



SANT'ANNA LEGAL STUDIES

STALS / PANOPTICA BOOK REVIEW

Giuseppe Martinico,
**Lo spirito polemico del diritto europeo Studio sulle ambizioni
costituzionali dell'Unione,**
Aracne, Roma (2011)

reviewed by M. Simoncini

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G. Martinico, **Lo spirito polemico del diritto europeo Studio sulle ambizioni costituzionali dell'Unione**, Aracne, Roma, 2011.

Reviewed by
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The new book by Giuseppe Martinico offers a stimulating account of the current state of EU law after the so called “constitutional failure” represented by the “swing” taken with the rejection of the Constitutional Treaty.

Being based on an interesting chemistry between legal theory, EU law and comparative (constitutional, mainly) law, the main argument presented in the book is pretty intriguing: while according to many authors (gathered by Martinico under the formula “discontents of EU constitutionalism”) the rejection of the Constitutional Treaty is evident proof of the failure of the constitutional ambitions of the EU, Martinico twists these arguments and claims that many of the difficulties encountered by the EU are actually present in many other legal (constitutional) experiences (Canada and Switzerland). Martinico’s argument is that these difficulties should be seen as “*a confirmation of the current constitutional nature of the EU rather than the proof of the impossibility of transplanting the constitutional discourse to the EU level*” (in English, see G. Martinico, “Constitutional Failure Or Constitutional Odyssey? What Can We Learn From Canada And Switzerland?”, *Perspectives on Federalism*, Vol. 3, Issue 1, 2011, E-51- 77, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1891831).

The book is divided into four chapters and the final section is devoted to the final remarks of the author.

In the first chapter Martinico presents the research questions of the work and his main thesis:

- 1) Does the so called constitutional failure represent the end of any constitutional ambition for the EU?
- 2) If this is not the case, can we use the constitutional categories in order to read the EU integration process?
- 3) Can we compare the so called constitutional failure to other difficulties encountered by other legal experiences characterized by a high level of cultural (and legal) pluralism?

In a nutshell, Martinico tries to challenge the “discontents” argument both from a theoretical point of view – insisting on the idea of the EU as an example of “evolutionary constitutionalism” – and

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from a comparative perspective- comparing the EU experience to other fully-fledged federal legal orders like Canada and Switzerland.

After having clarified the terminology employed in the work, defining what he means by constitution, constitutionalism and constitutionalisation at an EU level, in the second chapter Martinico challenges the main points raised by the “discontents” of EU constitutionalism.

Even if this is a very heterogeneous group of scholars, according to Martinico all these scholars (Avbelj, Krisch, Luciani among others) basically: 1) underestimate the constitutional dynamics that already exist at EU level; 2) tend to consider continental nation-state constitutionalism (the revolutionary constitutionalism) as the constitutionalism *par excellence*, neglecting the evolutionary constitutionalism tradition; 3) underestimate the importance of the judicial (constitutional) compromise reached by national and supranational judges over the years (what Martinico identifies as a set of principles shared by the national and supranational level and the outcome of a sort of negotiation between the ECJ and national constitutional courts after reciprocal menaces, i.e. see the *Solange* saga).

In the third chapter, Martinico starts with the *pars construens* of this volume, by comparing the EU to Canada and Switzerland. Martinico explains in a very detailed manner the analogies between the Canadian Constitutional Odyssey (he builds on the very famous works by P.H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* First edition, Toronto, University of Toronto Press, 1992) and the troubles encountered by the EU, and identifies further analogies with the Swiss case. These legal orders offer different examples of reacting to the existing tensions between the “constitutional form” and the “constitutional substance”. Whereas in Canada, the constitutional odyssey has produced a long series of failures to amend the constitutional charter, in Switzerland tensions have produced a continuous series of revisions of the formal constitution.

Nevertheless, according to Martinico, Canada and Switzerland as compared to the EU share some difficulties that are probably a consequence of the decline of the classic model of the constituent process: all these three legal experiences are characterized by: a) the coexistence of different languages, cultures and even legal systems; b) the coexistence of different patterns of welfare; c) the important asymmetries characterising the respective integration processes.

The fourth chapter is maybe the most innovative, as it is based on the attempt to rehabilitate the role of conflicts as a key element to preserve diversity and heterogeneity in the life of constitutional polities.

When making this argument Martinico relies on the very well known works by Chantal Mouffe (C. Mouffe, *The Return of the Political*, Verso, London, 1993; *The Democratic Paradox*, Verso, London, 2000; *On the Political*, Routledge, London, 2005).

By sharing the notion of “conflictual consensus”, Martinico shows “*how even prima facie anti-systemic actions [i.e. actions leading to fully fledged constitutional conflicts] taken by an actor at the national level result, in the end, as characterised by a systemic impact, since they contributed to the development and change of the primacy principle*” (G.Martinico, “Born to be together: The Constitutional Complexity of the EU”, *Rev.Const.Studies*, 63 ff) . A clear example is identified in the conflicts between the ECJ and the national constitutional courts: as judicial competitors these judges have obtained a sort of (partial) convergence, changing their starting positions and agreeing to reshape the basic principles of the coexistence. The *Solange* saga is emblematic from this point of view: it could be conducive to the complete disintegration of the EU, but actually it worked as a way of obliging the ECJ to overcome the idea of absolute primacy (expressed in the *Internationale Handelsgesellschaft*, 11/70, [1970] ECR 1125, by incorporating the necessity to enlarge the respect of fundamental rights even when they are not guaranteed by a EC law principle *stricto sensu* conceived).

By analysing the recent case law of the ECJ, Martinico tries to identify other cases of conflicts potentially provided with a systemic/positive impact on the life of the EU, dealing with cases like *Elchinov* (C-173/09, *Elchinov*, www.curia.europa.eu) for instance.

The last chapter and the final remarks insist on the future of constitutional conflicts. Martinico argues that conflicts will continue to have a fundamental role in the life of the EU and he lists three possible causes for future constitutional conflicts (i.e. conflicts between the EU law primacy and the constitutional supremacy, borrowing the language of the Spanish Constitutional Court in D-1/2004): the EU enlargement of the East (which introduces new constitutional heterogeneity in the EU); the future accession of the EU to the ECHR; and the tension that exploded after the rejection of the Constitutional Treaty, a document which had employed a highly problematic (and for certain aspects, aggressive) language by recalling concepts belonging to the nation-state constitutionalism traditions (constitution, loi, minister).

The “*Spirito polemico del diritto europeo*” (the polemical spirit of European law) is a challenging book, where Martinico engages in a direct and frontal dialogue with many Italian and foreign outstanding scholars.

At the same time, it could be argued that some ideas (concerning, for instance, the relation between complexity and conflicts) remain just intuitions that are not fully developed and explored.

The final impression one gets is that of a work still in progress, as the author seems to confirm this in the last pages of the volume (and indeed the relation between complexity and theory of conflicts is at the heart of another project by the same author: <http://www.routledge.com/books/details/9780415688192/>). However, these are minor points if

compared to the great merit of the book which is the in-depth investigation of the creeping dynamics of European law. Therefore, the purchase of this book is highly recommended for scholars interested in constitutional law, political and constitutional theory of the EU and comparative public (not only constitutional) law.