Aida Torres Pérez. ***Conflicts of Rights in the European Union. A Theory of Supranational Adjudication***. Oxford: Oxford University Press, 2009. Pp. 224. £55.00. ISBN: 9780199568710.

Aida Torres Pérez' *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication*[1] is a comprehensive monograph dealing with one of the most striking normative challenges in the European Union (EU): the relationship between the European Court of Justice (ECJ) and Member State courts in adjudicating fundamental rights.

Torres Pérez presents the existing spheres of fundamental rights protection in the EU and provides a thorough analysis of the conflicts that emerge where these different spheres overlap. Her volume covers a number of different approaches and provides suggestions on how to deal with these conflicts and eventually proposes a normative model for ECJ adjudication through judicial dialogue based on comparative constitutional reasoning.

The book is well structured in three parts. The first part gives a brief but thorough overview of the different systems of fundamental rights protection open to EU citizens. The author describes these different systems as the multilevel protection of rights in Europe and distinguishes between human rights protection through national constitutions (constitutional rights), through the ECJ (EU fundamental rights) and through the European Convention on Human Rights (convention rights). She outlines the conflicts that arise when these different systems of fundamental rights protection overlap. In general, such conflicts may arise when different rights are considered to be fundamental (at 10) and where community members disagree regarding fundamental rights interpretation (at 11), especially concerning sensitive issues like abortion or affirmative action (at 16). A potential for conflict exists whenever states act within a field of application of EU law which includes two types of situations: (i) state acts implementing EU law, and (ii) state acts derogating from the EU basic freedoms of movement (at 16). An example of a rights conflict between German courts and the ECJ is the 'banana saga', where the courts disagreed on the scope of protection of the right to property and the freedom to pursue a professional or trade activity (at 16–17).

Torres Pérez' emphasis lies with the relationship between the ECJ and Member State courts, and for the main part leaves aside the implications of the European Convention on Human Rights (ECHR). She concludes that 'on the whole, the function of protecting human rights in Europe is being "disaggregated", in that this function is now shared by different institutions from different, possibly overlapping spheres' (at 37).

[1] Aida Torres Peréz is Professor of Constitutional Law at Pompeu Fabra University, Barcelona. The book under review is her doctoral thesis.

The second part of the book deals with attempts made to solve rights conflicts by applying traditional constitutional theories that foresee hierarchical models. The author discusses both state constitutional supremacy and EU law supremacy. The former is rejected on the basis that states in the EU 'have undergone a profound transformation as a consequence of their participation in this supranational form of governance' (at 50). This transformation eventually led to a loss of sovereignty, with the consequence that the Member States can no longer claim supremacy over EU law based on their ultimate popular sovereignty. The latter is rejected because ultimately no supremacy can be derived from the EU treaties. The treaties themselves are autonomous and can serve as a '*Grundnorm*' within the EU legal order, but it cannot be claimed that they override state constitutions: 'Recognizing a measure of autonomy to the EU legal order does not imply unlimited supremacy of EU law over state constitutions' (at 57). Having discussed the shortcomings of strictly hierarchical models, the author proposes a pluralist framework. She discusses two approaches: first, applying EU fundamental rights as a floor of protection;[2] second, introducing a supra-adjudicative institution for conflict resolution.[3] The first type of proposition is rejected as inadequate. The author contends that states, according to such an approach, would be free to 'make a more protective constitutional right prevail over a parallel EU right' (at 61) and thus endanger the uniformity and effectiveness of EU law. EU fundamental rights, according to Torres Pérez, have to be regarded not only as setting a floor, but also a ceiling. The author rebuts the second type of proposition because a new adjudicatory institution would further complicate the EU judicial architecture. In addition, a legitimacy problem would be created in so far as it remains unclear why a third adjudicative body would have more authority than the ECJ. The proposal of a Constitutional Council[4] with the authority to review EU legislation before it enters into force is rejected because the author doubts that an *ex ante* review would suffice, given that a violation can often only be detected once a legislative act is applied to a concrete case.

Although the author finds the suggestions for a pluralist framework proposed in the literature unconvincing, she concedes that in general a constitutional pluralist framework is superior to a hierarchically structured model: '[A] constitutional pluralist framework – understood as a community constituted by partly separate but independent legal orders, whose foundational norms are not hierarchically ordered – not only provides a better account of the new reality but should be normatively embraced as well' (at 67).

Before presenting her own account of a pluralist framework the author dedicates a chapter to the relationship and tension between uniformity and diversity. The chapter includes a comparative analysis of US and EU federalism, in which the US debate on federalism and rights is briefly depicted. It concludes with the finding that uniform supranational fundamental rights are desirable, but that a certain degree of diversity has to be accommodated.

[2] Here the author mainly deals with the proposals by William J. Brennan, Jr. See Brennan, 'The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights', 61 *New York University Law Review* (1986) 536; Brennan, 'Constitutions and the Protection of Individual Rights', 90 *Harvard Law Review* (1977) 489.

[3] Here the author mainly refers to three authors: N. MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (1999); C.U. Schmid, 'From Pont d'Avignon to Ponte Vecchio. The Resolution of Constitutional Conflicts Between the European Union and the Member States through Principles of Public International Law', *European University Institute Working Paper* No. 98/7 (1998); J.H.H. Weiler, *The Constitution of Europe* (1999); Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals', 33 *European Law Review* (1997) 150.

[4] See Weiler, *supra* note 3.

In the third and last part of the book the author finally presents her own approach towards a model of adjudication of fundamental rights in the EU. She suggests a model of judicial dialogue between national and supranational courts, which she claims would best balance the tension between uniformity and diversity and eventually provide for the legitimacy of ECJ fundamental rights' adjudication.

She presents four major grounds for judicial dialogue (at 112 *et seq.*). First, it would lead to better-reasoned outcomes; second it would enhance participation by all members in the interpretive process; third, it would help build a common identity, and fourth, it would provide for a horizontal interaction between different judicial authorities, hence respecting the pluralist framework of the EU.

The idea of dialogue as a source of legitimacy is ultimately derived from Habermas' discourse theory. Consequently, in structuring the required judicial dialogue the author relies on the conditions for rational discourse. She points out six prerequisites for dialogue, which she believes are all given in the EU (at 118 *et seq.*): (1) differing viewpoints, (2) common ground for understanding, (3) no complete authority of one participant over the other, (4) mutual recognition and respect, (5) equal opportunity to participate, (6) continuity of the dialogue over time.

As the key mechanism to realize judicial dialogue in the EU, Torres Pérez suggests the preliminary reference procedure of Article 234 EC (now Article 267 TFEU). Through the preliminary reference, the author contends, a conversation between the courts and an exchange of reasons can actually take place. To date its potential for fostering dialogue has not been fully realized. She opines, however, that 'the preliminary reference is fit for a robust dialogue about the interpretation of fundamental rights between courts pertaining to different levels of governance' (at 140).

Finally, the author discusses the method of interpretation that should be applied during judicial discourse, and proposes comparative constitutional reasoning as the best available method. She discusses the pros and cons of comparative reasoning (without, however, referring to experiences within other jurisdictions) and comes to the conclusion 'that comparative analysis of state constitutional law provides the most adequate reasons to justify the attribution of meaning to EU rights' (at 153). Once the comparative method as such is accepted, the difficulty arises as to how to operationalize it: Shall one embrace the constitution with the highest standard of rights protection or that with the lowest? The author rejects both, a lowest and highest standard approach, and suggests aiming for a synthetic outcome that allows for a certain amount of diversity. This basically means that the ECJ 'should not seek to impose a uniform interpretation in each and every case' (at 168), but should occasionally defer to the interpretation of state courts. Here the author borrows from the 'margin of appreciation' doctrine established by the European Court of Human Rights (ECtHR) case law. Some examples are given in which the ECJ has already refrained from a uniform interpretation, such as in *Omega* or *Familiapress*.[5] The author suggests that these cases can be seen as examples of a convincing application of the comparative method, although this method is not explicitly articulated by the judges. For future judgments the author recommends that judges 'must speak "the law"' (at 178) and clearly articulate the reasons that led them to their opinion. This could also include the admission of dissenting opinions.

Taken as a whole the three parts of the book provide a clearly structured argument for a new way to understand transnational judicial authority, namely as an authority incorporated into a system of judicial dialogue. The idea of judicial dialogue in the sense of cooperation among courts is not uncommon in recent international law scholarship. Eyal Benvenisti and George W.

[5] *Omega Spielhallen-und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02; *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag*, C-368/95.

Downs have described one form of it, namely the contribution of domestic courts to the evolution of international law.[6] They describe a loose form of inter-judicial coordination among domestic courts that influences and shapes the evolution of international law. Torres Pérez' approach of applying discourse theory to the ECJ fundamental right's adjudication adds an interesting facet to the idea of judicial cooperation. Given a situation of competing sovereigns or of an unclear and not fully developed structure of sovereignty, dialogue could be a more effective and even more legitimate way of fundamental rights adjudication than the artificial establishment of a hierarchy. Indeed, through dialogue diversity is maintained and once the dialogue comes to a result, one can rightly claim that this result has obtained legitimacy through the participation and consent of those who participated in the dialogue.

The problem lies in the existence of the necessary prerequisites for true dialogue. Torres Pérez focuses very much on the rather abstract requirements for a rational discourse and only insufficiently deals with the practical procedure necessary to enable dialogue between the ECJ and national courts. She suggests making use of Article 234 EC, the preliminary reference mechanism, which she presents as the avenue for judicial dialogue. However, the paramount objection to this approach is the persistent unwillingness of constitutional courts to bring preliminary references. To address this practical hurdle merely by stating that the potential of the preliminary reference has to be fully realized (at 139) is not convincing. The national courts may simply refuse to participate in the dialogue. The author does not sufficiently illuminate what the national courts' incentive could be to participate in a judicial dialogue. The argument is made that in return the ECJ has to restrain itself in adjudicating fundamental rights in order to 'accommodate diversity' (at 183), but it is questionable to what extent the ECJ would be willing to do so. Here further empirical studies are necessary.

Another problem in relying on the preliminary reference procedure in order to foster judicial dialogue is that the preliminary reference is in fact simply an exchange between the referring national court and the ECJ. It does not involve the courts of other EU Member States and is therefore not a truly European dialogue. One can of course argue that the ECJ in its decision, or rather the Advocates-General, should take into account interpretations by other national courts, but this does not really result in a participation of these courts in the dialogue. Rather, their understanding of fundamental rights is interpreted and possibly misinterpreted. Hence Torres Pérez might be a little too enthusiastic about the potential of the preliminary reference procedure and it is doubtful whether it is already fit for a robust dialogue. Nevertheless, this procedure is definitely a mechanism that allows for an exchange between the ECJ and national courts, and it is worth considering the possibility of developing such judicial exchange into a real judicial dialogue.

A necessary prerequisite for judicial dialogue is a common language, i.e., a common way of interpreting and applying the law. It is essential to agree upon a common method of judicial reasoning. The method that Torres Pérez suggests, comparative constitutional reasoning, is probably the correct tool for achieving judicial dialogue. To rely on that method is not a novel idea,[7] but combining it with the proposal of judicial dialogue is quite remarkable.

[6] Benvenisti and Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *EJIL* (2009) 59.

[7] See the quotation in Torres Pérez, *supra* note 1, at 154, from J.H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal Order on the European Communities', 61 *Washington Law Review* (1986) 1103, at 1125 ('The constitutional traditions of the Member States are the obvious place to seek this inspiration [. . .] because it will be there that one may be able to find a European content to human rights.')

Torres Pérez is convincing in her rejection of both the lowest and highest standard approaches, and instead argues for a more flexible form of synthesizing different standards of fundamental rights protection in the EU. Only this approach will provide the necessary flexibility to attain the most suitable outcome regarding fundamental rights protection in every Member State. At the same time it is more likely to gain the consent of Member States and will hence be the politically most feasible method. One can understand the comparative method as the common language of aspired dialogue and if that language is accepted by all participants promising results can reasonably be expected.

One problem of a dialogue based on comparative constitutional reasoning cannot be denied, however: an unavoidable degree of indeterminacy and unpredictability. Without a clear structure of hierarchy and a clearly defined set of fundamental rights, it is almost impossible to know beforehand what the outcome of a case will be. It is in the nature of dialogue itself that its outcome is not certain from the outset. Moreover, relying on a synthesis of different constitutional traditions instead of applying an independent European fundamental rights understanding makes it difficult to predict the concrete content of fundamental rights. Torres Pérez acknowledges this down side to her theory, but unfortunately does not present a solution (at 182 *et seq.*). However, one has to admit that it is generally difficult to reach determinacy in the context of fundamental rights adjudication. Even in a hierarchically structured system the interpretation of fundamental rights is, due to the open texture of any set of such rights and the prevalent method of balancing, open to a broad margin of interpretation, and hence hardly predictable.

The question is whether the proposal of judicial dialogue can be a long-term solution to fundamental rights conflicts in Europe. Torres Pérez' book is based on the assumption that the problem of competing and conflicting systems of fundamental rights adjudication ultimately results from the absence of a European sovereign. On the one hand, without a European people a European sovereign is not possible; on the other hand, the Member States, having given away many sovereign rights to the supranational organization, can also no longer claim absolute sovereignty. Consequently, each potential solution to judicial conflicts must provide for a balancing of the competing sovereignty claims between the European Union and the Member States. Judicial dialogue might only serve as a transitional method in this respect. As Torres Pérez states: 'Dialogue does not work to eliminate conflict, but rather it manages conflict over time in a process of constant, mutual accommodation' (at 183).

Perhaps, for now, Europe has to remain content with 'managing' conflicts rather than 'solving' them. With the failure of the EU constitutional project it is unlikely that a European sovereign will emerge any time soon. Accordingly, the conflict between the fundamental rights systems will continue to exist. Given this situation, judicial dialogue seems to be an acceptable method of managing conflicts. The failure of the EU constitutional project, moreover, indicates a lack of acceptance of uniform European fundamental rights standards, and suggests instead that the ECJ should follow a path that allows for diversity by bringing together different fundamental rights traditions. Torres Pérez' book can provide useful guidance in finding that path.

Constantin von der Groeben

Email: constantin.vondergroeben@law.nyu.edu

doi: 10.1093/ejil/chr017