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Book Reviews

Giuseppe Martinico, L'integrazione silente. La funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo, Jovene, Napoli, 2009

The book explores the *dark side* of EC Law, that is not the law of the Treaties – governed by the EU Institutions and by the Member States – but it is a kind of "silent law" (at 3), which stems from the judicial dialogue between courts and in a karstic manner shapes the law of the European Union (EU). In order to develop such analysis, the Author focuses preliminarily on the nature of the EC legal system and, within it, on the function of the European Court of justice (ECJ).

Recognising the hybrid character of the EU, in the first chapter, the Author pushes the doctrinal debate on that issue a step forward, incorporating the key aspect of diversity – stressed by the Treaties as the European system's distinguishing feature (in particular, in the I Preamble of the Treaty establishing a Constitution for Europe and in the II Preamble to the Charter of Fundamental Rights) – in the definition of the *complex* nature of the EU. Getting back to Morin, the term complexity is used in a strict and irreplaceable meaning. More precisely, it identifies a system whose behaviours cannot be fixed in advance according to the conducts of its single parts only: it is fed by the diversity of its components and it lives on the active relations among them. Efficaciously, the symbol of such a relational structure is identified in the directive, EC legal source that needs a positive interaction between the Community and the Member States in order to produce the desired legal effects. On this premise, the analysis easily includes the multilevel constitutionalism's approach, although transforming its static and descriptive vision into a dynamic interchange between legal orders. In this perspective, the EC system seems a "constitutively maimed" (at 33) legal order, which needs the Member States in order to found an autonomous legal system. The Author calls this necessary and continuous interaction between those legal actors *constitutional synallagma* (at 23 and 38), and he makes it the core of that unrepeatable *unicum*, which is the EU.

In this perspective, the Author emphasises the concept of European legal order, only implicit in Mayer and Pernice's analysis, and the correspondent idea of European Law, as something different from the mere EC law, namely as the combination of a continuous cooperation between national and supranational level. In this frame, besides the political sources of law another category, that of the cultural sources of law, which are not the manifestation of the will of the sovereign, but the answer to a "rational determined need of justice" (at 6), becomes fundamental.

Judicial decisions are a meaningful part of this construction, reproducing the complex dynamics of the European legal system: the dialogue between judges represents "the concrete and dynamic side of the complexity/weave which characterised the European multilevel system" (at 50) and, consequently,

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it becomes the privileged point of reference in the analysis of the relationships between legal orders. In this perspective, the second chapter focuses on the fundamental function played by the ECJ, the guardianship of unity in the interpretation of the norms in the EC legal order.

From this standpoint, the preliminary ruling proceeding, stated in Article 234 EC Treaty, becomes an essential means to grant the ECJ's monopoly of the interpretation. As a consequence, the preliminary ruling proceeding allows the ECJ to guide the national judges in their activity of interpretation and application of EC law.

In this regard, the third chapter is centred on the ECJ's interpretative judgments, which the Author considers sources of law. In particular, on grounds of both the *Cilfit* doctrine and Article 104 of the ECJ Rules of procedure, he demonstrates that the rulings of invalidity ex Article 234 EC Treaty are endowed with an *erga omnes* efficacy. It stems from an analogical interpretation of Article 230 EC Treaty and it means attributing to the *erga omnes* effect a *de iure* nature, and not only a *de facto* character, because of the continuity in the respect of some fundamental principles of law; first of all, the principle of legal certainty, otherwise compromised by the survival of norms declared invalid. Secondly, the principle of non discrimination, which impedes equal situations to be dealt with in different ways; furthermore, the principle of *effet utile* of the norm, which would lose part of its prescriptive power, should the *erga omnes* extent not be recognised. Considering that Article 234 EC Treaty does not distinguish between the effects of the judgments of invalidity and of interpretation of law, the Author infers that also the latter has an *erga omnes* effect. It implies a change in the judge of final instance's legal position: from the duty to raise the question in presence of a doubt to the possibility to raise it (even) if a previous ECJ pronouncement in the same or in a very similar case exists. Such an approach shapes the following judicial cooperation, conferring the ECJ a double role: it tries to fill the gaps in the EC legal order, delimiting, at the same time, the circuit of national interpretative competition.

However, in order to protect the EC court's interpretative function, the Author associates a kind of *erga omnes* effect also to those ECJ interpretative judgments that rule outside the preliminary procedure. In this regard, the *Köbler* case is a clear example, claiming the ECJ's monopoly on the interpretation of EC law without prejudicing the authority of the national court's ruling. In this perspective, every decision of the ECJ is a crossroads for national judges: they can conform to the EC court's interpretation or, *in dubio*, they can refer to it through the preliminary ruling, in any case preserving the ECJ's guardianship of EC law.

Moreover, in the fourth chapter the Author identifies this leading function of the ECJ in the development of the case-law and, in particular, in the judicial *de-pillarisation* process, which represents the attempt of the court to reaffirm its mastership on the interpretation in the first pillar, constitutionalising the third one.

However, in this virtuous circle of cooperation between the supranational and the national judges, characterised by complex antinomies, another actor plays a central role and represents a dialectic point of reference for the constitutionalisation of EC law: the national constitutional courts or the supreme

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courts, guardians of the national constitutions and endowed with a fundamental democratic legitimacy, which lacks to the European judge who, on the contrary, bears the well-known democratic deficit. In this perspective, their interaction is not of the kind of the ordinary and administrative national judges, because in the dialectic of integration they try to protect the fundamental rights posed in the national constitutions and, at the same time, preserve their central role in the interpretation of such constitutional liberties and values. To this end, in the fifth chapter, the Author analyses the different developments of the counter-limits doctrine in all the Member States describing it as a form of bargaining between constitutional courts and the ECJ (as the Solange saga shows). As a consequence, the constitutional values work like a "gun on the table" (at 198). From this point of view, the communitarisation of counter-limits (Article 6 EU Treaty) is interpreted as a proof of the constitutionalisation of EC Law, stating their closeness to the common constitutional traditions, absorbed in the EC legal system.

In this framework, between the constitutional courts and the ECJ some other informal means of negotiations take place, dealing with some procedures invented by the national supreme courts in order to assure the coherence of the multilevel legal order, preserving at the same time the national constitutional autonomy (at 203). The Author defines those bargaining techniques as "hidden dialogue" (at 201), developing on the side of the constitutional courts Claes' study on the alternative modes of communication between domestic judges and ECJ and deepening Poiares Maduro's approach to the negotiated normative authority of EU law.

In this perspective, the sixth chapter discusses six fundamental techniques of hidden dialogue, which resembles the definition of judicial comity, as employed in the international law theory (Shany): the deliberately uncertain placement of the EC sources of law in the hierarchy of national sources (*e.g.*, the case of the Spanish *Tribunal Constitutional*, 28/1991); the distinction between the primacy of EC law and the supremacy of the constitution (*e.g.*, the *declaratión* of the Spanish *Tribunal Constitutional*, 1/2004); the discrepancy between dis-application (which is a sanction of invalidity) and non-application (which limits the efficacy of a norm); the definition of some compensative judicial remedies by the constitutional courts (*e.g.*, the admissibility of the *recurso de amparo* by the Spanish *Tribunal Constitutional* – case 58/2004 – in the event the refusal of a domestic judge to refer to the ECJ ex Article 234 EC Treaty would damage some fundamental rights); the *erga omnes* effects of the ECJ's interpretative rulings (*e.g.*, Italian Constitutional court rulings in the cases 113/1985 and 389/1989, regarding acts with direct applicability and direct effect); the dual preliminarity (*e.g.*, Italian Constitutional court, 165/2004, where the court decided to wait for the ECJ to pronounce ex Article 234 EC Treaty, before ruling on the case). From this point of view, the hidden dialogue seems the positive declination of the counter-limits doctrine, namely an instrument of the EC legal order's judicial costitutionalisation. As a consequence, it favours the progressive "humanisation" of the common market law (at 214), that means a progressive communitarisation of the principles of the human dignity and of the fundamental rights (see ECJ,

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Internationale Handelsgesellschaft, C-11/70, 1970, and *Omega*, C-36/02, 2004) and a progressive integration of national constitutional traditions in the European Constitution.

From a methodological point of view, the book reflects the extensive nature of the issues at stake, recognising the importance of an interdisciplinary approach to the study of the European legal order. In this regard, in the introduction it promises to be in the rut of the European Studies, and it keeps its word, thanks to the capability of the Author to contextualise the discussed legal concepts in a philosophical and political framework. Moreover, the book marries a fundamental comparative approach to the legal issues at stake, which seems a necessity in order to grasp the complexity of the European system and, in particular, the strategies of the judicial dialogue.

Through these methodologies, the Author succeeds in giving the European constitutional law a shape that cannot be reduced to the logics of the EC legal order, as he remarks in the final chapter. However, the book fails to stress the implication of the presence of another fundamental actor in the European constitutional dialogue among courts, the European court of human rights (ECtHR). Actually, the Author recognises the importance of the international treaties, recalled by the EU Treaties and by the EC case-law, *in primis* the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but the ECtHR case-law remains a voice out of the analysed judicial chorus. On the contrary, the ECtHR has always provided a fundamental contribution to the development of the protection of fundamental rights in the adherent states and a clear example comes from the UK Human Rights Act 1998, which has integrated the European Convention at constitutional level. This way, the ECtHR case-law contributes to the EU's constitutionalisation from two sides: shaping the Member States' constitutional values and dialoguing with the ECJ in some variable manners.

Notwithstanding, the fundamental part of the European constitutional law analysed in the book has been examined in depth and with lucidity. To this end, the Author's choice of putting a synopsis at the end of each chapter seems to be a helpful tool to guide the reader into the understanding of the EC judicial adjudication's prismatic character.

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