Is Yet Another Book on Constitutional Pluralism Worth Reading?

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TOM FLYNN, *The Triangular Constitution – Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart Publishing 2019) pp. 251.

'The last thing we need is another discussion about constitutional pluralism',[1] suggested one blogpost of distinguished EU law scholars, commenting on the German Federal Constitutional Court's decision to deny EU law's primacy with regard to national law in its Public Sector Purchase Programme judgment of 5 May 2020.[2] Instead, the scholars suggested engaging with the (substantive) ills of European Monetary Union and the Eurozone in the ensuing exchange. The Federal Constitutional Court ruled that the European Court of Justice was acting *ultra vires* (outside its judicial mandate) in its judgment sanctioning decisions of the European Central Bank. Hence, according to the Federal Constitutional Court, the European Court of Justice's judgment had no binding force. The reasons given for finding the judgment *ultra vires* relate not just to proportionality. They also relate to the European Court of Justice's methods of interpreting EU law and the quality of its reasoning as the final interpreter of EU law. This brings to mind that, after all, legal reasoning is the 'currency for transactions' on the market of judicial activity – a discussion squarely falling within the heartland of constitutional pluralism.[3] When reasoning is not approached from a rigid point of view building on EU law's primacy (on these occasions often dubbed supremacy), it is

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[1]M. Dani et al., 'At the End of the Law: A Moment of Truth for the Eurozone and the EU', *verfassungsblog*, ⟨www.verfassungsblog.de/at-the-end-of-the-law/⟩, visited 19 April 2021. For more on 'how the legal-academic news cycle operates nowadays', *see* F.C. Mayer's (also substantively) insightful case note 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020', 16 *EuConst* (2020) p. 733 at p. 733.

[2]BVerfG, 05 May 2020 - 2 BvR 859/15, PSPP.

[3]M. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford University Press 2003) p. 514.

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the core issue that either allows European courts to avoid constitutional conflicts within the composite European legal order, or prevents them from doing so. As is often the case, no consensus exists on this aspect of the judicial dialogue unequivocally being the main issue; neither does it exist here with regard to the Federal Constitutional Court's ruling.

Burgeoning literature on (constitutional) pluralism

The Triangular Constitution under review here is exactly what the blogpost referred to above abhorred: another discussion about constitutional pluralism. Much ink has been spilled on Europe's constitution and European constitutionalism in recent decades.[4] Perhaps all too much or with not enough results. Frankly, the lately proliferating analyses reviewing the said literature effectively make the same point. Can anyone keep up, much less care to, with all this scholarship? What, really is the point of these newly bourgeoning writings each glossing – or not – random handfuls of more or less complete but incommensurable takes on the European constitution without constitutionalism, the disorder of orders, and so forth?

Putting the present point of consensus briefly: for those – like your reviewer here – to whom constitutional pluralism is undead, it remains (like democracy in terms of governing people) descriptively if not prescriptively the least bad available model on peaceful (and to a degree dignified) coexistence of legal orders. In short, all forms of constitutional pluralism share the idea that relations between autonomous legal orders can be conceived of *heterarchically* (instead of *hierarchically*) and that such heterarchy does/can yield sufficient legal stability and certainty. In turn, this manifests as ambiguity in terms of EU law's absolute primacy over national law. *The Triangular Constitution*'s perspective is broader than traditional constitutional pluralism (focusing on national and EU legal orders) in that it considers relationships between the national, EU and ECHR legal order. Following Sabel and Gerstenberg, who understand this triad of legal orders as a deliberative polyarchy based on incompletely theorised agreements and overlapping consensus,[5]

[4]The body of literature has grown far beyond one footnote. The 'movement' started with Neil MacCormick and was further developed by Neil Walker, Miguel Maduro, Mattias Kumm and others. For encompassing documentation of literature, *see* e.g., the book reviewed here, G. Davies and M. Avbelj (eds.), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018), K. Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014).

[5]C.F. Sabel and O. Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order', 16 *European Law Journal* (2010) p. 511 at p. 550. Incompletely theorised agreements can either denote an (explicit) agreement to disagree on the grounds for agreement or just agreeing but (not necessarily explicitly) on different grounds – Sabel and Gerstenberg build on the latter.

the triangle is referred to as a composite polyarchy (p. 54). But what, if any, added value does *The Triangular Constitution* bring to the general discussion? More practically, can such theorising help make sense of, for example, the recent Federal Constitutional Court decision? I admit that I started reading *The Triangular Constitution* with a rather doubtful or pessimistic disposition as to a positive answer to either question. However, not expecting much was not the only reason for my positive reading experience.

The Triangular Constitution appears to begin precisely from where another discussion ended two decades ago: Connie de la Vega's review[6] of Diarmuid Rossa Phelan's *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Sweet & Maxwell 1997). In 1997, as to resolving constitutional conflicts between EU and national law, the book canvassed four possible directions for relations between national and EU legal orders (revolt or revolution in national law, enacting a European Constitution, EU constitutional rule 'capping' the extent of integrating EU law into national law below threshold of legal revolution of national law, and a further qualified version of the capping rule). De la Vega's review suggests there is a fifth alternative that *Revolt or Revolution* does not consider, namely 'that the present system will continue and that the national courts will proceed to find ways to avoid the conflicts and thus either revolt or revolution'. As de la Vega sees it, *Revolt or Revolution* is 'fraught with examples where the courts have managed to do just that' (p. 621). De la Vega concludes that the courts achieve this by working with legal principles – although not always doctrinally consistent – and can be expected to continue to do so, provided that political will remains in support of integration and courts will find ways to reconcile conflicts.

The Triangular Constitution carves a very precise niche for itself. First, it qualifies itself as an exercise in 'applied constitutional theory' (pp. xxv, xxxi). Second, it builds on constitutional pluralism understood as departure from state-based constitutionalism (p. xxvii). Third, and more precisely, it seeks to examine the second-order type (p. xxviii) interface norms of the metaconstitutional pluralist triangular framework between Irish law, EU law and ECHR law. That is, the focus is not on 'empirically' testing which theory of constitutional pluralism is most convincing. (To be fair, though, Chapter 1 goes quite some way to doing exactly this.) Nor is the focus on interpreting and weighing 'first-order' type substantive norms – such as any constitutional or fundamental rights – in conflicts between legal orders (or within one European legal order, see more below). Instead, *The Triangular Constitution* focuses on studying case law in order to examine if and how courts use 'second-order' type metaconstitutional

[6]22 *Human Rights Quarterly* (2000) p. 603.

interface norms that define the relations between legal orders (suggested by Kumm, see in more detail below).[7] The chief motive for the analysis is to study whether second-order interface norms discussed in theories on constitutional pluralism are by nature universal, which 'is an always inherent – and sometimes explicit – claim in the literature' (xxviii).

Comparing the analyses in *The Triangular Constitution* and *Revolt or Revolution*, the latter was not limited to the same second-order type interface norms that *The Triangular Constitution* assesses. However, de la Vega's comments above on the latter could have formed the bedrock of the former, as its analysis shows the centrality of avoidance of conflict for courts operating under triangular constitutions. Moreover, even substantively, the books resemble each other by situating their analyses in (the same) national Irish context and drawing heavily on (Irish) abortion cases. On this point, the review from 2000 by de la Vega considered it 'unfortunate' that *Revolt or Revolution* focused on decisions dealing with the 'emotionally charged issue of abortion' as to the Irish constitutional order (p. 618). One gathers, emotions aside, that in addition to the pro-life or pro-choice conviction being a highly politicised as well as a very personal (even religious) question, the right to life of the unborn is (was) a constitutional tradition not shared by all EU (or ECHR) member states. Yet it is exactly such national specificities, among other things, which *The Triangular Constitution* ultimately addresses and further theorises. Nevertheless, how far the two books relate or not, we do not know, as *The Triangular Constitution* does not enter into a dialogue with *Revolt or Revolution*, which limits the rapport of the two studies to four references made in passing in Chapter 2.

On metaconstitutional interface norms

Chapter 1 presents the scholarship on constitutional pluralism. The overview is as encompassing as nowadays humanly possible – it disposes of the task elegantly, concisely and overall exceptionally well. Having reviewed the literature, *The Triangular Constitution* concludes that three theories of 'metaconstitutional pluralism' (Sabel and Gerstenberg; Maduro; Kumm) 'offer guidance' on the point of interest of the book, that is, as to managing conflicts between legal orders (p. 28). This is the pool of theories from which *The Triangular Constitution* seeks to draw the interface norms regulating relations between legal orders, the universality of which is to be assessed based on whether they appear in actual case law. Can they actually be observed being operationalised by courts? More precisely the norms

[7]M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty', 11 *European Law Journal* (2005) p. 262 at p. 299.

are those listed by Kumm's theory of cosmopolitan constitutionalism: legality, subsidiarity, democracy and protection of basic rights.[8] But why choose Kumm's work over the other two? What distinguishes it?

First, Kumm's metaconstitutional interface norms provide more concrete guidance for judges in charge of resolving conflict than the others (more, and more specific, norms). However, any concreteness is relative, as the nature of interface norms is understood as both rules and principles, that is, less rigidly than some focusing on hard legal rules (p. 30).[9] Second, the claim to the universality of these norms is made explicit by Kumm. Though the specific justification for choice of theory and choice of research question for *The Triangular Constitution* could give rise to some chicken-or-egg issues, the analysis that follows should lessen the reader's knee-jerk reaction that this particular theory is chosen just 'because it's there'.

The third, and final, point distinguishing Kumm's theory from the others is that it specifically concedes that applying the universal metaconstitutional interface norms may not lead to the same outcome, a similar interpretation, in every legal order (p. 43).[10] For Kumm, this is a relative weakness of the theory in terms of its universality. For *The Triangular Constitution*, this is reason to acknowledge, if not celebrate, that (even) within the EU, there are (still presently) '56 different 'vertical' relationships … – … to the EU and [European Convention on Human Rights] legal orders' and at the level of applying interface norms, altogether '30 different triangular constitutions' (p. 59). This is because the idea of triangular constitutional*ism* is a composite whole of three legal orders (in this instance Irish, EU, Convention). The heuristic device, the triangle, stands on the national point or vertex. The sides denote the separate from each other and specific to each legal order relations between them (organised by – presumably universal – metaconstitutional interface norms). Placing the national legal order at the lowest point of the triangle implies no hierarchical relations between the orders (p. 58, fn 242). In this particular Irish triangle, the relationship of the Irish legal order with the Union and Convention legal orders form the vertical frame of the triangle and the relationship between the two European legal orders forms the horizontal one. Again, the triangle remains without hierarchies. The empirical context in which the second-order interface norms between European legal orders are examined is the context of Irish case law and constitutional evolution relating to abortion. In short, one could say that *The Triangular Constitution* sets out to test (i.e., applied constitutional law) whether the metaconstitutional interface norms proposed by constitutional pluralism – more precisely

[8]Kumm, *supra* n. 7, at p. 299.
[9]Kumm, *supra* n. 7, at p. 290, fn. 70.
[10]Kumm, *supra* n. 7, p. 300.

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Kumm's theory of cosmopolitan constitutionalism – can be observed in practice and whether they in fact are universal (p. 54). Precisely, *The Triangular Constitution* sets out to refute the *hypothesis* that the metaconstitutional interface norms are universal (p. 53).

Chapter 2 finds that the Irish Supreme Court operates with internal instead of metaconstitutional interface norms (constitutional ones, p. 87) in dealing with the EU legal order. That is, the conclusion of Chapter 2 is that as Ireland relies on internal interface norms, it seems likely that all member states (and Convention) legal orders have their own interface norms with the EU legal order. According to *The Triangular Constitution*, the Irish-EU relationship is presented as constitutional and the Irish-Convention relationship as sub-constitutional. All in all, in practice the relationships on both 'vertical' sides of the triangle seem regulated by norms different from or additional to Kumm's *meta*constitutional interface norms (p. 102). Based on the case law reviewed, the Irish approach is that, ordinarily, conflicts between national and European orders are loyally resolved by adapting the national legal order, but the possibility of constitutional conflict and ensuing invocation of ultimate authority remains open.[11] The national legal order looks at the triangular constitution from its own heterarchical perspective. From the national perspective it seems that 'both European orders depend on the national for their validity and applicability but are subject to the interpretive authority ('final' within their own domain) of the organs established by the European orders themselves' (p. 101).

Chapter 3 spells out the relationship between the non-statist Union and Convention legal orders. It finds that neither, in practice, is this relationship regulated by Kumm's universal metaconstitutional interface norms (of statist origin). Instead, based on the case law analyses, it seems that the relationship EU–Convention is rather characterised along the lines that Sabel and Gerstenberg's theory of deliberative polyarchy and coordinate constitutionalism suggest (p. 123). In terms of the existing – present – relationship between the EU and the Convention, the coordinate order formed by the EU and the Convention orders relies on acknowledging that their constitutional values overlap. This 'overlapping consensus'[12] is operationalised by ongoing iterative dialogue between sites.[13] To put it crudely, this presents a Gentlemen's Agreement between the orders on one not challenging the decisional outcomes of another under regular circumstances, combined with an emergency

[11]M. Poiares Maduro, 'Three Claims of Constitutional Pluralism', in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) p. 70; M. Maduro, 'In Search of a Meaning and Not in Search of the Meaning: Judicial Review and the Constitution in Times of Pluralism', 2 *Wisconsin Law Review* (2013) p. 541.

[12]J. Rawls, 'The Idea of Overlapping Consensus', 7 *Oxford Journal of Legal Studies* (1987) p. 1.

[13]Sabel and Gerstenberg, *supra* n. 5.

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option or backboard often referred to in this context as the *Solange* principle. Of all the approaches considered constitutional pluralism by *The Triangular Constitution*, this one by Sabel and Gerstenberg is suggested to most closely explain interaction between EU and Convention orders in light of empirics, or applied legal theory, meaning the case law analysed. As case law is lacking on Kumm's metaconstitutional interface norms, they are found to have little or no purchase power in describing the present relation between the EU and the Convention.

As to the future EU-Convention relationship, the dialogue between two non-state actors (the horizontal side of the triangle) is, according to *The Triangular Constitution*, focused on protecting the prerogatives of each order through *ex ante* constitutional review, instead of once-and-for-all fixed metaconstitutional interface norms. The latter might be better, if at all, suited for the vertical frame of the triangle. This conclusion arises to a large extent from examining the draft accession agreement and European Court of Justice's opinions on the EU's accession to the Convention. Moreover, should the EU accede the Convention, the relationship between these two orders would change from metaconstitutional to constitutional – ruled by the Accession Agreement. Framed as testing whether Kumm's metaconstitutional interface norms are observed 'in nature', *The Triangular Constitution* approaches the EU's accession to the Convention as a Treaty obligation, taking no strong normative stance as to whether or not accession should happen.

The main finding of Chapter 4 is that the three legal orders forming the triangular constitutional frame interact with each other in a contingent manner – meaning that no universally applicable metaconstitutional interface norms for all cases, countries, and times can be drawn. However, in light of the cases studied, the findings support that as far as principles go, the principle of avoidance comes up on top. As its name suggests, it is not a way to solve a constitutional conflict, but rather an avenue to avoid one. It is a method for triangular constitutionalism of a 'deliberative polyarchy to constitutionalise an overlapping consensus' (p. 202) of the three legal orders.

Although *The Triangular Constitution* finds that in the cases studied all courts of the triangle avoided conflict – some at a greater cost to the integrity of their legal order than others – the avoidance principle does not amount to a universal metaconstitutional interface norm. It appears not to be one for two reasons: first, it is not on Kumm's list of norms; and second, it is too vague to guide courts' actions. That is, *The Triangular Constitution* argues that anything possibly metaconstitutional falls into category of principles, and not just principles but such general principles that escape attempts to tease out of them universalisable norms (including avoidance) – hence lacking the preciseness required to actually guide courts' actions.

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From descriptive to prescriptive

Until the beginning of Chapter 5, *The Triangular Constitution* has more or less stuck to being an exercise of applied constitutional theory, as it promised at the outset. However, soon after this final chapter commences with the promise to refute 'the hypothesis of the non-universality of metaconstitutional interface norms' (p. 205), it also discloses the book's ambition to formulate 'foundations for a theory of national and European constitutionalism'. Hence, here *The Triangular Constitution* clearly goes beyond the descriptive, into a normative or prescriptive account of what the theory of triangular constitution is and how it should be understood. To cut a long list of qualifiers short, the theory does away with any legal order having primacy (supremacy) as it accepts that every order may internally have the final say – which is only ever final in a relative sense. Therefore, the theory cannot resolve conflict between orders: it can only integrate the incomplete points of the triangle. To many, this may sound much like middle-of-the-road constitutional pluralism, presuming one's take is that EU law's primacy is less than sacrosanct.

What, then, distinguishes *The Triangular Constitution* from other accounts of constitutional pluralism? This would relate to the question raised already in Chapter 2 which dealt with the vertical frame of the triangle, the relationship of national legal order with the European ones. The question is whether and when the Irish legal order should make use of the option it has left open for itself to resist or depart from European courts' interpretations (p. 101)? In light of the *PSPP/Weiss* exchange, an intriguing question. I do believe that *The Triangular Constitution* provides its own kind of answer to this question, or more precisely a justification for the answer.

Chapter 5 seems to answer as follows. With regard to EU law's primacy – under a theory of national and European triangular constitutionalism – there are no conflicts between norms of different competing legal orders but only conflicts between competing norms of the same order. This seems at once both a descriptive and prescriptive point. The theory effectively does away with the idea of conflicts between legal orders. That is, the theory of national and European triangular constitutionalism does not require the individual yet triangular legal order to solve a conflict between its internal competing norms by considering their pedigree (national or European) alone, but instead on the basis of the triangular legal order's own specificity, its historical contingencies, jurisdictional specificities and inter-institutional rivalries. Such a theory of national and European triangular constitutionalism may actually work from the Federal Constitutional Court or German perspective as to *PSPP/Weiss* and the peaceful coexistence of overlapping legal orders. It seems it is (and should be) universal that each triangular legal order's specificity justifies the tailor-made particular balance it strikes in a given case, place and time, as to the overlapping orders forming the constitutional triangle. Much of that

balance depends on the quality of legal reasoning. That is, the articulated specificities and justified arguments they give grounds for that support the answer given to the whether and when to resist interpretations of others, or in other words different balances drawn in other distinct triangular orders – which is what the Federal Constitutional Court can be considered to suggest in *PSPP*. All in all, such understanding of the form and working of the individual triangular legal orders (universal and separate at the same time) is what *The Triangular Constitution* considers 'descriptively accurate and normatively desirable' (p. 230).

Conclusion

Who is the book written for? It is more than likely that readers already part of the constitutional pluralism movement will agree with most of its contents. But can it really push the envelope in terms of convincing the anti-pluralism camp, or is it in effect preaching to the converted? I would say yes and no. For those subscribed to anti-pluralist views, the sophisticated elaboration of triangularism, specificity and avoidance are likely not convincing enough to raise constitutional pluralism from the dead. However, for both descriptive and prescriptive pluralists the theory put forward is one worth engaging with, especially in order to reassess more deeply what courts are actually doing and how.

Granted, both the theoretical ambition as well as the normative claim of the author clearly bubbled under throughout the book, while remaining relatively implicit in Chapters 1–4 that were more descriptive. Hence the prescriptive Chapter 5 that presents the novel theory of national and European triangular constitutionalism seems to end rather abruptly. One is left to ponder on the specifics of whether and when to depart from the European Court of Justice's interpretations? Do any more precise constraints for resolving conflicts between competing norms of the same triangular legal order exist? Are there norms for coexistence of a host of triangular legal orders, and whether each should in some way show it also relates to such coexistence?

Nevertheless, let us return to the questions raised above of whether one more book on constitutional pluralism is worth reading and whether scholarship on it remains worth engaging with. The answer is a firm yes, times two. First, *The Triangular Constitution* is worth reading simply as one of the most succinct and approachable analyses of existing literature. Second, it does contribute to scholarship on constitutional pluralism by empirically assessing and theorising further what de la Vega's analysis concluded 20 years ago: the resilience of the fifth alternative (avoidance) ignored in *Revolt or Revolution*.

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