“THE TANGLED COMPLEXITY OF THE EU CONSTITUTIONAL PROCESS”
A SYMPOSIUM

(eds.)
Giacomo Delledonne
Julio Pinheiro Faro Homem de Siqueira
Taking complexity seriously. A rejoinder

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It is impossible to do justice to the richness of the points raised by Julio Pinheiro Faro Homem de Siqueira, Marco Goldoni and Pablo José Castillo Ortiz. Indeed, while reading their generous reflections on my book I was tempted to modify substantially huge parts of my volume. This is perhaps inevitable since three years have already passed from its publication (and this is another reason to thank my colleagues for the attention paid to it).

This brief rejoinder will deal with some of the questions that emerged in the symposium, trying at the same time to confirm the main claims of the book.

The first element shared by all the contributions is undoubtedly the attention that I paid to courts and judges in the origin and evolution of the complex constitution of the EU.


This is true, but in spite of what recent scholarship argued about the “diminishing importance of courts” in the current phase of the European integration process (N. Scicluna, European Union Constitutionalism in Crisis, Routledge, 2015, 135), courts still play a major role. It is sufficient here to think of the important decisions given by both constitutional courts and the Court of Justice with regard to the financial crisis.

However, the importance given to judges in the volume does not exclude the possibility to extend the considerations made therein to institutional actors other than courts.

Parliaments offer a spectacular example of this: what I wrote in the book about judges can be recovered with regard to Parliaments as well. Parliaments have similar incentives to interact in a complex system and this has been explained by Manzella and Lupo who employed the formula “euro-national parliamentary system” to refer to the progressive construction of a compound parliamentary arena (“that is to say, being it constituted both by the EU Treaties and by the Constitutions of the Member States”, A. Manzella and N. Lupo [eds.], Il sistema

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Complexity is about interaction not only about dialogue and this point has been emphasised by Marco Goldoni as one of the most important claims of the book. I opted for this terminological distinction because it offers a selective notion which excludes other forms of interactions and which helps scholars understand the very essence of dialogue. At the same time, it underlines the crucial importance that conflicts can also play in forging and reshaping the interdependence characterising the complex constitution of the EU.

A very intriguing point has been made by Marco Goldoni concerning the relationship between evolutionism and conflicts and this deserves some lines to clarify how it is possible to acknowledge the importance played by conflicts without falling into constructivism. In my view, this can be explained relying, once again, on Hayek.

Hayek distinguished between “action” and human “design” and recovering this distinction one could argue that only the latter is deeply present in the very idea of constructivism.

In this scheme, in fact, the action and the role of the agent would not be excluded from the constitutional dynamics but these actions are not performed with the intent of producing a legal change. Usually scholars interested in sources of law explain, this way, the origin of customary law which emerges from the repetition of some conducts that are not characterised by the specific intent to produce an *erga omnes* effect but, rather, that can be explained in light of other contingent reasons. The same often happens with conflicts, they are usually inspired by egoistic reasons and without the intention to contribute to the change of that set of values and principles characterising the relationship with other actors.

I think that the current phase of the EU integration process still confirms the importance paid by conflicts and I do not agree with Marco, according to whom “The provisions enacted to cope with the financial and economic crises of 2008 (the so-called new economic governance) do seem to point toward this direction and, while they are bringing about an important change in the EU constitutional development, they are everything but unintentional and direction-less”. What I see is rather an increasing explicit involvement of political actors. From a formal point of view, this has resulted in a series of deliberate efforts to produce legal
changes out of the realm of EU law understood stricto sensu, as the recourse to instruments of public international law shows but this is just a portion of the complex Constitution of the EU.

Last but not least, Pablo José Castillo Ortiz in his article stresses that “some sceptic approaches to the EU ‘constitution’ should be taken seriously by anyone who wants the EU to become a fully-fledged constitutional system” and that the “no-Constiution’ thesis is actually, then, a tool for the achievement of a fully democratic and constitutional European Union’. I took his point; it is true that even theories denying the existence of a real Constitution at EU level can serve as a stimulus to give new blood to the necessary public debate on how to make the EU more democratic. However, to confirm the reasons why I do not embrace sceptic approaches in my book I would like to recall two counter-arguments.

First of all, sceptics often accept to label a given community as “constitutional” only under certain circumstances that - and this is my main point - at a closer look sometimes are not even present at national level.

Here comparative law helps a lot. Many other legal orders that share some similar difficulties to those that have been seen by the EU can be labelled unequivocally as constitutional, for instance Canada, which has been experiencing “constitutional odysseys” (P. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People?, University of Toronto Press, 1992) in recent years, or Switzerland, which has been suffering from a semi-permanent constitutional revision.


These constitutional processes thus display similarities: the necessity to involve citizens and national parliaments in order to overcome the democratic deficit of the Union, the difficulty of finding “a satisfactory and comprehensive constitutional settlement” (R. S. Kay, “Book
Review Essay: Canada's Constitutional Cul De Sac”, American Review of Canadian Studies, 2005, 705 et seq.), the important role played by courts in reshaping the relation between centre and periphery, intergovernmentalism and asymmetry.

My second point is connected to an important distinction: that between euro-scepticism and euro-criticism. Arguing that the EU is a constitutional phenomenon does not exclude the possibility to criticise the current EU or to ask for more democratisation at EU level. Likewise, studying the constitutional function performed by national and supranational judges does not imply accepting the status quo or denying the democratic concerns related to the lack of involvement of the national and supranational political actors, being here the explanatory and normative levels distinguishable.

Complexity offers an alternative theoretical proposal able to understand the origin and the current version of supranational constitutionalism or, in other words, able to explain how it works without identifying a model to be followed or the final destination of the European journey (confirming its non-apriorism).

In conclusion, I am really grateful to Julio Pinheiro Faro Homem de Siqueira, Marco Goldoni and Pablo José Castillo Ortiz and to the editors of this special symposium for permitting me to add a rejoinder. While addressed to different aspects of the book, their critical comments helped me clarify or rethink some ambiguous points present in the book.