

Constitutionalization as an Open Process: Constituting Compound Polities From Philadelphia to Brussels

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Abstract - The European Union is a compound polity and as such is a constitutionally open regime. A compound polity is a system of multiple separations of powers, organized around anti-hierarchical relations, structured by governance (rather than) government relations. This anti-hierarchical structure is necessary for aggregating state units characterized by different demographic size, economic power, geographical location and political history. The asymmetrical relations between the state components of the polity makes implausible any attempt to foster decision-making processes based on a majority logic. A compound polity is a pluralistic regime necessarily characterized by constitutional pluralism. This constitutional pluralism makes implausible any attempt to give a fixed and permanent constitutional identity to the compound polity. Indeed, due to its very nature, a compound polity is subject to an end-less process of contrasted constitutionalization, in which opposing views of the constitution continuously confront each other. Accordingly the popular rejection of the Constitutional Treaty of the EU in the French and Dutch referenda of, respectively, May and June 2005 might not be an unexpected outcome. Indeed, that outcome signals

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the structural difficulty to find a definitive solution to the constitutional identity of a compound polity.

Mr. Chairman and illustrious members of the scientific committee, let me thank you for the honour of being awarded the prestigious "European Amalfi Prize for the Social Sciences". However, let me also assure you that I am perfectly aware of your generosity, or better of the limits of my work (and especially of the book, "*L'America e i suoi critici*", which prompted your decision). Thinking of the previous winners of the Prize (scholars such as Norbert Elias, Serge Moscovici, Zygmunt Bauman, Ranier M. Lepsius, Wolfgang Mommsen, Charles Tilly, Raymond Boudon, Niklas Luhman, Alain Touraine, Shmuel N. Eisenstadt, Suzanne Keller), a trembling inevitably run through my backbone. As Machiavelli noticed centuries ago, "la Fortuna" is really a blind bird. Being the first Italian scholar to receive the prize, I believe, this award wishes to celebrate? also the Italian community of social scientists and not only my scientific work. This evening, my *lectio magistralis* will focus on the constitutionalization of the European Union. I will try to show why the American past might help us to better understand the European future.

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Introduction

My argument is the following one: the European Union (EU) is a compound polity and as such is a constitutionally open regime. A compound polity is a system of multiple separations of powers, organized around anti-hierarchical relations, structured by governance (rather than) government relations. Indeed, the main institutional feature of a compound polity is *the lack of a government*, that is of a centralized mechanism of decision-making and accountability. This anti-hierarchical structure is necessary for aggregating state units characterized by different demographic size, economic power, geographical location and political history. The asymmetrical relations between the state components of the polity makes implausible any attempt to foster decision-making processes based on a majority logic. Indeed, a compound polity is a systemically anti-majoritarian system, without being necessarily a consensus one. Its multiple separation of powers makes possible the formation of different majorities in the various institutions which structure that separation. It is thus a system of concurrent majorities checking and balancing one the other. Thus, political hegemony is at odds with the anti-hierarchical structure of the compound polity. A compound polity is a pluralistic regime.

Such pluralism has inevitable implications for the constitutional identity of the polity. Indeed, compound polities are necessarily characterized by constitutional pluralism, that is by different views on the proper organization of powers and rights within and for the polity. This constitutional pluralism also makes implausible any attempt to give a fixed and permanent constitutional identity to the compound polity.

In a compound polity, the very concept of constitutionalism is open to debate. Different interpretations of the constitution compete and contrast within the polity. These different interpretations are the expression of the different identity, history, culture and interests of the constituent units of the polity. In a compound polity, the constitution is a process more than a document. Indeed, due to its very nature, a compound polity is subject to an end-less process of contrasted constitutionalization, in which opposing views of the constitution continuously confront each other. If that is plausible, then, the popular rejection of the Constitutional Treaty (CT) of the EU in the French and Dutch referenda of, respectively, May and June 2005 might not be an unexpected outcome. Indeed, that outcome signals the structural difficulty to find a definitive solution to the constitutional question of a compound polity.

In this paper, I will try to base my argument concerning constitutionalization as an open and continuous process on a comparison between the EU and the other main compound polity of the democratic world, namely the US. In fact, the EU and the US have much more in common than it is generally accepted, exactly because both display the features of polities based on multiple separations of powers which distinguish them significantly from the EU member states. Certainly, the EU does not have a constitution, whereas the American political experience started exactly from a formal constitution. Or better yet from two constitutions (Wood 1969; Banning 1986), as the Articles of the Confederation were approved in 1781 to be subsequently replaced by the federal Constitution elaborated in Philadelphia in 1787, and approved by a majority of 9 out of 13 states' legislatures in 1789. Whereas the EU does not have a formal constitution, it has been characterized since its very inception, by a process of constitutionalization which radically changed its original inter-national nature (Weiler 1999). Thus, the comparison is justified by the fact that the institutional outcome of the process of constitutionalization of the EU has striking similarities with the institutional structure of the US.

By *constitutionalization* (Pennock and Chapman 1979), I mean a set of arguments, principles and procedures utilized, in a given society and at a given historical period, both to define the nature of the supreme law of the land to promote the strategy of limitation of public powers *and of protection* of individual rights. Constitutionalization is a process of *construction* of a given constitutional order.

For this reason, I will first compare the US and the EU constitutionalism. Second, I will discuss the arguments of the critics of the EU constitutional treaty, and try to show that their main weakness lies in their misunderstanding of the compound nature

of the EU. Finally, I will derive from this comparison and discussion some normative indications on the constitutional future of the EU.

Constitutionalization in compound polities: the US experience

Through the Preamble to its written constitution, the US introduced a novel idea of republican government: the constitution as the expression of a covenant among people organized in distinct territorial communities. It is the people's will which creates, through the constitution, the specific system of government to which the same people thus delegate the responsibility to solve their individual and collective problems. The distinction between citizens and rulers is crucial: the latter have to operate within the institutional constraints defined by the former in their constitution. This is why the American constitution is *dualistic*, because it precludes any possibility of collapsing the constitutional will of the people into the latest political majority of the rulers, as is the case in the European nation states of the *monistic constitution*. In a monistic constitution, governors and governed coincide through the principle of parliamentary sovereignty (Fabbrini 2004).

The American constitution of 1787 is distinct from other legal texts because (Elster 1997): (1) it is regarded as the supreme text of the legal order; (2) it regulates matters that are more fundamental than others; (3) it may be changed only through specific amendment procedures. Thus, through the constitution a hierarchy of norms has been introduced in the US (to which did not correspond, however, an overarching hierarchy of institutions and organized powers). In the American case, the definition of a hierarchy of norms was not a simple endeavour. In fact, the difficulty in identifying that correlation had much to say in the failure of the first American constitution, the so-called Articles of Confederation of 1781 and in the crisis of the second in the period 1861-65. However large was the consensus on the idea of a supreme text in Philadelphia, it was more limited with regard to regulating fundamental matters.

The fundamental matters concerned the power relations between the centre and the associated territorial units (the states). This relation eventually was given a *federal solution*. The slavery question was subdued within the more general question of how to distribute competences between centre and peripheries. The new American republic was the outcome of a *process of aggregation* of previously separated territorial units of government, which tried to retain as much power as possible once they had decided to pool their sovereignty. In order to solve this crucial question the Philadelphia framers designed, , a system of multiple separation of powers, that is

vertically (among the federal centre and the federated states) and horizontally (among the federal governmental institutions). Once the constraints on the governmental capacity for arbitrary behaviour were introduced, there was no need to specify other matters which deserved special protection, such as individual rights. In Philadelphia, rights were considered implicit, or better they were considered (by Madison in particular, see Mathews 1995: ch.6) constitutive of civil society, and not of the political realm per se.

It was the persuasive action exercised by Thomas Jefferson on the framers (and Madison in particular), and above all the need to appease the opposition of the anti-federalists to the new federal constitution, which exerted pressure for laying down a battery of individual rights, to be added to the constitution as the first ten amendments (*Bill of Rights*). Written by Madison, approved by the two chambers of Congress in 1789, the ten amendments were finally approved by the states in 1791. The amendments have since become only twenty-six (Bernstein 1995: especially Part II), as the procedure to amend the constitution is quite stringent. Some of the amendments altered significantly both the institutional structure of the republic and the interpretation of the fundamental rights to protect, implicit and explicit (Levinson 1995). Yet, other important constitutional changes (especially since the New Deal of the 1930s) were brought about through alternative channels, such as judicial sentences of the Supreme Court, once the amendment procedure became inaccessible because of the resistance that powerful and privileged social and territorial minorities were able to raise in Congress or in the state legislatures. Supreme Court decisions soon became an integral part of American constitutionalism (Ackerman 1998: Part Three).

Thus, the American constitution is first a *frame of government* and then a protector of rights (Elazar 1985). A frame of government and not of the state, because in Philadelphia (and even much later) there was no sense of the state as "reified entity which continues to exist regardless of how it is constitutionalised (or not constitutionalised) at any particular moment" (Ibidem. 234). It was the constitution that created the republic (Toinet 1988), or, better, that established the political pact on whose basis the body politic was born. Although this constitutional model was later adopted by Canada, Australia, New Zealand and South Africa, most European nation states in the 20th century (and especially after the Second World War) followed a rather different constitutional model. In (Western) Europe, constitutions had the features of a *state code*, which was the expression of a *declared democratic ideology*, on whose basis society had to be organized (Elazar 1985). In fact, the constitutions of

the European nation states start with a definition of fundamental (individual, but much more social and economic) rights and end with a specification of powers and procedures to preserve them. It is a code because of its highly specific and detailed character. It can be amended, of course, but it is quite rigid by virtue of its structured nature.

In sum, the Philadelphia constitutional convention created a *compound republic*, based on multiple separation of powers. The compound republic's constitution is the Madisonian answer to the fear that factionalism could disrupt the new republican polity. Its "complex system of checks: national representation, bicameralism, indirect election, distribution of powers, and the federal-state relationship would operate in concert to counteract the effects of faction despite the inevitability of the factional spirit" (Sunstein 1993:186). The European nation states, on the contrary neither have an institutional compound nature nor did they pursue in the past a constitutional strategy of multiple separation of powers. At the governmental level, they have followed (in general) the model of parliamentary sovereignty, which has resisted as the dominant European model notwithstanding the semi-presidential innovations of the Weimar Republic and the French Fifth Republic after 1958. In Europe only Switzerland pursued the road of the *multiple separation*, largely imitating the American constitution. But whereas the US and Switzerland were demographically comparable at the turn of the 18th century, nowadays they differ immensely in terms of the complexity of their societies.

Constitutionalization in compound polities: the EU experience

Contrary to the US, the EU did not start from a constitution. The EU is the outcome of inter-state treaties aimed at fostering the formation of a common market on a continental scale. Those treaties were imposed by historical events and by wise politicians and public officials (Parsons 2003). Their scope was to effectively conclude the century-long European civil war (which started with the Franco-Prussian war of 1870-1871, replicated in the First World War and exploded with the Second World War), and to give life to trans-national cooperation on a growing number of economic matters (Lindberg 1963). In fact, setting the building of a common market as the Community target implied a very broad perspective for Community action. It was the promotion of that perspective which triggered a process of institutionalization of the European Community which eventually became the EU with the Maastricht Treaty of 1992 (Pierson 1996). To be sure, this process of integration was, at times, incremental and, at other times, characterized by breakthroughs. The incrementality of much of

the process was punctuated by critical junctures which made it possible to introduce significant innovations in the structure of the treaties (as happened in 1986 with the approval of the Single European Act which introduced majority voting in the Council of the Union or with the Maastricht Treaty of 1992 which called for the adoption of a common currency, Ross 1995). Creating a three-pillars structure, however, with the Maastricht Treaty the member states governments tried to preserve the realms of foreign (second pillar) and home and justice affairs (third pillar) from the supranational logic of the common market (the first pillar) on which is based my argument.

Born as an international regime in the 1950s and 1960s, the EU thus gradually acquired a *supranational* nature in the subsequent decades, and especially after the Single European Act of 1986, the Maastricht Treaty of 1992 and the Amsterdam Treaty of 1997. A supranational polity is a polity which no longer is an international organization, but not yet a domestic system. In the supranational mode of governance, intergovernmental bargaining is present and at times crucial to political outcomes. The regime's institutions, however, possess an independent capacity to structure this bargaining or to generate political outcomes, alone or in conjunction with trans-national (private) actors. Supranational governance as shaped by the work of the EU's supranational institutions tends to follow from increasing levels of trans-national activity (exchange and cooperation across borders) Trans-national activities tend to provide opportunities for EU institutions to push their own agenda, namely the deepening of integration and the expansion of supranational governance. Indeed, the increase in trans-national economic activity brought an increase in legal litigation which in turn demanded a more active role from the Community system's judicial organ, the European Court of Justice or ECJ. Increasing litigation provided EU institutions with an incentive to define new rules and to introduce new laws. The ECJ was the meeting-place of this three-fold pressure.

In fact, the ECJ used the opportunities offered by the treaties to promote a new legal order for a supranational market. The ECJ has gradually transformed international treaties into quasi-constitutional documents. Its creative legal reasoning was recognized as legitimate because of the organic character of the founding treaties. The net effect of the ECJ action has been the gradual constitutionalization of the treaties. Constitutionalization of the treaty system means the transformation of the EU from an international regime, founded on the precepts of international law, into a multi-tiered quasi-federal polity, founded on higher law constitutionalism. The EU treaties have gradually evolved from a set of legal arrangements binding upon

sovereign states, into a vertically integrated legal order that confers judicially enforceable rights and obligations on all legal persons and parties, public and private, within the EU territory. Thus, whereas it is true that the EU is not based on a formal constitution, it is not true that the EU is not a constitutional regime. The US started from a constitution and then witnessed a contradictory process of constitutionalization, at least until the Civil War of 1861-1865, in the EU instead the process of constitutionalization proceeded without the support of a formal constitution. In both cases, it was the judiciary which promoted a supra-state (in the US) or supranational (in Europe) legal order aimed at guaranteeing the development of a common continental market (Egan 2001; Goldstein 2001).

A supranational regime entails the existence of an internal structure of institutions and procedures comparable to that found in domestic political systems. The internal structure of the EU (in the first pillar in particular) features a multiple separation of powers. The distribution of decision-making is aimed at spreading power, not at concentrating it as is the case within EU member states. The EU's structure has gradually evolved into a system of separated institutions sharing governmental power. The governmental and territorial institutions enjoy distinct and separated sources of legitimacy, but they have incentives to cooperate in the law making procedure, especially after the co-determination procedure established in Maastricht. Certainly, also international organizations might be constitutionalized regimes (Koenig-Archibugi and Zurn 2006). In the case of the EU, however, the constitutionalization process has reached a level of *normative density* which has made it more similar to domestic than international polities (Hine 2001). Indeed, the ECJ has interpreted the treaties as *quasi-constitutional documents*, in the sense that it has transformed an intergovernmental treaty for pushing ahead true constitutional principles. The decision on the direct effect of EU law has introduced the principle of individual equality before the law. The decision on the supremacy of EU law *vis-à-vis* domestic law has established the principle of uniformity of legal norms. The protection of fundamental rights has imposed a sort of implicit bill of rights across the continent (Lenaerts and de Smitjen 2001). In sum, the material EU constitution is the outcome of the process of re-interpretation of the treaties *according to superior principles*.

The Brussels Convention tried to transform this material constitution into a formal constitution. Which constitution? A *frame of government constitution* of the American type, and not the *constitution as a code* of the European type. The Charter of Rights, recognized by the IGC of Nice 2000 but not included in the Treaty (Toniatti 2002; de Burca 2001), has thus received a due constitutional recognition, but it has

the characteristics of a bill of rights added to the governmental frame, rather than those of a moral statement which justifies the constitution itself, as happened in many European nation states. Thus, the IGC (Inter-Governmental Conference) of the European Council in Rome has signed a *frame of government* constitution, whose aim is to preserve *compound nature of* the EU. This is why EU constitutionalism is much closer to American constitutionalism than to the constitutional experience of the EU member states. In particular, the CT seems to have recognized the need to institutionalize the anti-hierarchical structure that the EU has become in its half-century development. Needless to say, that the EU and the US will continue to manifest many differences in crucial aspects of their institutional and cultural patterns. Although constrained by their respective historical paths, the constitutional evolution of the US and the EU is making the Atlantic Ocean less wide than it used to be. Certainly, the CT signed in Rome in October 2004 reflects a compromise between different interests and cultures (Magnette 2004; Amato 2003). However, this compromise does not challenge the compound nature of the EU (Ziller 2003).

The Constitutional Treaty and its critics

The implications of EU compoundness seem still under-conceptualized in the European constitutional debate. Indeed, the CT was rejected in France and Netherlands and highly criticized by large sectors of the British and Scandinavian public opinions for two opposing reasons, but both unrelated to the question of compoundness. The first group of critics argued that it moved the EU too far ahead and the second group that it did not resolve the EU's democratic deficit. Both criticisms seem unsound to me .

The first criticism is unfounded because the CT represents a rationalization of the compound structure of the EU, making it more efficient and simple. The CT has not introduced any transformative change in the constitutional structure of the EU, as it was the case with the Philadelphia Convention of 1787 which elaborated a completely new constitution, even though the mandate received solicited just a revision of the existing constitution (Wood 1969), the Articles of Confederation. Moreover, advocating a purely intergovernmental model, in which the representatives of the EU member states' executives take decisions unanimously, is not a sound solution either. Not only because the EU has already institutionalised a supranational method of decision-making, but also because that method has shown to be necessary for promoting the same intergovernmental interests in a Union of a large number of member states. In

fact, in such a Union, intergovernmentalism might be the recipe for decision-making paralysis. A paralysis which would have negative effects on the EU member states themselves, given that many policy decisions have been already allocated to EU institutions.

The second criticism is unfounded because it continues to look at the EU with the eyes of the European nation states experience. This criticism is based on the assumption that the CT has not resolved the lack of accountability of the EU institutions because decision-makers are not selected through an electoral competition. For this criticism, the legitimacy of a political system depends mainly on the direct accountability of its decision-makers. Legitimacy presupposes an electoral relation connecting rulers and ruled. This criticism has been persistent since the Single European Act (1986). Given the difficulty to detect a clear responsibility within the EU and given the difficulty in accommodating a mobilized society which would alter the relations between institutions, it has been common to criticize the EU for its democratic deficit (Marquand 1979). Inevitably, proposals for moving the EU in a more parliamentary direction were advanced (Dehousse 1998), because in fusion-of-power systems it is much easier to identify 'who is responsible for what', even if they have a federal organization of their territory. In fusion of power systems (either parliamentary or semi-presidential) the horizontal power is centralized and its exercise depends on the outcome of the latest election. Among the EU institutions, only the Parliament is elected directly. Given the growing number of policy decisions taken by EU institutions, increasing calls for greater democratic accountability were therefore raised (Bellamy, Bufacchi and Castiglione 1995); and delusion thus emerged with respect to a CT lacking a solution for that problem. As Nicolaidis (2004: 98) remarked commenting on the CT, "the fact remains that Europeans cannot hold their politicians directly accountable for what the EU does".

But the EU is not another nation state (Mancini 1998). It is the most advanced experiment of constituting a post-Westphalian polity out of asymmetrical constituent units or nation states (Caporaso 1996). A post-Westphalian polity cannot rely on a single principle of legitimacy as a nation-state order. Embedded in the constitutional structures of its member states, the EU constitutionalized polity epitomizes a sort of multi-level constitutional regime which reflects different sources of legitimacy (Moravcsik 1998). Certainly, at the beginning of its development, the EU was based on an indirect mode of legitimacy. Its democratic quality derived from the democratic quality of its member states, given that the main decisions were taken by the Council of Ministers, which represented the member states' executives. As a polity, the EU

gained its legitimacy more through its performance (output legitimacy) than through the popular participation in the decision-making process (input legitimacy) (Scharpf 1999). However, this indirect mode was gradually complemented by a direct mode of legitimacy through the popular election of the EP (since 1979). Moreover, once the EU has emerged as a polity in its own right, it became clear that it had the capacity to severely affect the democratic process of her member states. Such an Europeanization of the EU member states had inevitable consequences for their democratic legitimacy. As Schmidt (2005) has argued, with the institutionalization of the EU, the legitimacy of the EU can no longer be separated from the legitimacy of her member states. The coexistence of different modes and levels of legitimacy has contributed to the further institutionalization of the EU.

This system of multiple legitimacies (Aalberts 2004) is at odds with the system of single legitimacy characteristic of the parliamentary state (MacCormick 1999). A system of single legitimacy presupposes an organization of the political system based on a vertically direct relation between ruled and rulers, citizens and institutions, voters and government. Although lacking the degree of legitimacy of the previous regimes of *direct democracy*, the regimes of *representative democracy* of the modern era have been able to retain a direct link between popular will and policy outcomes through the institutionalization of a *bottle-neck structure* connecting society and state. This bottle-neck structure came to be justified on the basis of the parliamentary sovereignty's principle. This is not the case of the EU. In fact, the absence of any bottle-neck structure characterizes the EU. In legislative terms, in the First Pillar, none of the Community institutions can claim a superior legitimacy with respect to the others. Certainly, in the past, the Council of Ministers did so, but the development of the EP, the strengthening of the Commission, and the role played by the ECJ, have made that claim outdated. It is noticeable that the strengthening of the EP or the Commission did not happen to the detriment of the Council of ministers or the European Council, exactly because of their separated sources of legitimacy.

It could not have been different, if the EU was to keep its compoundness. The CT does not resolve the democratic deficit of the EU *because that deficit cannot be resolved in a compound democracy*. A supranational polity as the EU has to be conceptualized in a different manner than national polities. The concept of democracy should be reformulated in the transition from national to a post-national order, as it was re-elaborated in the transition from small to large polities. The EU has to construct a theory of compound democracy which can accommodate different sources of legitimacy. The recognition of such multiplicity of legitimacy principles is going to

inhibit any attempt to close permanently the polity within a single constitutional frame. Compound democracies are inevitably constitutionally-open and contested regimes. The constitution and its interpretation are the basis of an ongoing political conflict and public dialogue. This is why, as the American experience shows, constitutional reform is a permanent process (Schutze 2000). In America, the constitution was and continues to be “a matter of negotiation and jurisprudence, driven by shifting interests and interpretations” (Di Palma 2004: 267).

Constitutionalization as a contested concept in the US

Indeed, the criticism of the EU democratic deficit recalls the one raised against American federal institutions by the Progressive populist movements (Kazin 1995) at the turn of 19th century, when those institutions (with the nationalization of US politics) started to play an increasing role in the federal decision-making process. A critique which led to important institutional innovations aimed at extending popular participation in the federal decision-making process, such as the introduction of the primaries for the selection of presidential candidates and the direct election of senators previously selected by state legislatures (amendment XVII of the constitution introduced in 1913). However, the democratization of the federal institutions did not resolve the question of their democratic deficit nor did it change the undemocratic nature of some of them (such as the Electoral College or the Senate, see Dahl 2001). The criticism of the American compound democracy has represented a permanent public exercise, which has involved individuals as well as states, due to her inability to guarantee a collective accountability of the system or better to form a government (Committee on Political Parties 1950; Ranney 1962; Robinson 1985; Committee on the Constitutional System 1987).

The criticism of American constitution has also represented a healthy exercise, because it has fostered the formation of a public culture sensitive to institutions. From Madison to Jefferson on up to Dewey and Dahl, the theory and practice of reform in the US has focused on institutions and their improvement (see Young 1996). As a legal and historical study has shown (Ackerman 1991, 1998), the political conflict that has marked the critical phases of the democratic regime in America has always been constitutional in character. Thus it was in the 1780s when the constitution was drafted; thus it was in the 1830s when the fierce debate broke out over the role of financial power in democracy; thus it was in the 1860s when the Civil War erupted thus it was in the 1930s when the role of the federal government was redefined in the

face of an unprecedented economic crisis; and thus it was in the 1960s when the civil rights movement mounted its radical challenge against the segregationist laws of the southern states. And thus, it has been since September 11, 2001, with the conflict on how to respond to terrorism. In all these cases of fierce or even bloody political conflict, the dispute ultimately centered on the appropriate interpretation of the constitution---and on the adequacy of the institutions derived from it for dealing with the specific problems at hand. This is the reason why constitutional language in America has also regularly defined the order of legitimate political discourse. In sum, American "democracy is not a static system. Democratic ideas and institutions as they unfolded in the two centuries after the American Constitutional Convention would go far beyond the conceptions of the Framers and would even transcend the views of such early democrats as Jefferson and Madison, who helped to initiate moves towards a more democratic republic" (Dahl 2001: 10).

However dynamic the American constitutional system might be, it will never be able to close the democratic deficit. In fact, because the systemic imperative of a compound democracy is to promote an anti-hegemonic order able to accommodate the interests of constituent territorial units which are different in demographic size, economic strength, political influence and historical experience, the option to create a direct relation between citizens and power holders will not be available.

Like the US also the EU has to deal with the *asymmetry of powers* of her constituent units. This asymmetry precludes the formation of permanent majorities, although it cannot prohibit them. Indeed, in the past such hegemony was evident through the so-called axis between France and Germany (Hendriks and Morgan 2001), but in an expanding Union that hegemony resulted difficult to sustain (in fact, it activated anti-hegemonic coalitions to offset it, as happened in the case of the Iraq War of 2003). It is this anti-hegemonic need which makes the parliamentary model unfit for governing EU compoundness. The parliamentary model might cure the ill of the EU (her democratic deficit) by killing directly the patient (the EU compoundness). In fact, if the decision-making power is located entirely in the legislature, then the more populous states are going to play a permanent majoritarian role within it through the election of a large size of its representatives. Nor is it plausible to argue that political parties might neutralize the sectional or territorial cleavage, because in compound democracies they tend to be, at the supranational or supra-state level, confederation of state and local organizations. Indeed, the parliamentary system of federal (West) Germany has historically worked because it was designed (by the Allied occupying authorities) since the beginning to guarantee a structural equilibrium (in

terms of economic potential and demographic size) between the *Laender* (Jefferey and Savigner 1991). This, of course, is not the case of the EU, constituted by member states with 400,000 inhabitants (as Malta and Luxembourg) and others with 82,3 millions (Germany) or with 59,9 millions (as United Kingdom) inhabitants. In this asymmetrical system, which interest do the small and medium size states have in remaining within a Union where they would be a permanent minority?

Constitutionalization as democratization

If the democratic deficit cannot be resolved in compound democracies, however political legitimacy can be reformulated and redefined. In compound democracies, political legitimacy is a process, not a relation. If there is no constitution which can definitively resolve the democratic deficit, however the constitutionalization process furnish the opportunities and the concepts for dealing with it. The critique of the CT is useful if it allows the public to construct the constitution *as a process of permanent democratization* of the EU (Sbragia 2005), rather than to look for the perfect normative frame within which to enclose its functioning. To institutionalize a process of *constitutionalization as democratization* implies the construction of a permanent dialogue on the very interpretation of the supranational pact, a dialogue conducted through constitutional concepts but open to "creative disagreement" (Lord and Magnette 2004), as is proper of a polity characterized by constitutional pluralism. Constitutionally, the EU is inevitably an op-ed polity, a method more than a model of dealing with internal contradictions and external challenges, as the US was and continues to be (Fabbrini 2005a). Multiple principles of legitimacy generate competition and not only cohabitation, contrast and not only coexistence. The tension between alternative principles and practices of democratic legitimacy is nested in the very nature of a compound democracy (Fossum 2003; Kohler-Koch 2000). Indeed, the constitutional history of America shows why compound democracies cannot close definitively the democratic deficit gap and *thus the constitutional debate*. For America, legitimacy is an endless process, a process framed by the constitutional discourse. In compound democracies, process counts more than ends, pluralism more than uniformity, deliberation more than decision (Checkel 2003). Compound democracies are a rolling boat in floating waters. It is up to citizens and elites alike to construct the appropriate constitutional discourse to keep sea-sickness under control and move the boat ahead.

The Brussels Constitutional Convention and the Convention which elaborated the Charter on Rights presented at the Nice IGC of December 2000 represent the first attempts to deal directly with the question of the constitutional legitimacy of the EU. Although the EU is a constitutionalized political regime, the CT elaborated by the Brussels Convention and revised by the European Council has tried to move the EU from a *legal* to a *legitimate* constitutional order. Legitimacy needs to have a constitutional basis, while this is not necessary true for legality (Poggi 2001). As it has been aptly observed (Menendez 2004), a constitution might have different meanings: material, formal and normative. A *material* constitution speaks to those social practices that are regarded as the basic norms of a given society. A *formal* constitution speaks to the set of legal norms that are contained in a single written document. A *normative* constitution is a formal document which respects specific ideal standards on human rights and democratic procedures. The EU has a material constitution composed of the founding treaties and ECJ rulings, integrated and supported by the member states constitutional orders. With the Brussels CT, the EU has tried to move from a material to a formal constitution. The CT, incorporating the Chart of Rights, has thus tried to give a normative content to this attempted formal constitution. Certainly the document remains a constitutional treaty, more than a traditional constitution. However, its Preamble, structure, recognition of fundamental rights, separation of powers and definition of sources of European law, all recall a constitution rather than a pact or agreement between states.

It is the inevitable non-coincidence of material, formal and normative constitution which will keep open the contrast and the dialogue on the constitutional future of the EU. Certainly, in unified polities, organized around a principle of fusion of powers, the different interpretations of the constitutions and the different levels of constitution can be aggregated and ordered by the winning electoral or political majority. Certainly, also in these polities there might be a constitutional dialogue if not conflict, as is shown by the experience of Italy, the UK or France. However, this contrast is based on contingent power relations, whereas in compound polities that contrast has a structural basis. Yet, the transformation of the EU into a parliamentary and centralized system is impeded exactly by the compound nature of European polity. The EU is a compound democracy by necessity, while the US is a compound democracy by choice. Of course, the complexity of the EU's development is much greater than the complexity historically faced by the US. Nevertheless, the experience of the US indicates the opportunities and constraints of a compound republic in the conditions of a continental size democracy.

This is why the Madisonian concept of a compound republic might be useful, not only for stressing the similarities between the EU and the US, but also and especially for defining the normative order within which the EU development will have to take place. The theory of compound democracy is based on the structural need to provide opportunities for the access to the decision-making process of state, supra-state and sub-state communities of interests, other than individual citizens. It is a theory of an *anti-hierarchical and anti-hegemonic polity* where no specific interest (supranational, national, regional, economic, social, political) should have the chance to transform itself into *the* general interest. Limiting the concentration of powers through their dispersion and fragmentation is functional to the need to guarantee a dynamic equilibrium among a multiplicity of actors and institutions. A system which promotes dispersed majorities cannot be accountable as a system which concentrates them.

Conclusion

Thus, if the goal of the EU is both to guarantee its compound nature and to promote the aggregated interest of the member states, then it has no alternative to the pragmatic search for those institutional devices which might improve its decision-making process without jeopardizing its basic premises. *The EU is a compound polity which needs to construct its own theory for being a fully coherent compound democracy.* "Without a robust theory and practice of division and separation, it is difficult to construct fuller unions that are not hierarchical" (Deudney 1995: 226). The critics of the EU miss their point, not just because they base their criticism on "an abstract standard of democratic participation rather than assessing it as a second-best constitutional compromise designed to cope pragmatically with concrete problems" (Moravcsik 1992: ?), but also because they use an inappropriate model of democracy for criticizing the EU. In sum, they do not deal with the question of *compoundness*. In this endeavour, it is not the US which should be a model for the EU; rather, it is the Madisonian approach to the compound of different states which can help the EU in facing the dilemma originating from the integration of separate state units and individuals (Fabbrini and Sicurelli, 2004; Fabbrini 2005b). Regardless of the specific institutional architecture Madison derived from his compound republic theory, it is the Madisonian approach to the compound of different communities of interest which might be helpful to an understanding of the European integration process. As Olstrom (1987: 9) remarked, for Europeans "(t)o find (the American, *ndr*) theory useful for thinking about problems does *not* mean that Europe should copy the American model. That would show intellectual poverty – of doing no more than imitating the American

example. The task, rather, is to use conceptions and the associated theoretical apparatus as intellectual tools to think through problems and make an independent assessment of appropriate ways for addressing the problem of contemporary Europe”.

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