

al organizations mentioned above. In the concluding summary, the author advances some policy recommendations in order to enhance coherence of the international legal order and certainty of the rules applicable to certain cases.

The author points to the most interesting cases of interaction between the WTO and other international agreements. A peculiar one is that of the World Health Organization and the Codex Alimentarius Commission, analyzed in Chapter nine. The SPS Agreement of the WTO makes direct reference to the Codex Alimentarius Commission. The settlement of food safety-related disputes is not an easy task for panelists and AB judges, hence they need advice from scientific experts. The author warns –after a rather extensive overview of the case law- that there is a tendency to confine the role of scientific experts to consultation. According to Foltea, this poses a threat to a coherent settlement of the disputes, since panelists and AB judges might not take in due account the evidence provided by experts and decide without a clear assessment of the facts. In the conclusions of Chapter nine, the author points at some sort of specialty of the Codex Alimentarius Commission and the WHO when compared to the other international organizations analyzed in the book. As a policy recommendation, she suggests the appointment of “expert review groups”, in order to avoid the appointment of individual experts and enhance the ‘legitimacy’ of the involvement of scientists.

Overall, the structure of the volume is coherent and defined. In particular, the categorization of the different linking techniques between WTO Agreements and other international organizations sounds convincing, but perhaps a deeper analysis of the causes would have made the book more complete. In fact, the book is based on the assumption that a fragmentation of the international legal order has occurred and that it is somehow desirable to reach a higher level of coherence and integration among the different forums. According to the author, institutional sensitivity towards the law of other international organizations can serve as a tool to enhance legitimacy of the WTO judiciary. Irrespective of the position one might have on this, it would have been interesting for the sake of the completeness of the volume to give more attention to the different rationales *behind* each of the WTO Agreements and, therefore, behind the interplay with the laws of other organizations. GATT, TBT, SPS and so on serve different

functions (they aim at reducing either tariff or non-tariff barriers to trade), hence their interaction with other international organizations should follow different patterns. Moreover, the international organizations taken into account are different from each other, so that not only it is hard to advocate for more coherence, but also difficult to think of it happening in the near future. The author is of course well aware of this, but maybe some clarification on the different natures and functions performed by WTO Agreements could have helped the reader understand the issues in a better way.

In conclusion, Dr. Foltea’s book gives a good account of the state of the art in the interaction of the WTO and the rules of other international agreements. The picture of the main actors on the stage is sharp, but probably further reflection on the different aims pursued by the WTO agreements would have been useful. Overall, the book is certainly worth the reading.

The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe

by Giuseppe Martinico

Abingdon: Routledge, 2012, 208 pp.,
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*Giacomo Delledonne**

Giuseppe Martinico’s latest monograph is part of a longstanding inquiry into the nature and internal balance of European constitutional law. This research interest has already resulted in two books (written in Italian) and a number of articles published in leading European and international journals. How does *The Tangled Complexity of the EU Constitutional Process* advance its author’s reflection? As it will be laid down more in detail in this review, its strength lies in its internal barycentre, halfway between theoretical discussion and case-by-case analysis of the role of European judicial actors in coping with constitutional conflicts. Another remarkable aspect of the book is that its theoretical assumptions are not limited to strictly legal arguments but also consider the philosophical debate, especially the Hayekian notion of order and Chantal Mouffe’s agonistic pluralism.

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The book's first chapter is devoted to reviewing the main hypotheses in the debate about the existence and nature of a European Constitution and, more generally, the possibility of conceiving any kind of constitutionalism outside of the Nation State. The second chapter, in turn, is more directly linked to the object of the book: it deals with the main theoretical frameworks that have been developed to capture the integration process. The author argues that the unfinished and ongoing process of constitutionalisation of the European Union can be read in the light of a "notion of complexity (*à la Morin*), conceived as a bilaterally active relationship between diversities" (p. xii). This concept is instrumental in grasping some aspects of the constitutionalisation of the EU, which escaped the most important theories in the last two decades – namely, multilevel constitutionalism and constitutional pluralism. The former does not pay adequate attention to horizontal diversity and downplays the role of constitutional conflicts, thus prompting a neutralisation of a key element in constitutional dynamics. This may be a shortcoming also of pluralist schemes.

According to the author, the "efficient secret" (in Walter Bagehot's sense) of the European Constitution is "a vertical fusion connecting national and supra-national legal orders, a fusion that makes the EU an 'interlaced' (i.e. complex) legal system" (p. 2). In order to explain this peculiar situation, he elaborates a notion of complexity drawing on social and natural sciences. The Constitution's four defining traits are non-reversibility, non-reducibility, unpredictability, and non-determinism. The constitutional synallagma might be defined as complexity in action: "a new kind of law which is not reducible to the legal provisions of the Treaty or of the national legislations" (p. 44) and heavily depends on "exchange" between legal orders. As shown in the subsequent part of the book, the leading characters in this exchange are European and national judges. Another fundamental feature of the Constitution of the EU – which helps establish a link between complexity and more familiar constitutional discourse – is its non-constructivism. Indeed, it is closer to evolutionary constitutionalism (although, it might be added, the very notion of evolutionary constitutionalism is all but controversial).

The subsequent section of the book – chapters 3 and 4 – tries to apply this theoretical outlook to the analysis of concrete developments in EU constitu-

tional law during the last two decades. In doing so, however, it strengthens the theoretical foundations of its basic hypothesis. Moreover, it compares constitutional reforms in various federal systems (most of all, the "constitutional odyssey" in Canada) in order to provide a better understanding of the actual peculiarities of constitutionalisation in the EU. In chapter 3, Martinico clears the field of the haunting shadow of the failure of the Constitutional Treaty in the mid-2000s. Do the French and Dutch referenda and "the disappointing Reform Treaty" lead to the claim "that the EU cannot develop its constitutional ambitions" (p. 55)? In fact, the constituent process that has been put in place since 1992 can be viewed as a constructivist attempt to inject constitutional substance into the European building. Constructivism and complexity, however, are totally irreconcilable because "the former implies the possibility of domesticating complex processes by reducing them to 'human design' and controlling them" (p. 56). The complexity that characterises the EU needs an evolutionary approach to constitutional issues in order not to become unsustainable. This implies a preference for an understanding of constitutional order as spontaneous *κόσμος* rather than as *τάξις*, and, consequently, a preference for the rationalizing role of courts instead of ambitious constituent conventions. Thus, it is apposite to deconstruct the idea, typical of the last twenty years, that the Union should be provided "with all the *clichés* present in the continental idea of a constituent process" (p. 61). In no way are the credentials of evolutionary constitutionalism less persuasive than those of continental revolutionary constitutionalism; what is more, it is basically incorrect to pretend that the latter is the only viable form of constitutionalism *even* at the national level. Drawing on Anne Peters' works, the author convincingly shows the consistency of the EU integration process with an evolutionary model *à la* Hayek. In fact, the Austrian economist also included complexity among the defining features of his own idea of spontaneous order. Another meaningful consequence of these arguments is the pre-eminence of cultural over "political" sources of law in the EU legal order. In the light of these assumptions, much of the evolution since 1992 is labelled as an attempt to "hijack" the *acquis communautaire* and an ultimately unsuccessful struggle for *τάξις*, aiming at diminishing the gradualist, federative role of the Court of Justice. The Court itself frustrated initiatives seeking to limit its interpreta-

tive activity. A convincing example for this assertion is its decision in *Pupino*, which placed directives and frame-decision under the then third pillar on an equal footing. The apex of this contradictory approach, oddly resembling the movement of a crab, is the constitutional identity clause contained in Article 4(2) TEU, as modified by the Reform Treaty. According to the author, it should not be read as providing an exception to primacy but, in accordance with Armin von Bogdandy and Stephan Schill, as a codification of the principle of loyal cooperation, especially among judicial actors (see “Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty”, 48 *CMLR* (2011), pp. 1417 *et seq.*).

Chapter 4 is perhaps the most innovative part of the book as it applies the complexity model to judicial interactions: “this context exalts the case-by-case judicial approach to solving legal conflicts between rules” (p. 106). According to a trend that has been very visible in domestic and comparative constitutional scholarship in the last decade, the book focuses on the role of judicial actors. The preceding exposition, however, is a powerful methodological explanation of the reasons why this perspective is so appropriate. The analysis of recent case law is particularly rich and up-to-date, revealing a deep knowledge of the less spectacular aspect of the constitutionalisation of the Union. The concrete existence of conflicts between the European and national legal orders – with judges supposedly loyal to both of them – makes it possible to reconcile the complexity narrative with some traditional assumptions concerning democracy. In this regard, the author considers Mouffe’s attempt to “tame” Carl Schmitt’s categories of “the Political”, notably the friend/enemy contraposition and the necessity of homogeneity for the establishment of a democratic order: “According to this scheme, actors in a complex legal system share a common framework which, nevertheless, admits the emergence of interpretative disagreements ... the *Solange* saga could be understood as an example of conflicts in these terms” (p. 117). In the light of this premise, the book moves on to develop a possible

classification of constitutional conflicts within the European legal space: conflicts concerning the interpretation of the same and shared principles; conflicts involving the dual role of national common judges; conflicts over the interpretative monopoly; and, finally, conflicts concerning a contrast between EU law and national constitutional provisions. The book also effectively stresses the significance of informal cooperation between national constitutional courts and the ECJ: “even in those contexts that present very sophisticated systems of judicial cooperation, there is room for judicial comity” (p. 140).

In the fifth and last chapter, four possible conflict-triggering factors are pointed out: the accession of the EU to the European Convention on Human Rights, further enlargement to the East, the financial crisis, and the dubious aftermath of the season of “mega-constitutional politics” (as defined by Peter H. Russell with regard to Canada). Response to the sovereign debt crisis, for instance, has already proved to be a contentious issue with regard to the roles of national and European judicial actors, as the judgments of the French *Conseil constitutionnel* and the German Federal Constitutional Court in August and September 2012 have clearly showed. The book ends on a quite realistic note, ultimately confirming its major hypothesis: “conflicts belong to the life of constitutional politics” (p. 176).

To sum up, this book is a particularly rich and challenging presentation of the EU constitutional order: its masterful analytical framework turns out to be a success in leading the reader through the European “constitutional odyssey”. A possible flaw lies in its occasional ellipticity or allusiveness. Being part of a wider research itinerary, its author may sometimes seem uninterested in providing readers with all the legal or theoretical references. Its major strengths, in turn, are its rigorous outlook and openness to comparative and interdisciplinary perspectives. The great array of judicial cases discussed in chapter 4 positively confirms the complexity architecture and corroborates this important theoretical contribution to the debate about the European Constitution.