Filippo Fontanelli, Giuseppe Martinico & Paolo Carrozza (eds). ***Shaping Rule of Law through Dialogue. International and Supranational Experiences***. Groningen: Europa Law Publishing, 2010. Pp. 433. €68. ISBN: 9789089520579.

Dialogue, this noble art, which, like many other things, was invented by the Greeks, is always a sort of collaboration, a way of trying to attain the truth. Perhaps this is why Plato used it as a literary vehicle when he wrote his Socratic dialogues, a *corpus* of pieces in which he laid the foundations of Western philosophy. Deeply impressed by the death of his mentor Socrates, Plato wrote some of the most brilliant and insightful works of all time, perhaps in order to keep on debating with his master after his death. In all likelihood, no-one since has ever had the same great ability to create such architectures of thought. His enjoyable and entertaining dialogues deal with essential topics such as the nature of time, politics, love, and death. Not only is his style concise and meticulous, with a proverbial ability to pose the right questions, but also didactic and kind. His dialogues enable all participants to engage in an inquiry which, despite not always being successful in reaching the desired goal, has at least proved to be a fundamental tool in the development of all expressions of human thought.

The book under review is inspired, *mutatis mutandis*, by this very same philosophy regarding dialogue. As its editors (Filippo Fontanelli, Giuseppe Martinico, and Paolo Carrozza) point out in their introduction, '[t]he process of fragmentation of the international legal order and the absence of constitutional devices governing the connections between the various legal regimes can be reduced to a rational picture only through the activity of the judges' (at 23). This is why judges play a key role in creating and developing links between the different legal systems which constitute our multi-level judicial environment. The increasingly complex nature of the interaction between national and international judges has often been described using the metaphor of dialogue.

With this observation as its starting point, the book brings together essays by experienced scholars, on the one hand, and by promising young jurists, on the other, all of them coming from different legal backgrounds such as Public Law, EU Law, WTO Law, Public International Law, Criminal Law, and Legal Philosophy. This mixture is one of the most appealing features of the book, given the differences in experience and fields of research of its co-authors. Moreover, it reflects one of the main purposes of the Sant'Anna Legal Studies (STALS) project: to provide a space for debate where both consecrated and emerging scholars can discuss the legal issues at stake, as can be seen on its website (www.stals.sssup.it/).

Following an elegant and erudite foreword from Ernst-Ulrich Petersmann which nicely introduces key themes in the book under review, such as the interaction among national and international courts of justice in their protection of the rule of law and the risk of legal and jurisdictional fragmentation in international law, the first essays deal with the foundations for the judicial dialogue elaborating on issues like the distinction between national and international bodies and the risk of fragmentation of international law, whereas the following essays focus more on particular cases involving such dialogue as the role of the European Court Justice and its relationship with (i) on the one hand, national ordinary, administrative, and constitutional courts; and (ii) on the other, certain judicial bodies like the European Court of Human Rights and the panels and Appellate Body of the WTO. The book also examines other judicial dialogue experiences such as the relationship between the International Criminal Court and the International Court of Justice.

In Chapter 1 Yuval Shany explores the blurring distinction of the traditionally clearly separated fields of national and international judicial bodies. The essay studies, in the first place, cases in which international courts have applied national law and vice versa. This serves Shany to support the thesis that the traditional dichotomy between national and international courts ought to be revisited. In the conclusion, following the famous *dédoublement fonctionnel* theory

formulated by Georges Scelle, he submits that when national courts apply international law, they should be considered as part of the building blocks of international law, because they fulfil an international judicial function (at 39–41).

Chapter 2, by Joost Pauwelyn and Luiz Eduardo Salles, examines thoroughly the nature of the relatively new phenomenon of forum shopping among international tribunals, giving special consideration to the conflicts of jurisdiction in the dispute settlement process of the WTO and Regional Trade Agreements (the panel and Appellate Body reports in *Mexico – Soft Drinks* are a must in this field of research). After analysing the domestic doctrinal solutions to the forum shopping phenomenon (*res iudicata*, *lis pendens*, *forum non conveniens*), Pauwelyn and Salles dismiss them, due to the fact that there are several mismatches or *décalages* when legal constructions from domestic law are directly 'transplanted' to the international field. *Res iudicata* applies only when the parties, the object (*petitum*), and the cause of action (*causa petendi*) are the same, which hardly ever happens when there are overlaps in jurisdiction of different international tribunals. The conditions for the application of *lis pendens* are so strict that the principle could only rarely be applied by international tribunals. As for *forum non conveniens,* one of the main reasons to apply this common law doctrine is the lack of connection between the defendant and the forum, a geographical factor which is irrelevant to inter-states disputes before international tribunals. The essay instead suggests that the best solution to the problem of forum shopping would be to regulate overlaps explicitly in the relevant treaties.

Chapters 11, 12, and 13 provide further analysis of judicial dialogue within the WTO context. Chapter 11 by Jorge A. Huerta-Goldman is particularly interesting in its emphasis on the constant and enriching exchange of legal solutions to similar problems addressed by the WTO panels/Appellate Body on the one hand and the NAFTA panels on the other. Personally speaking, I have especially enjoyed Chapter 12, a study of the dialogue between judges and experts in the WTO and EU contexts. As Alberto Alemanno rightly points out, the outcome of many disputes depends on scientific evidence. The stimulating cross-fertilization of ideas created by the 'trialogue' between the judge and the parties is therefore further enriched when scientists act as expert witnesses, presenting evidence in courts. However, it is always difficult for judges, who are usually lay people in science, to manage disagreements between scientists. Few things in professional life are more frustrating for a lawyer than losing a case because the judge has not properly assessed or understood the scientific evidence presented. Thus, Alemanno's proposals (to appoint expert review groups and to introduce peer review systems) in order to improve this mechanism of interdisciplinary dialogue between science and law are particularly enlightening and deserve due consideration. Finally, Chapter 13 by Fontanelli examines a subject which, given its relevance, has attracted the attention of recent legal scholarship: the necessity test and what deferential practice actually means in the field of WTO law. The chapter contains a painstaking analysis of the case law on this subject which serves the author to conclude that, paradoxically, a device such as the necessity test, which seems to concede a margin of appreciation to states, 'departs from its presumptive purpose and ends up delivering the discretion to the judges' (at 404).

As mentioned above, the book under review further contains chapters on more specific themes of EU law. Chapter 3 is one of them and defends, in a rather bold and persuasive way, the thesis that the preliminary ruling procedure (Article 234 ECT) should be limited to national courts of final appeal in order to enhance, among other things, the clarity and authority of the European Court of Justice's ('ECJ') judgments. According to Jan Komárek, this would reduce the workload of the ECJ and reflect its philosophy of being a real 'Supreme Court' for the European Union and its courts. In his opinion, this proposal would not endanger the uniformity of EU law. The quotation which Komárek provides from Chalmers is especially enlightening in this regard: '[u]nity of interpretation does not mean that the highest court should provide rulings on every provision. Within most national legal systems, higher national courts, with far more

wide-ranging jurisdictions, guarantee the unity and ordered development of their legal systems through setting out a number of steering judgments each year, which define the hallmarks of that legal order and guide other actors in how to apply the law'[1] (at 94). It is especially interesting to read this chapter in combination with Chapter 7, in which Martinico examines the preliminary ruling proceeding from another perspective, observing the progressive tendency of European Constitutional Courts to use this mechanism of dialogue with the ECJ, a tendency the last milestone of which was the historical 103/2008 *ordinanza*, where the Italian Constitutional Court (although in the context of *principaliter* proceedings, which refer to claims lodged directly before the Court by the Central Government or the Regions, not by ordinary court judges) agreed to refer a preliminary question to the ECJ regarding the interpretation of Articles 49 and 87 ECT. As Martinico rightly points out in the conclusion of his perceptive and profound legal analysis, we have moved towards a context in which European Constitutional Courts, which were traditionally reluctant to use the preliminary ruling procedure, now do use it, even though, for several reasons explained in detail in the essay, it is highly arguable whether or not this usage will be the beginning of a constant dialogue.

Chapters 4, 5, and 6 provide an analysis of the EU system of human rights protection from three different viewpoints, although with certain thematic overlaps. Chapter 4 by Nikolaos Lavranos explains how the ECJ has used the rule of conflict provided for in Article 307 ECT in order to insulate EU law from the interference of international law, 'thereby creating an untouchable core of fundamental European constitutional law values and principles' (at 143). The *Kadi* saga is seminal in this respect, because it was in this case that the ECJ clearly pointed out to the Member States that derogations from primary EU law based on Article 307 ECT can never affect the 'very foundations of the Community legal order'. Thus, in this case, the ECJ acted as an actual European Constitutional Court which protects its legal system from any modification of its fundamental laws or *Grundgesetze* which may come from international law. Connecting to this chapter, the following is a case study of the United Nations counter-terrorism sanctions in the European legal space. Although these sanctions exposed several gaps in the European human rights architecture, Federico Fabbrini considers that they have been filled by the aforementioned *Kadi* doctrine from the ECJ, which reaffirmed the *primauté* of primary EU constitutional law, and by the introduction of the new Article 275 TFEU, which permits the ECJ to review 'the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of [the Common Foreign and Security Policy]'. Finally, Chapter 6 also analyses the UN sanctions to fight international terrorism. After considering the dialogue of the ECJ with other actors such as the High Court of England and Wales, which adopted a ruling on this issue[2] some months before the *Kadi* judgment and therefore probably influenced the ECJ, Stanislas Adam emphasizes the importance of the *Kadi* doctrine in preventing any derogation from the principles of liberty, democracy, and respect for human rights and fundamental freedoms. As he nicely puts it in the conclusion of his essay, 'collective security purposes . . . cannot justify . . . derogations to the core principles upon which the Community legal order is based' (at 215).

After these analyses of the latest developments in the protection of human rights at the supranational level (EU), the following chapter examines this subject at an international level, the level of the ECHR. Exploring, like the previous chapters, the fragile balance between collective security and human rights, Chapter 9 analyses the ECtHR's controversial *Behrami* and *Saramati* decisions, where it held that the action (allegedly extra-judicial preventive detention in *Saramati*)

[1] Chalmers, 'The Dynamics of Judicial Authority and the Constitutional Treaty', in J.H.H. Weiler and Provost C.L. Eisgruber (eds), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, available at http://centers.law.nyu.edu/jeanmonnet/papers/papers04.html.

[2] *A, K, M, Q, & G v. HM Treasury* [2008] EWHC Admin 869.

or inaction (failure to de-mine a zone where a cluster bomb killed a boy and injured his brother in *Behrami*) of the armed forces of states acting pursuant to UN Security Council authorizations were not attributable to the states themselves, but to the UN, and thus did not fall within its jurisdiction. Antonella Angelini criticizes this formalist approach, which severely curtails the scope of application of the ECHR, and points out that 'one should not be oblivious of the fact that collective security is a goal which has progressively acquired a number of facets . . . not excluding altogether human rights' (at 293).

However, there is another side to the coin, that is, cases in which dialogue between different judicial bodies may have been taken too far. Focusing on the qualification of the armed conflict in the Democratic Republic of Congo, Rosa Raffaelli criticizes the inappropriateness of basing the first decision of the Pre-Trial Chamber of the International Criminal Court[3] on a factual finding which had previously been made by the International Court of Justice in *Democratic Republic of Congo v. Uganda*, given that these courts have neither the same rules of evidence nor the same standard of proof. Raffaelli concludes by stating that judicial dialogue certainly enhances uniformity in the interpretation and application of the law, but that taking it to the field of facts may violate basic principles of law.

Last but not least, Chapters 8 and 14 examine, respectively, several administrative law cases involving judges within the EU and the nature of the rule of law. The material is presented by Fulvio Cortese in Chapter 8 in a dense but thought-provoking manner, with examples taken from the case law of various EU Member States which represent the core of the community integration process (France, Italy, Germany, and Belgium), and an illustrative overview of the methods applied by the courts. The analysis serves to highlight the fact that national courts often refer to EU law or ECJ jurisprudence in order to endorse specific lines of reasoning or interpretations which already exist in their national laws, given that national judges are inevitably affected by their respective technical knowledge and legal background. The chapter by Gianluigi Palombella is a good way to end this book as it addresses such a fundamental concept as the rule of law from a more theoretical perspective. According to Palombella, the fulfilment of its formal requirements (separation of powers, judicial independence, equality before the law, protection of human dignity, and access to justice[4]) is essential, but also the fact that these conditions are 'embedded into a law that cannot be overwritten, and that on a substantive ground is capable of facing the tension against contingent legal policies' (at 428). The elements which comprise the rule of law have spread through legal orders worldwide, with this being one of the most significant examples of 'global' judicial dialogue.

To sum up, the multidisciplinary and comparative approach of the book clearly serves the purpose of enabling the reader to realize the need for dialogue between the different judicial bodies that constitute our multilevel legal system. This rich, varied, and comparative analysis sheds light on the dimensions and nuances of this increasingly important phenomenon.

However, given its relevance, it may have been useful and instructive to devote an entire chapter to the notion of judicial dialogue. As pointed out by Luc Tremblay, the concept is problematic and can be understood in different ways. The above-mentioned examples of judicial dialogue give the impression that it is considered as a sort of conversation between institutions, that is, an exchange of 'words, ideas, opinions, judgments, and experiences within a space of intersubjective meanings

[3] *Prosecutor v. Thomas Lubanga Dyilo*, Decision of the confirmation of charges, 29 Jan. 2007.

[4] These are the requirements highlighted by the World Bank in *Legal and judicial reform: observations, experiences, and approach of the Legal Vice Presidency* (July 2002), at I.

and institutional settings'[5]. However, no definition whatsoever is provided in order to clarify the meaning of this central concept. This omission clearly is a limitation of the book under review.

In addition, the book describes with detail and insight, in its central Chapters 4 to 6, the process of evolution of EU law, which today is probably more mature and autonomous than ever before. Indeed, the landmark *Kadi* decision from the ECJ has stressed the relevance of the fundamental European constitutional law traditions, which limit the reception of international law. Collective security purposes cannot be legitimately attained at the price of renouncing the core principles that make up these traditions: liberty, democracy, and respect for human rights and fundamental freedoms.

Nevertheless, the relationship between the judicial dialogue and the constitutional restraints on the reception of international laid out by the ECJ could have been further explained in the book. At first sight it may seem paradoxical to promote judicial dialogue between the different national and international courts, on the one hand, and praise the ECJ for having raised barriers to the reception of international law, on the other hand.

In a nutshell, this book is a worthwhile work which provides both knowledge and pleasure for all jurists, whether they are beginners or old hands. It forms a harmonious whole thanks to a distinctive *leitmotiv* that is present throughout its chapters: the same willingness to reach knowledge and truth by means of dialogue which presides over the works of Plato. The book is so well conceived, and its essays so insightful, that it is impossible not to become absorbed by it. I hope that this review will encourage more people to read and enjoy this valuable contribution to the debate in this field.

Individual Contributions

Ernst-Ulrich Petersmann, 'Constitutional Justice' Requires Judicial Cooperation and 'Comity' in the Protection of 'Rule of Law';
Yuval Shany, *Dédoublement fonctionnel* and the Mixed Loyalties of National and International Judges;
Joost Pauwelyn, Luiz Eduardo Salles, Forum Shopping before International Tribunals. (Real) Concerns, (Im)Possible Solutions;
Jan Komárek, In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure;
Nikolaos Lavranos, Revisiting Article 307 EC. The Untouchable Core of Fundamental European Constitutional Law Values and Principles;
Federico Fabbrini, Judicial Review of United Nations Counter-Terrorism Sanctions in the European Multilevel System of Human Rights Protection. A Case Study in Ineffectiveness;
Stanislas Adam, Overcoming Dissonance to Reshape Coherence. The European Court of Justice, Terrorist Lists and the Rule of Law;
Giuseppe Martinico, Preliminary Reference and Constitutional Courts. Are You in the Mood for Dialogue?;
Fulvio Cortese, ECJ and Administrative Courts in EU Member States. Towards a Common Judicial Reasoning?;
Antonella Angelini, *Behrami* and *Saramati*: When Silence Matters;
Rosa Raffaelli, The Relationship between the ICC and Other International Tribunals. An Analysis of the Lubanga Confirmation of Charges;

[5] L.B. Tremblay, 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures', 3 *Int'l J Constitutional L* (2005) 617.

Jorge A. Huerta-Goldman, Trade Remedies Disputes – Reciprocal Relationship between WTO and NAFTA Tribunals;
Alberto Alemanno, The Dialogue between Judges & Experts in the EU and WTO;
Filippo Fontanelli, Whose Margin Is It? State Discretion and Judges' Appreciation in the Necessity Quicksand;
Gianluigi Palombella, Global Threads: Weaving the Rule of Law and the Balance of Legal Software.

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