*, 1963 E.C.R. 3.

⁸⁴ Case C- 6/64, *Costa v. ENEL*, 1964 E.C.R. 1141.

⁸⁵ “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”, Case C-26/62, *Van Gend en Loos*, 1963 E.C.R. 3

⁸⁶ Italian Constitution, art. 11.

⁸⁷ Italian Constitution, art. 101

⁸⁸ See O. Pollicino, “Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint”, I and II, 2004, *German Law Journal*, 5, 3.

⁸⁹ Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051.

⁹⁰ Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 R.a.c.c. I-6363.

⁹¹ Case C-249/96, *Grant v. South West Trains Ltd.*, 1998 E.C.R. I-2143.

⁹² Case C-171/88, *P / S and Cornwall County Council*, 1996 E.C.R. I-2143.

adaptable to the changing context and aims of EC/EU while the latter imply a constructivist and linear policy (*indirizzo politico*).

Finally the EC/EU route was not a linear process because of functional predominance and State resistance. Thanks to Article 267 TFUE, the Court had a fundamental role: this provision allowed the Court to manipulate the legal “material”. 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 starting condition because all the systems involved in the coordination have evolved and changed, thanks to mutual implications and influence. Having said this, I argue that the European Union is a complex reality which is suspended on mutual diversities and requires legal and constitutional interpenetration. It is the outcome of a coordination which demands the solution of some incompatible antinomies. As a consequence, it is impossible to understand the whole (the system) starting from one of its parts.

If the EU as a complex system is characterized by the interlacing of different 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 specify 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 counterlimits (*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 *counterlimits* (quoting the language used by the Italian Constitutional Court) and the common constitutional traditions as pointed out by some scholars⁹³. The common constitutional traditions and the counterlimits 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 EC 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 ECJ⁹⁴. 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*.

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. Galetta⁹⁵ 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, which represented a fundamental turn in this sense. Another example is represented by Italy, where national judges

⁹³ Ruggeri, “Tradizioni costituzionali comuni e ‘controlimiti’, tra teoria delle fonti e teoria dell’interpretazione”, *Dir. Pub. Comp. E. Eur.*, 2003, 102-120.

⁹⁴ C-96/03 and C-97/03, *A. Tempelman and Coniugi T.H.J.M. van Schaijk v. Directeur van de Rijksdienst voor de keuring van Vee en Vlees*, 2005, E.C.R., I-1895.

⁹⁵ Galetta, “Il principio”, *cit.*, 541-557.

misunderstood the test of proportionality: clear proof of such a situation can be found in the confusion between reasonableness and proportionality⁹⁶. 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 demands⁹⁷.

Complexity as Constitutional Theory of European Integration

Constitutional complexity is of course indebted to some scholarly views on the European Union, namely multilevel constitutionalism and constitutional pluralism. 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. At the same time constitutional complexity points out how the interlacing that exists between legal orders exalts interpretive competition, the role of the judges and the case by case approach. Unlike constitutional pluralism, complexity does not present a normative proposal for adjusting or neutralising constitutional conflicts between constitutional supremacy and EU law primacy. Attempting to reduce complexity would mean killing or denying complexity.

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. Look at the *Solange* case, 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*? As everybody knows, in *Solange* – a judgment delivered a few years after the ambivalent judgment in *Internationale Handelsgesellschaft*⁹⁸ – the German Constitutional Court said that “as long as [German: *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”⁹⁹. In other words, 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)¹⁰⁰. 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 and new important provisions have been introduced in the Treaties, namely Articles 6 and 7 of the EUT. For example, in *Omega*¹⁰¹ 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 of the necessity, for the EU law primacy, to stop in front of values codified in a national constitution:

⁹⁶ TAR Lecce, Bari, Sez. III, from 2483/2004 to 2493/2004, available at: www.giustizia-amministrativa.it.

⁹⁷ *Gundesverwaltungsgericht*, BVerwG- Federal Administrative Court, *Deutsches Verwaltungsblatt* (DVBl) 613, 1993; *Gundesverwaltungsgericht*, BVerwG- Federal Administrative Court, *Deutsches Verwaltungsblatt* (DVBl) 68 1997.

⁹⁸ 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125. I am referring to the very famous point in which the ECJ argued 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”.

⁹⁹ BVerfGE 37, 271 2 BvL 52/71 *Solange* I-Beschluß.

¹⁰⁰ Declaration of the Rights of Man and of the Citizen (1789), Art. 16: “A society in which the guarantee of the rights is not secured, or the separation of powers not determined, has no constitution at all”.

¹⁰¹ C-36/02 *Omega* [2004] ECR I-9609, par. 41.

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 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 ripeness 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 counter-limits. 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 Ruggeri¹⁰², 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 ECJ¹⁰³.

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 (Art. 4 of EUT after the Reform Treaty of Lisbon) and I-6 of the Constitutional Treaty (omitted from the Reform Treaty of Lisbon). In Article I-5, in fact, we can find the proof of the communitarisation of the

¹⁰² A. Ruggeri, “‘Tradizioni costituzionali comuni’ e ‘controlimiti’, tra teoria delle fonti e teoria dell’interpretazione”, *Dir. Pub. Comp. e Eur*, 1, 2003, 102-120. The best example of such a dynamic is provided by the EC principle of proportionality, as we saw above.

¹⁰³ Emblematically, the ECJ held in *Omega*: “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”.

Complexity as the “efficient secret” of the European Constitution

counter-limits theory as a result of the judicial dialogue between the Constitutional Courts and the ECJ¹⁰⁴.

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*¹⁰⁵ 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 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 paper, I have attempted to present as the efficient secret of the European Constitution.

¹⁰⁴ 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 meant 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 “constitutional structure” and in this way it delivers the interpretation of the counter-limits to the ECJ.

¹⁰⁵ Case 11/70, *Internationale Handelsgesellschaft* 1970 ECR 1125.