

Giuseppe Martinico*, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*, Abingdon, Oxon; New York, NY: Routledge, 2012, <http://routledge-ny.com/books/details/9780415688192/>

In 2005, Nico Krisch opened his essay 'Europe's Constitutional Monstrosity' (N. Krisch, 'Europe's constitutional monstrosity', *Oxford Journal of Legal Studies*, 2005, 321-334) by recalling that in 1667 Pufendorf had described the Holy Roman Empire as *monstro simile*.

Starting from this anecdote, Krisch lingered on the mismatch between the classical constitutionalism and the European one, given the irregularities and inconsistencies that the supranational integration process displays when compared to the nation state model.

In those pages, however, the citation of Pufendorf slipped away too quickly without reflecting on the meaning to be attributed to the Latin word *monstrum*. Today 'monster' refers to one whose features are considered 'unnatural', this word having a mainly negative meaning.

However, in Latin *monstrum* stood for both 'monster' and 'miracle', so much so that *monstra* were the signs of God. Something similar happened with the Greek *téras*, which originally meant the first sign from God, a sign capable of inducing terror.

Trying to recover the etymology of the word, I could say that this book wants to be an essay on the 'monstrosity' of the EU, its 'prodigiousness' (which is expressed in its 'non-regularity' – i.e. not in perfect correspondence with the national model of constitutionalism), attempting, at the same time, to show how it does not forbid the integration process to assume a constitutional nature.

This volume tries to offer a fresh view on the EU constitutionalization process by presenting three main points: the idea of constitutional complexity, the tension between constitutional evolutionism and constitutional constructivism in the process of European integration, and the functional nature of conflicts in the evolution of the EU.

It is probably because of its 'monstrosity' that European law produces consternation among constitutionalists accustomed to traditional patterns of power. Yet, it offers the variety of a debate that is not limited to a few voices. This debate even attempts to answer the uncertainties highlighted by critics of European constitutional law, and can hardly be considered on the whole as 'a naive reconstruction'. (M. Luciani, 'Costituzionalismo irenico e costituzionalismo polemico', 2006, www.rivistaaic.it/old_site_aic/materiali/anticipazioni/costituzionalismo_irenico/index.html)

What is the "secret" (à la Walter Bagehot, Bagehot, *The English Constitution*, Oxford University Press, 1867, reprinted 2001, 44) of the European Constitution?

In order to provide this question with an answer, this book presented one of the possible constitutional interpretations of the EU integration process, introducing the idea of constitutional complexity and investigating some of the problematic consequences of the EU structural features.

I described the EU as a complex legal order that is a product of the interaction among constitutional levels/poles and is characterized by some precise features: non-reducibility, non-predictability, non-determinism and non-

reversibility. In the following pages I shall anticipate the structure of the volume, which is divided into five chapters.

The aim of the first chapter was to offer a brief overview of the international literature regarding the concept of European Constitution and European Constitutional Law.

When doing so, I insisted on the polysemy of some key terms in this debate: constitution, constitutionalization and constitutionalism, limiting, of course, my attention to the particular meaning that they can acquire in this field of research. In the second chapter I analyse the latest trends of the European integration process in light of the notion of complexity (relying on Morin's works rather than on those by Luhmann), conceived as a bilaterally active relationship between diversities.

This notion of complexity comes from a comparison between the different meanings of this word as used in several disciplines (law, physics, mathematics, psychology, philosophy) and recovers the etymological sense of this concept (complexity from Latin *complexus*= interlaced).

I argued that the EU legal order is a 'complex' entity that shares some features with complex systems in natural sciences: non-reducibility, unpredictability, non-reversibility and non-determinability. To present my argument, I understood by "complex" a system composed of several interconnected or interwoven (as the etymology of the word "complex" suggests) constitutional levels/poles. Their interactions create a kind of additional information which not visible by an external observer (in this sense one could say that in complex systems there is no Laplace's demon). New properties that cannot be explained from the properties of individual elements emerge as a result of the interactions among levels/poles. Such features are usually called emergent properties and correspond to those constitutional principles that cannot be entirely reduced to the national or supranational levels. In this sense a complex system should not be understood as a mere sum of its components, but as something characterized by an added value which is the product of all the interactions among them, what I called the constitutional synallagma.

The aim of that chapter was to contribute to the theoretical debate on EU integration by completing some points that may have been neglected by the main constitutional theories of EU integration (multilevel constitutionalism, constitutional pluralism).

As scholars have pointed out, the peculiar structure of the EU favours interactions between the interpreters of the constitutional levels/poles and the continuous exchange of legal materials among them: this is precisely at the heart of what I called "constitutional synallagma", understood as one of the consequence of constitutional complexity.

Scholars have been focusing their attention on judicial dialogue and judicial cooperation while I tried to pay attention to some borderline phenomena that are not univocally classified in literature.

The idea of emergent properties refers to those entities that "'arise' out of more fundamental entities and yet are 'novel' or 'irreducible' with respect to them" (T. O'Connor, H.Y.Wong, "Emergent Properties", *The Stanford Encyclopedia of Philosophy* (Spring 2012 Edition), E. N. Zalta (ed.), <http://plato.stanford.edu/entries/properties-emergent/#EmeSub>).

The emergence of these properties is frequently associated to evolutionary dynamics which shape and reshape the natural order stemming from the

different types of interactions possible among actors operating at the different levels/poles.

Starting from these considerations in the third chapter, I linked the idea of complexity to an evolutionary understanding of order and, borrowing Hayek's distinction between constructivism and evolutionism, read the last 20 years of constitutional politics (from 1992 to 2012) at EU level in light of this dichotomy.

My idea is that the last 20 years have been dominated by the constructivist attempts at reducing the EU constitutional complexity, with the specific aim of giving the EU a constituent process resembling the revolutionary and continental idea of a constituent process.

Rarely these constructivist efforts have worked, and the vulgate on the constitutional failure is the product of the frustration induced by the impossibility of dominating (completely, at least) the constitutional complexity of the EU.

In the fourth chapter, I moved to the consequence of complexity on the actors operating in the complex legal system. The reasoning behind that is as follows: a complex (i.e. interlaced) legal system forces actors operating at different levels to interact with each other.

These 'interactions' may assume different dynamics: they can be cooperative, merely competitive, or even conflicting.

As I argued in Chapter III, the constructivist attempts have not (always, at least) produced the desired effects and the issue of constitutional conflicts has not gone away. On the contrary, conflicts are still crucial in the constitutional life of the EU and sometimes they can play a systemic function in the economy of the constitutional life of the EU, by favouring the transformation of its basic principles (I described the *Solange* saga as an example of this, but other recent cases might be found).

The bridge between complexity and literature on conflicts is offered by non-reductionism and non-apriorism, and consistent with this there is no criterion for identifying a priori conflicts provided with systemic influence.

Sometimes conflicts among levels are only apparent (virtual conflicts), sometimes they are fully fledged conflicts which expose judges to a sort of 'constitutional dilemma' (On the concept of "constitutional dilemma" see: L.Zucca, *Constitutional Dilemmas- Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford: Oxford University Press: 2007), the interpreters being forced to renounce one of the two constitutional norms at stake.

This confers a key role on those actors that operate at all levels (national, supranational, international), in particular the national judges.

They pay the price of complexity every day, trying to solve those antinomies that complexity may produce.

In this part of the volume (Chapter IV) I tried to show how the nature of the antinomies in such a context, presents its own peculiarity by providing concrete examples taken from the national or supranational case law.

However, sometimes there are antinomies that present a particular – a constitutional – tone involving the necessity of establishing a priority of one of the constitutional levels over the other, in other words, involving a clash between the constitutional supremacy and the primacy of EU law (to borrow the language employed by the Spanish Constitutional Court, *Tribunal Constitucional*, declaración 1/2004, www.tribunalconstitucional.es).

In Chapter IV I also tried to identify some types of constitutional conflicts and to show how they may sometimes have a systemic impact on the life of the EU by causing a change in their fundamental principles.

The final chapter attempted to offer a reflection upon the destiny of constitutional conflicts in the future of the EU, by listing a series of factors that, in my view, will feed a new season of constitutional conflicts, confirming the 'polemical' spirit of European law (the accession of the EU to the ECHR, the financial crisis, the progressive enlargements of the EU and, finally, the consequences -one might say, the aftermath- of the roar of the mega-constitutional politics of the season of the Conventions) .

* *Giuseppe Martinico*, CEPC, Madrid, Scuola Superiore Sant'Anna, Pisa

Forum di Quaderni Costituzionali

stituzionali