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Giuseppe Martinico: The tangled complexity of the EU constitutional process. The frustrating knot of Europe (2.ª ed.)

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RESUMEN

Recensión del libro de Giuseppe Martinico, *The tangled complexity of the EU constitutional process. The frustrating knot of Europe* (2.ª ed.). Routledge. 2023, 238 pp.

PALABRAS CLAVE

Constitucionalismo; integración legal; actores judiciales; conflictos judiciales; derechos fundamentales.

ABSTRACT

Review of the book from Giuseppe Martinico, *The tangled complexity of the EU constitutional process. The frustrating knot of Europe* (2.ª ed.). Routledge. 2023, 238 pp.

KEYWORDS

EU constitutionalism; legal integration; judicial actors; judicial conflicts; fundamental rights.

Debates about the European Union (EU) as a constitutional process continue to be of particular relevance to both academics and practitioners: the Union remains a legal and political experiment which oscillates between the tensions of integration and sovereignty. In this book, Professor Giuseppe Martinico (Scuola Superiore Sant'Anna, Pisa) explores this process and provides a novel perspective through a comprehensive analysis of the current state of EU law and its constitutional features, its historical trajectory and future challenges, as well as the crucial role that judicial actors have played in shaping it.

The book starts from the premise that the EU Constitution already exists: not as a singular codified document but as a composite entity comprising treaties, the Charter of Fundamental Rights, the European Court of Justice (ECJ) case law, and national constitutional traditions. Therefore, contrary to what many authors argued after the failure of the Constitutional Treaty in the early 2000s, this was not the definite failure of EU constitutional ambitions. Instead, several parts of EU law provide it with a constitutional status, which does not aim to replace national ones but needs them. Martinico's argument is rooted in the concept of "constitutional synallagma", which captures the reciprocal and continuous circulation of norms, principles, and practices between national and supranational levels. This approach sets the stage for examining three central

ideas in the book, namely constitutional complexity, the existing tension between constitutional evolutionism and constitutional constructivism, and the functional nature of conflicts in the constitutionalisation process.

Structurally, the book is divided into six chapters. The first chapter introduces the book by offering a comprehensive overview of key terminology, and the debates surrounding it, which readers will encounter later on in the following chapters. Martinico looks at various groups of academic debates on EU constitutionalism, namely sceptical, conservative, and progressive approaches. He also explores the ECJ terminological ambiguity regarding constitutionalisation through concrete examples that include the Kadi Saga (where the ECJ aimed at defining the relationship between international and Community law within the framework of its own legal order, elevating the protection of fundamental rights to the status of an “eternity clause” within the EU legal system) and Opinion 2/13 (in which the ECJ reaffirmed the principle of EU legal autonomy).

Chapter two examines constitutional theories of EU integration, contrasting multilevel constitutionalism, which emphasises the dynamic interplay between legal orders and the complementarity of national and supranational levels, though it overlooks horizontal diversity and lacks normative guidance, and constitutional pluralism, which underscores the crucial role of judicial actors and the significance of constitutional conflicts. The chapter also introduces readers to the concept of constitutional complexity: the active relationship between legal orders (national, EU, and international) characterised by non-reversibility, non-reducibility, unpredictability, and non-determinability.

Chapter three provides a historical overview of the EU’s constitutional development between 1992 and 2010 through the lens of the dichotomy between constructivism and evolutionism. Martinico argues that constructivism, i.e., the deliberate design of social institutions by political forces, is fundamentally incompatible with the EU’s constitutional process, which is inherently complex, dynamic, and shaped by the interactions of judicial actors. He highlights the Treaty of Lisbon as a continuation of the Constitutional Treaty, challenging the notion that the failure of the latter represented an irreversible constitutional crisis. Additionally, Martinico critiques and refutes the “*demos* theory”, which contends that the EU lacks a constitution due to the absence of a unified European *demos*. He counters by pointing out that many national constitutions were crafted by elites or under external influences and did not necessarily originate from a singular *demos*. The chapter also reflects on the Maastricht Treaty as a pivotal moment in the relationship between the ECJ and national governments, setting the stage for the “Conventions season”, a period characterised by efforts to establish a constituent process for the EU following the continental tradition. Martinico concludes by discussing articles 4 and 6 of the TEU and the Charter of Fundamental Rights as key examples of the EU’s constitutionalisation process, particularly in affirming fundamental rights within EU law.

Chapter four naturally transitions the reader from historical developments to the present, examining the impact of economic and political crises on EU constitutional evolution. Martinico focuses on the 2008 economic crisis and the EU’s response to the COVID-19 pandemic, analysing their implications for the constitutional order. While the response to these crises have led to certain structural changes, Martinico convincingly argues that these are neither radical nor capable of fundamentally altering the EU’s core features. The “constitutional mutation” resulting from the 2008 crisis brought about increased intergovernmentalism and asymmetry, while the responses to COVID-19 marked a shift away from the austerity paradigm and demonstrated a renewed commitment to the rule of law. However, Martinico also highlights significant concerns regarding the subordination of social objectives to economic imperatives, the effects of budgetary constraints on social policies, and the broader implications for intergenerational justice.

The fifth chapter shifts focus to judicial actors, exploring how they interact in this multilevel constitutional order. Martinico begins by reflecting on judges’ multiple loyalties, to the ECJ and to their own constitutional courts, and then provides a compelling analysis of the complexity of conflicts between national and supranational courts. The author classifies these conflicts into a typology that includes different categories of conflicts related to interpretation of shared principles and constitutional materials. Through detailed examples, including rulings from both the ECJ and national constitutional courts (such as the more critical Italian Corte Costituzionale and German Bundesverfassungsgericht, as well as the more accommodating Austrian Constitutional Court), Martinico highlights how these conflicts, rather than stalling progress, drive constitutional innovation and foster convergence between national and supranational legal orders, particularly in relation to the protection of fundamental rights.

The book’s final chapter contemplates the future of EU constitutionalism. On the one hand, Martinico addresses the lingering challenges posed by Brexit, using this reflection to underscore the importance of the non-reversibility principle as a cornerstone of the EU’s constitutional order. On the other hand, he examines rule of law conflicts with Hungary and Poland, focusing particularly on the misuse of national identity

arguments by these illiberal governments. Martinico asserts that the EU serves as a vital counterweight to populism and sovereignty, maintaining that the future of state democracy is inextricably linked to the Union's ability to evolve and fortify its complex constitutional structure.

Martinico's contribution is particularly valuable due to its conceptual clarity and discussion of various theoretical perspectives, which the author contrasts throughout the book. The different chapters are not only deeply analytical but also loaded with examples from the jurisprudence of the ECJ and various national constitutional courts. The book is coherently constructed through a historical perspective that logically follows the different developments of EU constitutionalism. These features help readers clearly follow Martinico's argument on the complexity of constitutional conflicts, their features, and their implications as opportunities for further legal integration rather than obstacles. The book, therefore, proves very valuable in illustrating the EU's constitutionalisation process and, concretely, the fundamental role that judicial actors have played in it.

The book is an essential read for academics in law and political science interested in EU's constitutionalisation and judicial politics. It can also be a valuable tool for practitioners and policymakers. Nevertheless, the book may prove challenging for early-year students and/or those unfamiliar with the EU's functioning, as it requires some prior knowledge to be fully comprehensible. Additionally, the dense theoretical framework demands a degree of familiarisation before reading. Moreover, while the book's exclusive focus on judicial actors is intentional, it may overlook or oversimplify the role that other forms of interaction play within the constitutional chessboard.

In summary, Martinico's book offers readers a detailed map of the complexities, key events, and the crucial role of judicial actors in tying the EU's constitutional knot.

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