THE CONSTITUTIONAL FUTURE

OF

THE EUROPEAN UNION

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Abstract

The constitutionalisation of the European Union (EU) is necessarily a contested process. The final approval of the Lisbon Treaty will not resolve the division on the *finalité* of the union between those member states that interpret the EU as a political project and those that view the EU as an economic organization. This division is an outcome of the material and (especially) cultural asymmetries within the EU, asymmetry increased by the various enlargements. This is also the experience of the other main (democratic) union of states, the United States (US). However, whereas the contested process of constitutionalisation in the US was based, at least since the Civil War, on a common constitutional framework and it has been ordered by a super-majority procedure for settling disputes, the EU lacks a document that embodies a shared language and a procedure that is able to solve the disputes. Here is the puzzle: the EU needs a constitutional treaty for regulating its disputes, but the divisions between its member states make the approval of such a document highly implausible. How to sort out from this dilemma?

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1. The argument

The rejection of the Treaty on the Constitutional Future of Europe (henceforth Constitutional Treaty, CT) in the French and Dutch referenda of May 29 and June 1, 2005 respectively, was considered a dramatic failure of the project to politically integrate the continent[1]. That rejection solicited the EU to a pause of reflection. The pause was concluded by the agreement reached in the European Council meeting held in Berlin in June 2007, which brought to the signing of a new treaty in the following European Council held in Lisbon on 13 December 2007 (the Lisbon Treaty). The Lisbon Treaty has transformed a large part of the CT into a set of amendments to the two existing treaties and has recognized the Charter of Fundamental Rights as a *de facto* third treaty, discarding however all the symbolic features of the CT (such as the flag, the anthem, the preamble and, above all, the idea of a unified text)[2].

Subsequently, however, the Irish "No" to the Lisbon Treaty in the referendum of June 12, 2008 re-opened a new crisis in the constitutional process. A crisis which seemed to deepen when the Czech and Polish presidents of the republic decided to withhold their

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[1] I am referring to the *Treaty establishing a Constitution for Europe*. It was signed on 29 October 2004, in Rome, by representatives of the then 25 member states of the EU and was subject to ratification by all member states. Its main aims were to replace the overlapping set of existing treaties that compose the EU, to codify fundamental rights throughout the EU and to rationalize its institutional system.

[2] Formally the Lisbon Treaty refers to the *Treaty amending the Treaty on European Union* (TEU, Maastricht 1992) and the *Treaty establishing the European Community* (TEC, Rome 1957), the latter renamed *Treaty on the Functioning of the European Union* (TFEU) (Council of the European Union, 2007). The two consolidated treaties would form the legal basis of the EU (with the Charter of Fundamental Rights). Prominent changes in the Lisbon Treaty include the scrapping of the pillar system, reduced paralysis in the Council of Ministers due to the use of qualified majority voting for an increased number of policies, a more powerful European Parliament through extended co-decision with the EU Council, as well as new tools for greater coherence and continuity in external policies, such as a long-term President of the European Council and a High Representative for Foreign Affairs.

signature to the treaty already approved by the legislatures of those two countries. Moreover, the decision, taken in Germany, of submitting the Lisbon Treaty for an evaluation of its constitutionality to the German constitutional court (*Bundesverfassungsgericht)* made the process even more cumbersome. Nevertheless, these hurdles were bypassed. The German court, in a ruling of June 30, 2009, recognized the congruence of Lisbon Treaty with the domestic constitutional order, yet requiring a revision of the parliamentary law of approval of the treaty. That law should have had an explicit reference to a strengthened role of the German legislature in the EU decision-making process, revision thus immediately introduced by the two chambers of the German parliament before the national elections of September 2009. In Ireland, a new referendum on the Lisbon Treaty was held on October 2, 2009 and a large majority of voters this time voted in favour of the treaty. Finally, the Polish president of Republic signed the treaty, thus followed by his Czech pair. Eventually, by December 1, 2009, the Lisbon Treaty has become the new legal basis of the EU.

How to interpret this constitutional odyssey? Is this odyssey going to be concluded with the approval of the Lisbon Treaty? The constitutional odyssey of the first decade of the 21st century confirms both the EU's structural difficulty to find a definitive solution to the issue of its constitutional identity, as well as its structural need to look for such a solution. The Lisbon Treaty will not represent the end-point of the constitutional journey of the EU. Because of the nature of the EU, its constitutionalisation is (and will continue to be) a contested process allowing for both centripetal and centrifugal outcomes, or more plausibly for periodical stalemates. The EU has become a constitutionalized polity, through

the opinions of the European Court of Justice (ECJ) and the decisions taken by member states' governments in the various Intergovernmental Conferences (IGCs) (Christiansen and Reh 2009). Through such constitutionalization, the EU is no longer the international economic organization of the origins, but it is not a political union comparable to a domestic polity[3]. This ambiguity has been proper of other unions of states, such as the United States (US) and Switzerland, thus triggering a continuous debate on their constitutional identity. However, contrary to these union of states that have wrapped their constitutional disputes within a shared constitutional framework, the EU is weakened by constitutional disputes developing within a fragile (or low intensity, Maduro 2003) constitutional framework. Moreover, contrary to the other unions of states, the EU does not have a viable procedure for changing or updating its constitutional basis, being prisoner of the clause of the unanimity for amending its founding treaties.

Here resides the puzzle: the EU has a material constitution which prevents a step back to its original status of *economic organization*, however the EU has not a formal constitution which might support a step forward towards a *political union*. I will base this argument on an *indirect* comparison of the EU with the first historical species of a democratic union of states, namely the US. I will proceed as follows: I start defining the democratic nature of the EU (section 2) and discussing the reasons why the EU should be considered a constitutionalized political system (section 3); then I will reconstruct the process of political institutionalization of the EU (section 4), thus identifying the main

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[3] It is still worthy to read Forsyth (1991) which one of the first investigation around the features of unions of states.

constitutional cleavages which constraint its constitutional evolution (section 5); finally, in the Conclusion (section 6), I will derive from this analysis some hypotheses on the future of the EU.

2. The EU as democratic political system

Interpretations of the EU abound, although many of them are not helpful for understanding why its constitutional treaties (the CT and the Lisbon Treaty) are contested. The EU has faced contestation because it is much more than a regulatory system (Majone 2005), a governance system (Scharpf 1999) or a confederal system (Elazar 2001). The constitutional difficulties of the EU are not simply characteristic of a political system (Hix 2005), but of a political system with democratic features. Since its founding in 1956, the EU has passed through a process of institutional development which has strongly transformed its original nature of being an international organization based on inter-states treaties (Mény 2005). This development has created an extremely complex but also quite stable set of institutions (the European Commission, the Council of Ministers and European Council, the European Parliament and the European Court of Justice) at the Community level, set of institutions that have acquired growing responsibilities in a growing number of policies. Combining intergovernmental and supranational interests and logics, the EU has become more than the mere economic organization of a common market.

Certainly, the EU is based on the principle of economic integration. It is the most advanced experiment of economic regionalism, whose legitimacy is primarily generated by its capacity in promoting economic growth at the continental level. Indeed, the EU sets over 80 per cent of the rules governing the production, the distribution and the exchange of goods, services, capitals and labour force in the member states' markets. However, the economic rationale has pressured the EU to deal with policies not envisioned in the original framework agreed in Rome. It is a common opinion that decisions taken at the EU level condition, to day, roughly 2/3 of the legislation approved by member states' parliament. The EU is certainly an economic confederation, but certainly has become more than that. After all, other "commercial republics" or regional economic organizations (such as ASEAN, APEC, MERCOSUR or NAFTA) do not have the highly structured institutional system of the EU, or a court (like the ECJ) operating on the basis of a principle of judicial review of domestic legislation (Shapiro 2002), or a legislature (like the European Parliament) directly elected by the voters. Indeed, the EU has institutionalized a procedure of co-decision between the Council of Ministers and the Parliament, it has increased the number of decisions taken in the Council through Qualified Majority Voting (QMV), it has streamlined the institutional balance between the *four* governmental institutions (the European Council, the Council of Ministers, the Commission and the European Parliament)[4]. This is why the EU has become not only a political system as such, but a democratic political system.

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[4] I distinguish between the European Council and the Council of Ministers, considering the first (with the Lisbon Treaty) one face of the executive of the EU with the Commission being the other face (a sort of dual

A polity may be democratic when it meets basic criteria of representation and accountability. Regarding the first criteria, those who take decisions in the EU are elected either by citizens in national elections (members of the Council of Ministers or heads of governments and states of the European Council) or in European elections (members of the European Parliament), or nominated through an interlocking decision-making process by politicians elected in national and European elections (members of the European Commission). Moreover, EU decision-makers are compelled to act within a complex system of separation of powers, which was gradually defined by the various treaties. The system of checks and balances incentives the EU decision-makers to control each other and, at the same time, all of them are subject to the control of national constitutional courts and the ECJ, thus satisfying the first criteria of *inter-institutional* accountability. Finally, they have to face also the periodical evaluation of the voters, thus satisfying both criteria of *inter-institutional* and *electoral* accountability. Certainly defining the EU as a democratic polity does not mean shielding it from criticism. However, such criticism needs to be placed in the context of the democratic model adopted by the EU. A democratic model concerns the way in which systemic divisions are institutionally and politically regulated in order to generate authoritative decisions applicable to all members of the polity. The EU, however, has come to be organized along a democratic model that is very different from the ones adopted by its member states.

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or Janus-like executive proper of semi-presidential systems), whereas the Council of Ministers will become a mainly a legislative institution (see Kreppel 2009).

The national models of the EU member states fall into two polar categories: the majoritarian/competitive model and the consensual/consociational model, with some EU member states oscillating between the two (Lijphart 1999; Fabbrini 2008a). These two models reflect the different nature of the existing cleavages in European societies. The majoritarian/competitive model characterises countries such as the United Kingdom (UK) or France of the V Republic where material (economic, social) divisions are (or have become, in French case) more salient than other divisions, and where the main political actors share a homogeneous political culture. The consensual/consociational model, in contrast, characterises countries such as Belgium or France of the IV Republic where cultural (linguistic, ethnic, religious or ideological) divisions are (or were, in the French case) the most salient, and where the political actors do not share a common political culture. In both models, however, parliament is the only institution representing popular sovereignty. Or better, both democratic models are characterised by a government, *as a single institution,* that reflects the political majority of the parliament, regardless of whether it is formed through a bipolar electoral competition or through post-electoral negotiations among the main actors of a multi-party system.

The EU's model of democracy is quite different. I define this model as compound democracy (Fabbrini 2007)[5]. A compound democracy is a democracy *for a union of states,*

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[5] The concept of compoundness derives from the American debate. James Madison used it for the first time in the 1787 Philadelphia constitutional convention (Farrand 1966). Robert A. Dahl has investigated in 1956 (now Dahl 2006) the anti-majoritarian nature of Madisonian democracy. Vincent Ostrom (1987) has clarified the political theory of a compound republic. David C. Hendrickson (2003) has discussed the unionist paradigm of "a republic of many republics" which inspired (with the republican and liberal paradigms) the American founding fathers. However in Europe the concept of compoundness has been generally unknown. Recently, an American scholar, Vivien Schmidt (2006) has used it for addressing polities characterized by a

whereas the democratic models of the EU member states are characteristic of *nation states*. The compound nature of the EU is due, not only to the aggregation of distinct states *and their* individual citizens, but above all, to the *asymmetric* nature of these unit*s*. In the EU, the main divisions are between territorial units, i.e. member states, rather than between social classes or cultural communities (Bartolini 2005). In asymmetric unions of states, ultimate authoritative decisions are reached through the cooperation of multiple separated institutions. Contrary to the fusion of power systems of all EU member states, separation of power systems do not dispose of *a government as a single institution*. In the EU sovereignty is fragmented, pooled and shared by several separated institutions. The Council of Ministers, the Commission and the Parliament represent different electoral constituencies, if not concurrent majorities, and operate on the basis of different temporal mandates. Nevertheless they are constrained to share decision-making power.

In sum, I would argue that the EU, the US (Ostrom 1987) and Switzerland (Blondel 1998, Zweifel 2002) represent different species of the genus of the compound democracy. In fact, the EU displays many more institutional similarities with the US and Switzerland than with its member states. In the US "the Constitution created a Republic of different republics and a nation of many nations (and) the resulting system was sui generis in

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low degree of institutional centralization (such as Germany and Italy, other than the EU). In my approach, compoundness is more than a generic property of non-centralized political systems. Indeed, it is the analytical property of a democratic model characterized by a basic institutional feature: multiple separations of powers. It is an ideal-type comparable to Lijphart's ideal-types of majoritarian democracy or consensual democracy, but distinguishable from them because of that institutional feature (and thus because of the properties of the political process structured by it). For this reason, in my parsimonious approach, the compound democracy model might be applicable only to those polities organized around multiple separations of powers (such as the US, Switzerland and the EU). It is interesting to notice that all three of them are unions of states, although with different degrees of integration. Of course, an analytical model, or ideal-type, cannot be confused with an historical case. In fact, it is a genus to which belong different species.

establishing a continental order that partook of the character of both a state and a state system" (Hendrickson 2003: 258). The same might be said for the EU (Hendrickson 2006). Both the EU and the US are polities with a highly complex structure of multiple separations of powers in order to keep on board states of asymmetrical size (Fabbrini 2005).

3. The constitutionalization of the EU

Having defined the democratic model of the EU, it is now necessary to identify its constitutional basis. The concept of a constitution is not as unequivocal as it might seem (Menendez 2004). From the perspective of Comparative Politics (Lijphart 1999), we can distinguish, at least, between a formal and material constitution. A *formal* constitution is a single written document that it is regarded (by governed and governors alike) as the supreme text of the legal order, it regulates matters that are more fundamental than others and it may be changed only through stringent amendment procedures (Elster 1997). It is a document which symbolically connect the citizens with the polity and not only with its political authorities. Although all formal constitutions establish the set of fundamental rights, institutional arrangements, and functional procedures that must regulate the workings of a given political community (which constitutes itself through this founding document), one might argue (with Elazar 1985) that important differences are detectable among them. In fact, some formal constitutions (as the American one) are first a *frame of government* and then a protector of rights (indeed, the Bill of Rights is a set of ten amendments added to the formal document two years after its approval), while other

formal constitutions (as the ones approved in post Second World War Europe) have the features of a *state code,* expression of a declared democratic ideology (indeed, the French or Italian constitutions start with a definition of fundamental rights and end with a specification of powers' distribution and institutional procedures to preserve them).

On the contrary, a *material* constitution consists of the social practices, derived from political conventions, historical traditions, specific judiciary regulations or ad hoc fundamental laws (considered of an equivalent status of a constitution) recognized as the basic norms of a given society. It is the case of democratic countries like the UK, Germany or Israel: in the first case the material constitution is constituted by an historical accumulation of ordinary laws and judicial sentences considered of fundamental importance for the polity, in the other two cases by an ad-hoc fundamental law (called *Grundgesetz* in post Second World War Germany)[6]. It is not expected that material constitutions generate symbolic identification of the citizens with the polity because that identification predates the polity itself, being the outcome of a meta-constitutional tradition (the Jews do not need to have a constitutions for recognizing themselves as Jews, and probably it has been for long considered true also for the British 'subjects', whose identity was based on the historical tradition of the Magna Charta liberties)[7]. Evidently the EU does

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[6] Both in (West) Germany and in Israel it was an explicit choice of the post Second World War ruling political elite to approve a fundamental law but not a constitution. Through that choice, that political elite wanted to underline the 'transitory' nature of the political regime, because of the still Jewish diaspora (in the Israeli case) and the division between the West and East (in the Germany case). It is interesting to notice that the 1990 *Deutsche Einheit* or 'German unity' was not based on (finally) a new formal constitution. Indeed, it has coincided with the inclusion of the five eastern *laenders* into the west German federal state, constituted by eleven *laenders*.
[7] Indeed, once the UK has started the process of devolution of powers to Scotland and Wales in the late 1990s, it discovered the necessity of relying on a formal constitution for regulating the relations between different national/regional entities (King 2009)

not have a formal constitution, but it is indisputable that it has acquired a material constitution consisting of both the juridical expression of high-order principles (such as supremacy of Community law or direct effect of Community law on individual citizens) established by the ECJ on the basis of the treaties and the political specification of the powers allocated to the various institutions through the deliberations of the IGCs.

Thus, one might argue that the process of constitutionalization of the EU has been promoted and supported by both Community judges' and domestic governments' decisions, decisions thus integrated in the ordinary business of politics and policy. The ECJ has interpreted the founding treaties as quasi-constitutional documents and its rulings have gradually been integrated into the constitutional orders of the member states (Everson and Eisner 2007; Craig and De Burca 1999; De Witte 1999; Mancini 1998). Contrary to other international treaties, the EU treaties have thus given rise to a legal order which not only binds the governments that signed them (as it is typical of international treaties) but which is also of direct influence on the citizens of its member states (Curtin and Kellerman 2006; Weiler 1999). At the same time, the various IGCs have periodically rationalized or reformed the distribution of powers between the Community institutions and between the latter and the domestic ones. Accordingly, one might consequently argue that this material constitution has sustained a process of *constitutionalisation,* where the latter has to be interpreted as "an exclusively descriptive concept (indicating) the recollection of constitutional norms, rules and decisions as outcomes of a process" (Wiener 2008: 26), thus considered as the normative basis of the polity.

The normative activity of the ECJ has arisen from the need to deal with the 'functional' problems emerging from increasing levels of trans-national exchange and cross-border cooperation (Stone Sweet 2005; Stone Sweet, Sandholtz and Fligstein 2001). This has exacerbated legal disputes among economic actors operating in different national jurisdictions, and this in turn has required the Community's judicial organ, the ECJ, to play an active role in settling them. Through its rulings, the ECJ has used the opportunities afforded by the treaties to construct a new legal order for a supranational market, transforming those treaties into sources of law superior to those of the EU member states. At the same time, through the various IGCs, the European Council has answered to the growing complexity of the EU decision-making process, complexity emerged from the widening and the deepening of the process of integration. This constitutionalisation has gradually transformed the European nation states (with few exceptions among the established democracies, such as Norway and Switzerland) into *member states* of the EU (Sbragia 1994). The traditional European nation states have had to redefine their sovereignty by sharing it with other nation states within the context of the EU institutional structure. If sovereignty coincides, at least empirically, with the power of taking ultimate decisions, the nation states of Europe, becoming EU member states, have come to share this ultimate decision-making power (on several policies affecting their own societies) with institutional actors external to each of them (the other member states' representatives in the two Councils, the commissioners and the officials of the Brussels Commission and the members of the European Parliament). Thus, empirically, each EU member state has

remained sovereign in some policy fields (very few indeed) but not in others (quite a few indeed).

However, stressing the empirical quality of the process of constitutionalization which has taken place within the EU, intended as the creation of both a functional integrated legal order and an institutional defined political order in the European continent (Rittberger and Schimmelfennig 2007; Stone Sweet and Caporaso 1998), cannot imply to underestimate the lack of the symbolic quality of that process. Indeed, the material constitution of the EU continues to have none of the symbolic implications proper of a formal constitution (O'Neil 2008; Longo 2006). And here resides the crucial difference with the US experience. The US is based on a founding document and its XXVI amendments (the *constitutional text*), whereas the EU is based on successive inter-state treaties. Constitutionalisation based on inter-state treaties, originally addressed to create an economic union (a common market), is significantly different from constitutionalisation based on a constitutional document, formally addressed to create a political union (Weiler and Haltern 1998; Ackerman 1991). In fact, my argument is that, whereas in the US the constitutional text (after the Civil War of 1861-65) has furnished a normative language for framing the divisions on the nature of the constitutional order, in the EU the inter-state treaties' basis of the polity could not frame the normative discourse on its nature. Moreover, while the constitutional text of the US has allowed for the use of super-majority's criteria for emending it (the 2/3 majorities in each chamber of the Congress and the majorities of ¾ legislatures or special conventions of the states), on the contrary the

inter-state treaties of the EU has imposed the unanimity's criteria for changing them, thus making the dispute on the future of EU constitutional order highly uncertain.

4. The European experience with compoundness

The EU started (with the Rome Treaty of 1957 and previously with the Paris Treaty of 1951 instituting the European Coal and Steel Community) as a project for building an integrated continental market. Indeed, after the 1954 rejection of the European Defence Community's project by the French Parliament, the main European political leaders of the time decided to promote the integration of the continent through economic rather than political means (Dinan 2005). However, it was clear to the founding fathers of the (then) European Economic Community established by the Rome Treaty that Europe had to find a way to permanently close a long era of intestine civil wars (Judt 2005). Thus, the EU may be considered as the outcome of a *pact* for promoting peace among traditionally warring states. A pact based on an economic cooperation through a common market regulated by a complex institutional framework. Moreover, although the purpose of the treaties, especially of the 1957 Rome Treaty, was to create the conditions for a civil pact among traditional enemies, the latter had already established a military pact, tutored by the US, through the NATO (which was established in 1949 and thus strengthened in 1955 with the integration of West Germany) (Calleo 2001; Ikenberry 2000).

Indeed, the balance of power logic of the traditional Westphalian system of states had shown to be the source of permanent inter-states insecurity, thus triggering periodic

attempts by individual states (the strongest ones at the moment) to impose an imperial order on the continent. Thus, the European nation states had to recognize that their best chance of avoiding war was to build a *novus ordo seclorum*, although they decided to start from an economic cooperation in order to mature the conditions for a more advanced political integration. Thus, what we now call the EU is an attempt to steal out from the Westphalian solution to inter-states rivalry *without however giving a political justification* to that historical attempt. Whereas the founding of the US was based on the formidable justification furnished by the Madisonian theory of the need to protect the union from the formation of tyrannical majorities (of states and/or citizens) that might jeopardize its very existence (Kernell 2003; Dahl 2006 and 2001), the EU lacked any political justification of its institutional compoundness since its inception. It was probably a necessary choice to do that. However, some of the problems the EU is facing today are the inheritance of that choice.

With the EU, for the first time in history, the European nation states have tried to build an institutional order which combines intergovernmental as well as supranational features through negotiation over economic issues of common concern. In fact, as historical experience had amply shown, the peace pact could not be guaranteed solely by an intergovernmental agreement, but it needed to be protected by supranational Community institutions. Without authorities institutionally separated from the states that had created them (such as the Commission, the Parliament and the ECJ), there could be no guarantee that the signatories to the intergovernmental agreement would abide by their own rules. In the EU, Community features are thus necessary in order to protect the union

from inter-state rivalries and instability. In this sense, the EU has been an attempt to domesticate the external relations of the European nation states, creating an international regime with domestic features.

However, if the foundations of the peace pact resided in trans-national cooperation on a growing number of economic matters (Lindberg 1963), this cooperation has led nevertheless to the progressive institutionalization of the close network of Community institutions envisaged by the original treaties – the Council of Ministers, the Commission and the Parliament, the Court – but also institutions not originally envisaged, such as the European Council. The institutionalisation of the structure of multiple separations of powers between the Brussels' institutions and between them and the institutions of the member states has strengthened the compound nature of the EU. Since the 1986 Single European Act (SEA), the 1992 Maastricht Treaty (which introduced a three pillar structure) and 1997 the Amsterdam Treaty, the EU has progressively become a system in which several institutions separately but jointly contribute to numerous public policy decisions, primarily in the first pillar (concerning the building of the common market), whereas the other two have tried to preserve the nature of an intergovernmental agreement, although the process of cross-pillarisation has also led these two pillars to be affected by the logic of the former (Stetter 2007; von Bogdandy 2000). The 2009 Lisbon Treaty has thus recomposed the three pillars in a single legal and institutional framework, although it has envisioned different economic regimes in different policy areas (more intergovernmental in the foreign and defence policies).

Thus, the originally pre-eminent institution in the system, i.e. the Council of Ministers has been forced to acknowledge the considerable influence acquired by the Commission. In addition, it has been obliged to recognize the co-determination and co-decisional power acquired by the Parliament since its direct election in 1979, and especially since the SEA and the two fundamental treaties of the 1990s. And, finally, all of them have had to recognize the strategic role the European Council has come to play. Whereas the formation of an hegemonic coalition was possible within an institutionally dominant Council of Ministers (as shown by the so-called Franco-German axis leading the Community decision-making process till the 1980s, Hendricks and Morgan 2001), this has become much more difficult after the treaties of the 1980s and 1990s (and thus the 2000 Nice Treaty). These treaties, in fact, have contributed to a deeper institutionalization of the separated decision-making structure of the EU. To be predominant in the Council of Ministers has become no longer a condition for being predominant in the other Community institutions (Fabbrini and Piattoni 2007). Moreover, the several waves of enlargement, which have brought the EU to be constituted by now 27 member states, have made the outcomes of the policy-making process highly uncertain. This anti-hegemonic trust has inevitably activated significant reactions by the big states (France, Germany and UK). However, in a multilateral system such as the EU, even the big states have to exercise their leadership within institutional and political constraints.

In sum, the EU has come to function *without a government acting as a single institution*. In Brussels decisions are taken and values are authoritatively allocated, but this is the outcome of a process of negotiation and deliberation involving a plurality of actors

and taking place within the loose confines of a system of separated institutions. Not unlike the US, the EU functions through a complex system of checks and balances between "separated institutions sharing power"[8]. In systems of this kind, the power relation between institutions is generally of a positive-sum quality: in fact, the growing influence of the Community institutions has not reduced the influence of the institutions representing the member states' governments. As a result of the progressive deepening of European integration, i.e. the proliferation of public policies decided in Brussels, the role of the EU has become increasingly more political and less economic. Indeed, with the end of the Cold War and the prospect of the political reunification of the continent, the dispute on the *finalité* of European integration has acquired a constitutional character. From the IGC held in Nice in December 2000 and whose treaty was signed in 2001 (European Council 2000) and the Lisbon Treaty approved at the end of 2009, the 2000s was a decade of permanent dispute on the constitutional future of the EU, a dispute emerged particularly clear in the Brussels Convention that elaborated the draft of the 2004 Constitutional Treaty or CT (Norman 2003; De Witte 2003; Dehousse 2003). One might argue that the Brussels Convention has transformed the EU from a *constitutional project* (Walker 2004) into a *constitutional process* (Shaw 2005), the so-called 'Laeken process'.

5. Constitutional divisions in Europe

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[8] The formula of "separated institutions sharing power" is the classical definition of the US system by Neustadt (1990: 27).

This process of constitutionalization has been characterized by deep divisions or *constitutional cleavages* concerning both the normative nature and the organizational form of the EU (Sbragia et al. 2006). The cleavages that had remained submerged during the long period of material constitutionalisation of the EU have thus surfaced. Some of the conflicts that emerged during the Laeken process were of a temporary nature as the position of some member states on specific issues changed in relation to the government of the day. However, other divisions had a more permanent character, reflecting both structural differences of views and interests among member states (and their citizens), due to their different size (*material symmetry*) and political history (*cultural asymmetry)*.

The structural cleavages concern primarily the division between large and medium-small member states. This conflict is an effect of the asymmetries between EU member states. It has surfaced regularly during the history of the EU: as e.g. in the 2000 Nice Treaty's negotiations as well as during the debate on the CT, concerning the weight of the member states' votes within the Council of Ministers. The compromise found in the Rome European Council of October 2004 (European Union 2004), namely that a decision of the Council of Ministers will be effective if supported by a majority of 55 per cent of the member states representing at least 65 per cent of the population, was subsequently challenged by Poland at the Berlin European Council of June 2007. In the Lisbon Treaty the Polish government obtained a deferral of the introduction of this rule to November 2014 with an additional transition period until March 2017, during which a member state can ask for a qualified majority on a specific issue if considered of national importance (Council of the European Union 2007). The same cleavage also emerged on the issue of

the Commission's composition during and after the Brussels Convention (Magnette and Nicolaidis 2004). The small and medium member states obtained that each member state be allocated one commissioner whereas the large member states advocated setting the number of the commissioners to two thirds of the member states. The Lisbon Treaty originally established that the number of Commissioners be reduced, in the sense that only two out of three member states would have the right to representation on a rotating basis, although it formalized the postponement of this rule to 2014 in order to appease the small member states. However, after the Irish 'No' in the 2008 referendum, the European Council has decided to delete this rule, thus going back the proposal of a Commission constituted by a commissioner for each member states, for helping the supporters of the Lisbon Treaty in the new 2009 Irish referendum. (European Union 2008).

If the structural divisions seem to be negotiable, it is much more difficult to negotiate the cultural divisions. To this family of divisions belongs the traditional one between the countries of western continental Europe and the countries of northern insular Europe. For years this cleavage has accompanied the process of European integration, in particular since 1973 when the UK, Denmark and Ireland joined the EU (Gilbert 2003). This cleavage reflects the different historical experiences of the 'islands' and the 'continent' in the formation of the nation state and its international extensions. The former consider the deepening of the integration process a threat to their national sovereignty, which is to be countered by pressing for further enlargement (Geddes 2004). Although the process of Europeanisation has curtailed the sovereignty of the member states on many public policies, this has not impeded some of them from defending their founding myths.

In these countries, the defence of sovereignty springs from the distinct historical phenomenon of democratic nationalism: it is nationalism which has enabled them, and especially the UK, to preserve democracy (MacCormick 1996). Indeed, the UK, Ireland, Denmark and Sweden have obtained several opt-outs from parts of the treaties in question. In exchange for signing the Lisbon Treaty, the UK government has obtained the right to opt-out even from the Charter of Fundamental Rights and together with the Irish government it has also opted out from the change in the sector of Police and Judicial Co-operation in criminal matters (on the basis of which the principle of unanimity can be substituted by QMV). In sum, these member states have interpreted the EU as mainly an *economic* project (Gifford 2008).

The historical experience of the continental countries of Europe has been very different. Here, nationalism had erased democracy, owing to a set of cultural and ecological factors. The development of the democratic state encountered much more unfavourable conditions in the 'land-bound' European countries than in the 'sea-bound' ones (Tilly 1975). In the former, nationalism was frequently anti-democratic (Smith 1991), bending to (or sustaining) the centralizing ambitions of dominant authoritarian groups. For the EU member states that inherited this historical experience and memory, integration represented the antidote to the virus of authoritarian nationalism, whereas those that have inherited the 'island' experience view political integration as a threat to their democratic identity. For these member states, thus, the EU should be mainly a *political* project. It must be added, however, that important sections of the French elites and publics regard integration also as an opportunity to promote a larger role for France (Guyomarch, Machin

and Richtie 1998), thus confirming its hegemonic vocation (Grossman 2008). In this sense, the cleavage between these two Europe is also an effect of the competition between two traditional European powers, with the UK traditionally in favour of a Europe firmly allied with the US, and France traditionally favouring a Europe independent from, if not competing with, the US (Garton Ash 2004).

With the enlargement of the 2000s, the economic view of the EU has been clearly strengthened (and with it, the pro-US perspective in foreign policy). In particular, the nationalistic governments of some new member states, such as the Polish government of the period 2005-2007 and the Czech government emerged from the 2007 elections, have claimed the necessity to defend their regained national sovereignty, after almost half a century of domination by the Soviet super-power. These governments view the EU mainly as an open market in which they can remedy their economic backwardness without constraints on their political sovereignty (Zielonka 2006). Thus, after those enlargements, the economic view of the EU is no longer so in minority as it was in the first two decades of the integration process. Certainly, these territorial cleavages are only indicative of the constitutional divisions existing within the EU. In fact, in the northern islands as well in the eastern member states there are those in favour of greater political or federal integration, just as there are influential groups supporting only economic or confederal integration in western continental Europe. Yet, these cleavages express relatively stable divisions concerning the constitutional future of the EU.

This cultural division, in turn, has necessarily overlapped with the cleavage concerning the democratic nature of the EU. As shown by the French referendum of 2005

in particular, popular criticism has emerged that views the EU as taking too many decisions while being insufficiently democratic (Taggart 2006). For a long time some observers have argued that the EU suffers from a *democratic deficit* (Marquand 1979). Unlike the cabinet in parliamentary systems, the EU indeed does not have a political decision-making body the voters can judge politically. Given the separation among the institutions that structures the decision-making process and the number of actors involved, it is highly implausible to establish 'who has to be considered responsible for what' in the EU. However, if one takes into consideration the systemic constraints of a union of asymmetrical states, then this criticism would seem misplaced. Even in its federal form, a union of asymmetrical states cannot be organized along the vertical lines of a parliamentary model. Parliamentary federalism is possible only where the territorial units are relatively alike in terms of demographic size and economic capability, as e.g. in post Second World War Germany whose *Länder* were designed by the Allied authorities (Jefferey and Savigner 1991) in order to prevent the more populous ones from gaining control over the legislature on a permanent basis.

Finally, one should note that these various cleavages have not found (nor could they) party-based representation coherent with the left/right division across the EU governmental institutions. The left/right division has emerged in the European Parliament when dealing with ordinary issues, but it has had a very limited political salience in the Council and the Commission. Moreover, when extraordinary issues such as constitutional questions were at stake, the left/right division did not hold even in the European Parliament, where pro- and anti-integration positions are represented within the same

political groupings, such as the Party of European Socialist (PES) and the European People's Party-European Democrats (EPP-ED). In conclusion, the constitutional conflicts emerged in the 2000s have made visible the divisions between member states and their citizens on the future of the EU.

6. Conclusion

The coming into force of the Lisbon Treaty by December 1, 2009 will not conclude the constitutional dispute within the EU. The EU is a union of asymmetrical states that reflect different interests and perspective on its organization and scope. For some member states and citizens, the EU *should be* no more than the organization of a common market, a sort of economic confederation, a commercial republic whose rationale has to be the promotion and distribution of economic growth, without affecting the sovereignty of the members of the union. For other member states and citizens, the EU *should be* much more than the organization of a common market, a sort of post-national federation, a political union able to play an independent role in the international arena, necessarily affecting the sovereignty of its member states. Both views express a specific relation with the *national identity* of the contenders. For the former, nationalism is the 'natural' cradle of democracy, whereas for the latter it is the inevitable grave. The *economic* view of the EU assumes that democracy is safe only if wrapped into national terms, whereas the *political* view of the EU assumes that democracy is at risk if wrapped only in national terms. The *economic* view sees the nation-state as the bulwark of democracy, whereas the *political* view sees the nation-state as a limit on the further development of democracy.

This constitutional division reflects the condition of the EU, which is in the middle between its (certain) *economic* past and its (uncertain) *political* future. It will be impossible for the "confederalists" to roll back the institutionalization of the EU for returning to the status of international organization of the founding years. Through the twin processes of institutionalization and constitutionalization, the EU has become a compound democracy which has transformed the European nation states in its member states. But it will be also difficult for the "federalists" to transform the EU in a formally constitutional compound democracy, able to behave as a political subject in its own right. In fact, the various enlargements have increased the resistance to the political project of the EU. Looking at the EU with the US experience in mind, one might argue that unions of states consolidate and develop as compound democracies *only* when they are able to keep the disputes on the nature of the polity within a shared constitutional language and when they dispose of a procedure for solving such disputes unconstrained by the unanimity's criteria. A common constitutional language and a not-unanimous amendment procedure are the necessary conditions for neutralizing the centrifugal impetus of the divisions between states and between citizens. The US experience also shows that a centripetal outcome cannot be taken for granted if the contenders speak a different constitutional language, expression of a different view of the *finalitè* of the union, as happened before the Civil War, and if some of them do not accept some viable criteria (in that case, the double super majority) for solving the disputes.

In light of the US experience after 1865, one might thus argue that the opposition to an EU constitutional treaty (it does not matter how to call it) should not be in itself a cause

for concern, if that concerns divisions on specific issues of normative and institutional organization of the polity. However, in light of the US experience before 1865, one might argue that if the division goes deep into the reason why the union was created in the first place, then the constitutional cleavage might become a serious cause for concern, because of the difficulty of the contenders to develop a constitutional discourse inclusive of their different visions on the nature of the union[9]. Thus, in order to develop as a political union, the EU would need to be based on a basic document which celebrates the reasons of the union, its normative principles and the necessary institutional conditions for preserving it. In order to go back to an economic organization, the EU would need to dismantle many of its already established norms, institutions and procedures. In the EU of today, veto points can be activated for obstructing the former evolution but also the latter involution. Indeed, the Lisbon Treaty promotes neither of these options. It consolidates what has been acquired in the material constitution, but it is far from introducing elements of a formal constitution. The Lisbon Treaty precludes from going back, but it is not sufficient for going on. But the divisions are still there and the contestation will continue as soon as institutional or normative changes are required by the empirical reality.

How to sort out from this conundrum? In the meantime, centripetal and centrifugal logics will continue to clash. The pressures coming from the international system will support the centripetal logic of giving the EU a political identity, as it has happened in the case of the US (Hendrickson 2009; Deudney, 2007; Onuf and Onuf 1993), whereas the growing internal complexity will support the centrifugal logic of reducing the EU to an

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[9] The turning point of 1965 in US political history is well discussed by Greestone (1993).

economic entity in order to restore national sovereigntioes. One might speculate that such a division will create a pressure to differentiate the two Europe, either through the device of *ad hoc* advanced cooperation between some of EU member states or through the creation of two different institutional entities (of which the EU is one). One might also speculate that the preservation of the *status quo* might be considered the only acceptable solution, *at least for the time being*. In any case, with the Lisbon Treaty, the EU has not at all concluded the dispute on its *finalité*.

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