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Taking 'Constitutionalism' and 'Legitimacy'
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Taking 'Constitutionalism' and 'Legitimacy' seriously

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Abstract

The recent debate surrounding the 'Treaty Establishing a Constitution for Europe' and the following 'Lisbon Treaty' has been framed around the question 'constitution Yes or No' and the language of constitutional and legitimacy theory. This paper argues that we should not discuss whether the EU has a 'formal' constitution or not, but rather whether the EU treaties embody the principles of 'constitutionalism' as developed by the European enlightenment tradition. These principles include 'limited government', 'bill of rights and judicial review', 'checks and balances and separation of powers', and, last but certainly not least, 'the normative construction of political responsibility'. Judged by these standards, the EU treaties, independently of whether we call them, collectively, a 'constitution' or not, are definitely defective on 'constitutionalist' grounds because they very poorly substantiate these fundamental principles. This paper does not argue that constitutionalism *should* be introduced into the EU architecture, although an argument to this effect can be made. It argues that words such as 'constitution' and 'legitimacy' should not be abused for a context in which 'constitutionalist' principles are distinctively weak or absent altogether. Such verbiage is detrimental to the extent that it confuses and bewilders European citizens and it raises expectations or fears that cannot be either fulfilled or dissipated.

Table of Contents

1	Introduction	4
2	The 'strange case' of European 'constitutionalism'	5
3	The multiplication and 'crumbling' of the principles of legitimacy	11
	Claim 1: The EU does not require 'political legitimacy'	12
	Claim 2: The EU has 'different' but 'adequate' sources of legitimacy	13
	Claim 3: Legitimation by growing politicisation and partisanship	15
4	Taking 'constitutionalism' and 'legitimacy' seriously	17

"The name of the song is called 'LEGITIMACY'." "Oh, that's the name of the song, is it?" Alice said, trying to feel interested.

"No, you don't understand," the knight said, looking a little vexed. "That is what the name is *called*. The name really *is*, 'DEMOCRACY'."

"Then I ought to have said 'That's what the *song* is called?'" Alice corrected herself.

"No, you oughtn't: that is quite another thing! The song is called CONSTITUTION; but that's only what it's *called*, you know!"

"Well, what *is* the song, then?" said Alice, who was by this time completely bewildered.

"I was coming to that", the knight said. "The song really *is* TREATY: and the tune's my own invention."

Adapted from Lewis Carroll. *Through the Looking Glass*, London, Puffin Books, 1984 (1872).

1 Introduction

In the middle of the 1980s, two events spelled out clearly the alternative ways ahead for European integration. On the one hand, in early 1984, the 'Draft Treaty establishing the European Union' promoted by Altiero Spinelli and his associates proposed the constitutional foundation of a federalist union; it failed. On the other hand, immediately thereafter a new project was launched to 'complete' the internal market with a large set of directives and a common currency, and those initiatives were successfully realised via the Single European Act (SEA) and the Maastricht Treaty.

Spinelli did not use the word 'constitution', and the draft treaty associated with his name was not called 'constitutional'. Yet it was a constitutional foundation for the following fundamental innovations: 1) it instituted a clear separation between two legislative chambers voting by majority (the Parliament and the Council, the second by weighted majority) and an executive (the Commission); 2) it clearly established the political responsibility of the Commission in front of the Parliament; 3) it introduced a difference between organic law (mainly reserved for the organisation and functioning of the Union's institutions) and normal legislation (mainly referring to policies); 4) it endowed the Union with a fiscal power via organic law; and 5) it introduced the principle of treaty ratification by a simple majority of countries representing two-thirds of the Union's population.¹

The choice to complete the market via the SEA and the common currency under a substantial stability (or a piecemeal improvement) of the institutional framework was an opposite but equally clear and coherent choice. Many would also argue that it was a more realistic choice. Indeed, had Spinelli's draft Treaty been approved, the completion of the internal market would have been more difficult and controversial. However, the SEA and the common currency immediately caused the political

¹ Draft Treaty establishing the European Union, *Official Journal of the European Communities*, OJ C77/53 of 19/3/1984.

question to surface again: can a European market made by intergovernmental agreements later be constitutionalised and politically legitimated?

In fact, following Maastricht, the words 'constitution', 'constitutionalism' and 'constitutionalisation' spread widely in the discourse of the European political and administrative elites. They were highly cultivated in the intellectual and academic disputes, and they eventually filtered into the public and media debates. The terms 'legitimacy' and 'legitimation' and the issues raised by them had a similar fate, witnessing the growing concern with the constitutional foundation and legitimacy bases of the Union.

The decade of intense treaty reform after Maastricht eventually led to the Convention, to its overemphasised 'Constitutional Treaty', to its signing by the EU governments and to its eventual disavowal by the people of two countries. The politically sanitised version of the Constitutional Treaty – the Lisbon Treaty – is at present formally proceeding through the ratification process. Yet the only referendum held so far has resulted in a NO, opening a new phase of searching for a way out of the unanimity impasse.

Therefore, in slightly more than twenty years, two attempts to set up the constitutional foundation of the Union have been defeated: Spinelli's draft Treaty, approved by the European Parliament and not labelled 'constitutional', was defeated by the governments of the member states; the Constitutional Treaty, approved by the governments and explicitly presented as a constitutional pact, was defeated by the people.

However, the similarity is misleading. While Spinelli's draft Treaty was an attempt at constitutional foundation and federalist legitimacy, the Constitutional Treaty, notwithstanding its labelling, presented few constitutional features if any. It did not institute a clear separation between two legislative chambers voting by majority, on the one hand, and an executive on the other; it did not firmly establish the political responsibility of the Commission before the Parliament; 3) it did not introduce a difference between 'constitutional' law (organisation and functioning of the Union's institutions) and normal legislation (the policies); 4) it did not endow the Union with fiscal power; and 5) it did not renovate the principles applying to treaty ratification.

In this paper, I would like to discuss the reasons and the implications of 'sliding' from the prudence of Spinelli in the mid-1980s of constitutionalism without an explicit constitutional text to the imprudence of today's supporters of the 'constitution' terminology in the absence of constitutionalism. Elucidating the basis of this sliding into verbiage with limited substance is essential not only to understand fully the trap in which the integration process is now caught, but also to avoid repeating the mistake of not taking constitutionalism and legitimacy seriously; something that, perhaps, the European publics have instinctively felt.

2 The 'strange case' of European 'constitutionalism'

The term 'constitutionalisation' and 'constitution' intrude into the European integration literature and jargon through the work of international law and international relations scholars. Pointing to the *principles* of supremacy and direct effect of EC law and the

constitutional authority of the Court of Justice,² and referring to the *process* of evolution from an arrangement binding only states into a regime of judicially enforceable rights and obligations on all legal persons and entities,³ these scholars underlined that the treaties and EU law were becoming part of the legal order of each member state. Even in the absence of an EU-wide administrative apparatus and of direct instruments of implementation, the enforcement of European law could be 'defended' and 'upheld' at the national level by those individuals (i.e., litigants) that perceive a stake in it. National courts progressively made Community law operative within the legal orders of the member states.

The second stream of scholarship and thinking that contributed to the diffusion of the term 'constitution/constitutionalism' in reference to the EU was that of neo-liberal economics (and law). In the normative language of this school, the market-making freedoms, competition law, and more generally the removal of economic boundaries are regarded as the essence of the 'economic constitution'. Economic competition and individual contractual rights are primary goals to limit 'rent seeking' activities in an enlarged cross-national market. Policies aiming to secure specific results are considered prone to becoming the target of rent-seeking activities, even if they are not initiated this way.⁴ Following these premises, the 'constitution' of the EU is identified with the originally limited economic rights associated with the Common Market, and market-correcting policies are seen in a negative light. The hierarchisation of rights and the 'constitutionalisation' of the market predefines the goals that individuals and groups are allowed to pursue, and precludes the formulation of public policies that encroaches on such goals and rights. At the same time, this position 'solves' the question of the constitutional foundation by grounding the legitimacy of the EU on fixed ontological economic liberties and rights.

More recently, a further contribution to the spreading of the use of the term 'constitution' has come from constitutional lawyers of the positivist school. Their argument is that the EU already has a 'constitution', whether we call it this way or not. The 'constitution' of the EU is represented by those treaty norms that concern the general objectives, the allocation of competences, and the performance of legislative, executive and judicial functions.⁵ Political practicalities and expediencies aside - using the word 'constitution' puts into a difficult position national political elites vis-à-vis public opinion, and it may lead to ratification problems - the EU treaties *are* the EU constitution. This view contests the idea that the term 'constitution' should be reserved for states, much as some well-known international organisations call their founding legal documents their 'constitution'. In this formal sense, a 'constitution' is fundamentally that 'set of norms in a legal system which is more stable in terms of

² The Court of Justice has pointed to the EC Treaty as the 'constitutional charter of the European Community' in one of its cases (Case 294/83, *Les Verts* versus European parliament).

³ Jupille, J. and J.A. Caporaso (1999). Institutionalism and the European Union: Beyond Comparative Politics and International Relations. *International Review of Political Science* 429- 444, p. 440.

⁴ See Streit M. E. (1995). The Economic Constitution of the European Community: From 'Rome' to 'Maastricht'. *European Law Journal* 1: 5-30 as an example of this line of reasoning applied to the EU treaties.

⁵ See, for instance, Lenaerts K. and P. van Nuffel (2005). *Constitutional law in the European Union*. London: Thomson/Sweet & Maxwell.

alteration of procedure than the (subordinate) rest of the legal order'.⁶ Therefore, the EU has a constitution, which is indeed made up by those articles of the treaties that pertain to the general objectives, the competences, the legislative, executive and judicial functions of the Union, and a largely judge-made system of fundamental rights protection. On these premises, whether treaties are publicly called 'constitutions' or 'constitutional' is only a matter of political opportunity and expediency.⁷

The fourth main contribution to the spreading of the 'constitutional' terminology was the eagerness of large sectors of the EU techno-political elite to use it. The 'constitutionalisation' jargon was offering the impression of a major turning point in the history of the EU and of a newly founded source of legitimacy for further expansion of supranational policies. The declining public support for the EU institutions and the many setbacks in referendums and European elections since Maastricht have made these circles acutely sensitive to the fact that the integration process can no longer progress without more explicit popular support. The temptation to resort to the appeal of terms such as constitution and constitutionalisation was irresistible. Via increasing resort to such terms in interviews by functionaries and politicians, they eventually made their way through the Convention and its adventurous decision to define its output as capable of 'establishing a Constitution'. This was a macroscopic attempt to rejuvenate support for the EU without facing the impossible task of agreeing on its true constitutional foundation.

In conclusion, sources for the widening use of the terms 'constitution/constitutionalism' were disparate and the motivations were diverse: 1) the intellectual surprise and fascination for the unexpected intrusion of what was previously regarded as public international law into the national legal systems; 2) the attempt by neo-liberal thinkers to seize the EU opportunity to establish a superior-order economic constitution capable of weakening 'rent-seeking' activities at the national level from the outside; 3) the reduction of the concept of 'constitution' to the higher echelon of a hierarchically ordered set of norms typical of positivistic legal theory; and 4) the attempt by wide sections of the European political and administrative elite to renew the source of legitimacy of the EU's activities without unbalancing the delicate intergovernmental equilibriums too much.

To these components, one should probably add a certain amount of fearful complicity on the part of the European intellectual and academic milieus, generally with a positive orientation toward European integration and a strong awareness of the difficulties of the project. The fear of providing anti-EU munitions often made them prisoners of the traditional wartime dictum: 'silence, the enemy is listening to you'. Not much intellectual debate surrounded this spreading use of the constitutional jargon and few critical voices rose against it or anticipated the risks implicit in it.

⁶ See Griller, S. (2008). *Fundamental Approach of the Lisbon Treaty. Is this a Constitution?*, Discussion paper presented at the conference 'The Lisbon Treaty and the Future of the European Constitutionalism', Florence, European University Institute, 11-12 April.

⁷ For a similar line defining constitution-making as the activity of regulating matters that are more fundamental than others, attributing to a text the special status of primary law source, defending and shielding such a text from transformation by the requirement of stringent amendment procedures, see Elster, J. (1999). *Ways of Constitution-Making*. In A. Hadenius, ed. *Democracy's victory and Crisis*. Cambridge: Cambridge University Press, 123-142. These characteristics, however important, do not seem to me essential in defining the goals of the constitutionalisation.

Yet there would have been ample room for such criticism. From the point of view of constitutional history and of history of political thought the 'constitutional' label as applied to the EU and its treaties, including the last one explicitly labelled 'constitutional', should have been regarded as too audacious, if not misleading.

In the history of constitutionalism on the two sides of the Atlantic,⁸ this term meant 'limited government'; a set of principles⁹ to limit or otherwise circumscribe the previously unbounded and unconstrained powers of absolute rulers. The people that agitated throughout Europe asking for a 'constitution' between 1830-31 and 1848 aimed at some guarantees against the abuse and the arbitrariness of power, and a 'government' limited by some general principle. The goal was to 'legalise' power by offering a special protection to specific liberties of the governed. There is no doubt that this is the fundamental meaning of the term in the tradition which rests on the *Federalist* (1787-88), the *French Declaration of Rights* (1789) and the classic systematisation of constitutional thinking by Benjamin Constant in his *Cours de Politique Constitutionnelle* of 1818-1820.

The goal of limiting arbitrary power was achieved (more or less efficiently) with varying combinations of basic techniques: responsible government (directly, to the people, or indirectly to legislative assemblies), a bill of rights; judicial (and constitutional) review and control; and separation of powers.

In the Philadelphia style of constitution-making, the principle of the separation of powers took both a vertical and a horizontal dimension. The fundamental structuring principles were the centre-periphery relations - and the vertical power attribution between the federal centre and the federated states - and the horizontal distribution of powers, among the federal governmental institutions (Congress, President, and Supreme Court).¹⁰ In the European experience, the pre-existence of a centralised government and of a strong executive meant that the division of power principle was mainly institutionalised in the balances among central institutions (mainly government and parliament), while the territorial vertical division of powers was historically less important (with the exception of Switzerland).¹¹

The essential goal of constitutionalism was *the normative construction of political responsibility* - who is responsible for decisions - and following this, *the identification of the target of positive and negative orientations* - who should be praised or blamed

⁸ For a review of this history, see Sartori, G. (1962). Constitutionalism. A preliminary Discussion. *American Political Science Review* 853-864.

⁹ Generally 'written' but not always so, as the English case shows. Yet, a great deal of what could be called the British constitution has a written form (Magna Charta, Confirmation Acts, Habeas Corpus Act, Bill of Right, Mutiny Act, Toleration Act, Act of Settlement, and others) although it is not formalised in a single written document.

¹⁰ The 'rights to be protected (the Bill of Rights) was added later, with the first ten amendments approved by the two chambers of Congress in 1789 and finally approved by the states in 1791. The number of amendments has grown to 27 since then. See the literature in Fabbrini, S. (2002). *Transatlantic Constitutionalism: Comparing the US and the EU*. Transatlantic Studies Conference, University of Dundee, Scotland, July 8-11.

¹¹ This explains why, in the USA competition was largely articulated in institutional terms, between federal and state institutions and between central federal institutions, while in Europe competition was more based on central political conflicts between majority and opposition, political parties and, in general, centralised political actors.

for those decisions - and, closing the circle, *the positive and negative sanctions associated to perceived misbehaviour*.

In the EU treaties - pending the approval of the introduction of the Charter of Fundamental Rights as an external but legally binding document in the Lisbon Treaty - there has been no bill of rights tradition.¹² There is a strong centre-periphery institutionalisation of powers. This focuses on the prerogatives of the Council, but it is accompanied by a rather weak and technically formulated subsidiarity clauses that makes reference to 'efficiency' in problem solving, more than to the autonomy and prerogatives of each level of government. Notwithstanding the increasing resort to the co-decision procedure and the growing role of the European Parliament as a legislator, there remains a blurred separation of powers among the central institutions (Council, Parliament, and Commission). Moreover, the respective roles of these central institutions (including this time also the Court of Justice) changes dramatically from one policy area to the other. The procedures for the different decision-making areas and arenas are so complex and intricate as to make impossible a clear perception of political responsibilities. Any attempt to explain these rules to the broader publics beyond the restricted set of experts who interpret them is bound to fail.¹³

The Commission cannot be defined as the 'executive' of the Union. It does have a few features of an executive: 1) an administrative bureaucracy to prepare decisions and to monitor to some extent their implementation and enforcement; 2) a principle of political responsibility before the European Parliament, which can dismiss a Commission with a two-thirds censure vote; 3) it is appointed by the European Council (all national executives are appointed by a different body); 4) presents legislative initiatives to the approval of other bodies (as national executive do) , 5) it does not always have the legislative initiative (no national executive has such a monopoly). The fundamental differences between national executives and the Commission resides in: 1) its lack of 'constitutional competences' to propose the institutional architecture and policy competences of the Union, a power that no national executive is deprived of; 2) its monopoly of legislative initiative in various fields, a prerogative not enjoyed by national executives; and 3) its exclusion from vast areas of Union decisions reserved for the Council(s).¹⁴

The Council, on the other hand, looks like a second state-based legislative chamber in those areas where it is charged with the final approval of legislative initiatives of the Commission. Similarly, it has a typical legislature's power to both initiate and conclude 'constitutional' (treaty) revisions. Contrary to national legislative bodies,

¹² Although one can argue there are three partially overlapping systems of protection: the national system(s); the European Convention of 1950; and then the system developed by the ECJ.

¹³ For an excellent discussion of the continuing, if not growing, 'complication' of the EU legal instruments and decision-making procedure, see De Witte, B. (2008). *Sources of Law and Law-Making in the Lisbon Treaty*. Discussion paper presented at the conference 'The Lisbon Treaty and the Future of the European Constitutionalism', Florence, European University Institute, 11-12 April.

¹⁴ No similarity exists between the practice of '*domain réservé*' in dual executives and the circumscription of the Commission's role in the second and third pillar. The former more appropriately applies to those acts of the Commission acts that do not require the approval of the Council and the Parliament. For a discussion, see Blondel J. (1999). *Formation, life and responsibility of the European Executive*. Catania: University of Catania, Workshop on 'Democrazie ed Elezioni nell'Unione Europea', May.

there are considerable limitations to its formal right to initiate legislation in several areas. The Council is sometimes seen as a 'brunch' of a dual EU executive. As such, it is even more atypical. No other different body appoints it. In several areas, it does not refer to any other body for final decision and approval. The co-decision procedure implying the search for agreement with the European Parliament bears more of a resemblance to the legislative *navette* of symmetric bicameral systems than any known executive-legislative relationship. The Council is not politically responsible as a body before any other body (individual members can be politically responsible, but the Council as such it is not). Its composition is fixed and its members are ex-officio members. As an executive, the Council(s) also lacks the bureaucratic infrastructure to be able to process the high burden of administrative preparation of decisions. Unquestionably, however, the Council(s) is both executive and legislator in certain policy areas.

Considering the limitations to responsible government, the absence of a bill of rights tradition, the blurred separation of powers, the constitutionalisation of the EU treaties is best represented by the foundation of the European legal system as established and developed by the Court of Justice. However, the Court's power of judicial review only applies to a subset, however important, of the EU's activities. Pending the uncertain future of the Lisbon Treaty, in principle only the core (first pillar) activities of the EU are subject to the jurisdiction of the Court in this way.¹⁵

A further peculiarity makes the EU treaties very different from constitutions: the actual content of the protected core. National constitutions define basic rights and duties as well as the procedures for selecting those who are allowed to take decisions and the formal procedure for taking decisions. As far as the substantive fields of decision-making and the substantive goal of the decisions are concerned, constitutions are normally parsimonious. Many of their provisions are devoted to defining those areas in which the freedom of political decisions is constrained by higher principles, the protected core. Outside these constraints, constitutions say little or nothing about the actual content of what has to be done, where it is legitimate to do something. Every area not constitutionally protected is in principle subject to political decision-making. In other words, national constitutions tend to be procedurally oriented and goal-independent.

The EU treaties define institutions and decision-making procedures, but they are also largely devoted to a list of substantive goals in specific policy areas fundamentally aiming at the formation of a common market on a continental scale. There is no clear legal distinction between these two sets of norms. The 'constitutionalised' international treaties include a large set of pre-defined substantive goals, whose implementation has its own logic and its own constitutional defence. The areas where the Community has no competence are defined negatively, by omission. 'Constitutionalising' the Treaties via judicial review has therefore meant constitutionalising certain specific goals, shielding them from any political pressure or redefinition that is

¹⁵ That is why describing the EU as a confederal institutional arrangement and a federal legal arrangement is perhaps going too far. See Weiler, J. H. H. (2001). *Federalism without Constitutionalism: Europe's Sonderweg*. In K. Nicolaidis and R. Howse, eds. *The Federal Vision. Legitimacy and levels of Government in the United States and the European Union*. Oxford: Oxford University Press 54-70 (p. 58).

not effectuated by a treaty change and does not gain the unanimity or the overwhelming majority of nation-state executives. Therefore, we have a constitutional court for a non-constitutional text that is atypical with respect to all known constitutions. Private and public actors have been constitutionally empowered, but only with respect to a predefined set of goals.

Paradoxically, the definition of the Communities as having the target of a common market implied a very broad (rather than a very narrow) perspective on the Community's activities. Everything depends on what is defined as 'common market' (e.g., public services, health, labour contracts, etc.). This definition is left to intergovernmental negotiations and there is little that other institutions or actors can do to defend themselves from what the national governments decide by unanimity.

What has been said above is not meant to be a critique of the current institutional architecture of the EU. It is a critique of the undue application to it of the term 'constitution' and, still worse, of the term 'constitutionalism'. We can accept calling the architecture of the Union its 'constitutional structure' only if we give to the term 'constitution' a purely descriptive and formal meaning: this is the way the EU institutions work and relate one to the other. However, in mistaking or substituting the term 'constitution' for the essence of 'constitutionalism', we pay a great price. There are plenty of historical and contemporary examples of states, which are undoubtedly states, which have constitutions, which are undoubtedly called constitutions, and which are totally unconstitutional in their text, spirit, and working.

That constitutionalism is something more than basic economic rights, a hierarchy of norms, or a description of the functioning and competences of whatever political institutions the organisation may have is further demonstrated by the fact that constitutionalism soon became a structure of political legitimation. Indeed, it became one of the two powerful sources of political legitimation in Western political thought and institutional development (the other being, of course, electoral competition). Constitutionalism then became 'constitutional legitimation', that is, a way to legitimise collectivised and binding decisions. Constitutionalism is inextricably linked to the principles of modern and rational political legitimacy.

3 The multiplication and 'crumbling' of the principles of legitimacy

In its encounter with the EU, the concept of 'legitimacy' has suffered a fate similar to that of 'constitution/constitutionalisation'. Its meanings have been multiplied and stretched, and its principles have crumbled. Even in this case, therefore, coming back to the original meaning may help to orient oneself in the maze. The concept of 'legitimacy' refers to – and was 'invented' for – the fundamental predicament of politics: when and why should people accept and abide by collectivised and binding decisions, in the formulation of which they have not participated or, while participating, have seen their preferences unsatisfied?

Following this, legitimacy is clearly unnecessary and immaterial whenever decisions are not collectivised; that is, when the actors concerned and affected are left with exit options, with the possibility of avoiding the application and consequences of decisions taken without they dislike. Legitimacy is equally unnecessary and immaterial when decisions are based on the consent of the actors that have an effective veto

power on disliked decisions: unanimity. In short, legitimacy problems emerge only in conditions of no exit and no unanimity.

Given that the operational definition of legitimacy as the likelihood of obedience remains elusive and shows its importance only in extreme situations and only *ex post*, most debates about 'legitimacy' focus on the principles and the procedures through which it can rationally be argued that collectivised decisions must be accepted by those who have seen their values or preferences unsatisfied. Today, our capacity to rationally argue about the binding natures of the rules is still largely shaped by the constitutionalist principles, i.e.: if, the extent to which, and when these decisions have been reached following the principles of constitutionalism. In this sense, constitutionalism is at the core of the modern sources of legitimacy, that is, at the core of all rational arguments concerning the conditions of obedience to political decisions. Therefore, deliberately or inadvertently confusing the term 'constitution' with the term 'constitutionalism' attributes to a descriptive, formalistic concept the precious value of a source of political legitimacy. Which is exactly what according to my argument should be avoided.

Considering the foregoing reflections, it is not surprising that, although constitutionalism is at crucial root of political legitimacy in Western thought, it does not play a role in the debate about the conditions in which the EU's decisions must be accepted and respected by dissenters and non-participants – the debate about the political legitimacy of the EU. In actuality, this debate has followed three main streams, none of which takes on board constitutionalism: 1) it has denied the need for sources of political legitimacy; 2) it has argued for 'special' and '*sui generis*' source of legitimacy; and 3) it has pleaded for a political legitimacy resulting from partisan and adversarial behaviours within the main EU institutions. Indeed, this absence of constitutionalism among the sources of EU political legitimacy is the best sign of its weakness in the EU institutional framework.

Claim 1: The EU does not require 'political legitimacy'

The first line argues that the intergovernmental nature and action of the EU does not require any additional legitimacy beyond that indirectly offered by the voluntary consent of the member states and the ratification processes in accordance with their constitutions. To the extent that the EU is based on voluntary agreement to participate, leaves open a constant option for exit to all members, allows partial exits, options to 'contract out', variable geometry and the like, and resorts to unanimity voting and/or to the mechanism of disproportionate weights on many issues, legitimacy is immaterial within the EU and there is hardly any need to discuss it. Yet the constant advance of QMV in the Council(s), the growing legislative powers of the European Parliament in several fields, and the ECJ's guided 'constitutionalisation' process transform collective unanimity decisions into collectivised decisions that some member states and groups of citizens have to accept. If decisions are not always unanimous and exit options are progressively reduced, legitimacy problems re-emerge.¹⁶

¹⁶ Moravcsik, A. (2002). 'In Defense of the "Democratic Deficit": Reassessing the Legitimacy of the European Union'. *Journal of Common Market Studies*, 40: 603-634; Moravcsik, A.(2004). Is There a

A different version of the 'no need for political legitimacy' position stresses the intrinsic nature of the decisions, rather than the procedure for their achievement. It is argued that in the sphere of 'efficiency issues', the delegation of decision-making powers to independent institutions (that is, institutions not electorally legitimised) is justified and does not require further legitimation. For such issues, 'efficiency' is more important than political legitimacy, therefore competence, expertise, procedural rationality, transparency, accountability by results, etc. are sufficient to legitimise the EU and to justify the delegation of necessary powers.¹⁷ This reasoning boils down to two points: some issues, due to their technicality or complexity, are surrounded by some general consensus on the goals to be achieved and incompetence with respect to the means to do so. This consensus on the goals is arrived at without asking anybody about it. There will therefore be a range of issues and decisions for which debates among experts are insulated from any political decision-making process and debate.

This idea effectively denies the fundamental predicament of politics - how can people arrive at and accept collectivised decisions starting from different values and preferences – by arguing that people 'do not have' or 'should not have' different preferences and values in certain fields and issues. By assuming that values and preferences do not need to be ascertained and by pre-defining a number of goals to which 'efficiency maximisation' logic is applied, the political predicament disappears. The problem with this elegant solution is that competence legitimises decisions in matters where individual values and interests are easily defined in generalisable terms (interest to health, safety, survival, etc.) and as such can be 'pre-defined'.¹⁸ In many other areas, people disagree on what 'efficiency' is, which are the efficiency issues, and on whether experts' decisions are more appropriate than political negotiations to achieve efficiency. Assuming this disagreement exists, we need to invoke a higher conflict resolution principle to solve the problem. The competence/efficiency formula is a removal of the problem, more than a solution to it.

Claim 2: The EU has 'different' but 'adequate' sources of legitimacy

A second position suggests that EU activities are not deprived of legitimacy but are sustained by 'a different kind' of legitimacy, and should be judged by standards different from those of national political legitimacy.¹⁹ Within the general but weak 'infrastructure of political accountability' offered by national and European elections,²⁰ other mechanisms, alone or in conjunction with each other, can be utilized to sustain the legitimacy of the EU's outputs.

'Democratic Deficit' in World Politics? A Framework for Analysis. *Government and Opposition* 39: 336-363.

¹⁷ Majone, G. (1998). Europe's 'Democratic Deficit': The Question of Standards'. *European Law Journal* 4: 5-28; (1996). *Regulating Europe*. London: Routledge; (1999). The Regulatory State and its Legitimacy Problems. *West European Politics* 22: 1-24.

¹⁸ Even in the most obvious cases of generalisable public interests, however, the credentials to competence and the mechanisms to access those credentials may be challenged and refused.

¹⁹ Héritier, A., 1999. Elements of democratic legitimation in Europe: an alternative perspective. *Journal of European Public Policy* 6: 269-282.

²⁰ I refer here to Scharpf, F. (2000). *Governing Europe. Effective and democratic?* Oxford: Oxford University Press, Ch. 1.

The first of such mechanisms is represented by 'corporatist and intergovernmental agreements' for the determination and control of rule application in certain domains. The specific feature is the wide participation of affected and concerned parts and interests that control some crucial resource. With a wide participation of all (or almost all) affected interests, the need for legitimacy is actually reduced, according to the elementary rule that the more inclusive the input for decision the less any legitimization of it is necessary. With a slight switch of emphasis, it is also argued that decisions taken in this mode are legitimate because they are more effective in reaching the goals. In other words, the specific kind of input (the involvement in the decision of those interests that control key resources for its implementation/enforcement) does guarantee a more effective output. In this way, 'effective' (*nota bene*: 'effective', not 'efficient') implementation is regarded as a source of legitimacy. However, for effectiveness to be a source of legitimacy, the goals of these arrangements must be accepted and appreciated by the public, which does not participate in the decisions. However, if the goals are accepted and appreciated, the problem of legitimacy is resolved already, *ex ante*.

Another typical mechanism of legitimacy is the resort to independent expertise, as already discussed. In this case, expertise is not presented as a way to escape the legitimacy problem for issues defined by reference to efficiency, but it is seen as an additional element among many others that contribute to the legitimacy of an organisation's output. Competence, as opposed to political equality and the participation of affected interests, is a well-established principle of authority and source of legitimacy whenever everybody prefers to follow the advice of recognised authorities rather than to accept different decision rules. It is based on the recognition of strong asymmetries of knowledge and experience and on the acceptance of the requirements that stratify access to the credentials for those attributes.

An additional mechanism invoked as producing legitimacy for the EU is that of 'public policy pluralist networks'. This involves concerned interests with open access (not restricted to major representative organizations) and largely informal processes of exchange of information and critical appraisal of different options which contribute to the elaboration of public policies. The legitimising aspect of policy networks is deemed to be the associational pluralism '*à l'américaine*' and the process of deliberation and public discussions that make it possible consensually to define 'generalisable interests'. These public policy networks describe more informal interaction models that precede, accompany or follow the formal decisions rather than describe the formal institutions of decision-making. The argument is that network interactions eventually improve the quality of public policy choices.

Summing up this argument, in a concise way that does not do justice to his complexity, one may conclude that new forms of '*governance*' based on negotiated agreement among affected interests, mediated by experts' advice and open to wide processes of exchange of information and critical appraisal of different options, may lead to more effective implementation of policies. This, in turn, may constitute a

source of legitimacy for the wider polity. Fritz Scharpf has coined the imaginative term 'output legitimacy'.²¹

The European Commission has invested considerable symbolic and material resources in the new governance mechanisms and there are no doubts that have added to the mere intergovernmental legitimacy of the early times. Nevertheless, there remains a certain ambiguity between criteria such as the effectiveness of implementation, the quality of policymaking, the efficiency of outcomes, and legitimacy *tout court*. Moreover, this line of argument somehow equates the consent and agreement of the affected and involved with the acquiescence of the non-involved. Finally, it seems unlikely that these mechanisms can be effective in conflict resolution in those areas that appear more controversial: the constitutive EU issues of membership, decision rules, and competences.

In general, one should not overemphasize the EU's specificity in resorting to these mechanisms of governance. National democracies do not rest on the principle of electoral legitimacy alone,²² but on a plurality of concomitant and parallel mechanisms that complement each other in different functional areas. Most of the decisions at the national level, as much as in the EU, are shaped if not formally taken via these governance tools, rather than via political-parliamentary decision-making.

The overarching difference between the EU and the nation-state does not lie in the presence/absence of corporatist agreements, competence bodies and policy networks. It lies in the centralised convertibility of the resources each of them exchanges. Votes (and the principle of political equality) can be weighed against the control of implementation and enforcement resources of the relevant organised interest, and the latter can be weighed against the former. Expertise and procedural competence and the role of genuine deliberation fora also play a role in specific functional areas predefined by other decisional principles, and their effects spill over to other areas. The holders of different kind of resources, the politicians and the voters, the bureaucrats and the interest representatives, the experts and the judges, continuously exchange their respective assets in a situation in which ultimately none of them can remove itself from the collectivised decisions fundamentally resting on the principle of political equality. These 'political' decisions are therefore not the principal form of decision-making, but rather the guarantee of the convertibility of a plurality of resources and legitimacy principles. In the context of the EU, which lacks the element of political legitimation, the other principles are not complementary, but self-sustaining.

Claim 3: Legitimation by growing politicisation and partisanship

On the basis of the argument of the previous sections, therefore, a growing number of experts and European politicians have argued for a third solution that they perceive by now as necessary and/or unavoidable: legitimacy problems can only be

²¹ For an extended discussion of the utility of the concept of 'output legitimacy', see Bartolini, S. (2005). *Restructuring Europe. Centre formation, system building and political structuring between the nation state and the EU*. Oxford: Oxford University Press, pp. 165-175.

²² See Rokkan, S. (1975). I voti contano, le risorse decidono [Votes count, resources decide]. *Rivista Italiana di Scienza Politica*, 5: 167-176.

solved by politicising the EU, via the introduction of a stronger injection of political electoral responsibility for those who take decisions. The injection of stronger elements of partisanship and 'majoritarianism' in the EU consensual processes is expected to: 1) foster the development of partisan alignments in its main institutions; 2) make political mandates clearer; 3) help to overcome coordination problems among the key institutions (Council, Commission, Parliament), and 4) link citizens' interests and preferences to the Union's internal debates. Great expectations are linked to the idea of a more open contestation of the office of the Commission President, and of the key positions in the Commission/Parliament, allowing alternative candidates to declare their programmes before the EP elections, issuing manifestos for their term of office, and forcing parties to declare their support for one or the other candidate. It is expected that these results can be achieved by piecemeal changes that, while increasing the politicisation of given issues, do not change the basic institutional architecture of the Union, a change for which there is obviously no unanimous consent.²³ For this politicisation to have the expected beneficial effects and to avoid unexpected negative ones, a number of quite demanding conditions have to be met.

First of all, we should make sure that politicisation will spare the 'constitutional' or 'constitutive' issues of the EU concerning 'membership' (the geographical boundaries of the Union), 'competences' (what should be done at the EU level as opposed to other levels of government), and 'decision-making rules' (how should collective decisions be taken), and that it will focus only or mainly on issues similar to national issues (levels and types of market regulation, welfare, citizenship rights, immigration policy, law and order issues, etc.). So far, national parties and electorates are divided more often on European constitutive issues than on isomorphic issues. In the 36 referendums held between 1972 and 2003 in the member and candidate countries, the profound splits among party leaders and between party leaders and their electorates have affected both right- and left-wing parties and have all resulted from the politicisation of the constitutive issues of membership and new treaty ratification.

We also need to trust Euro-parties (parliamentary groups and federations) capable of offering a coherent and significant left-right alignment and competition and handle the delicate gatekeeper task that the politicisation thesis will attribute to them. Notwithstanding the proposition that they are strengthening in cohesion and partisan discipline, it is far from clear that they can effectively work as representational channels. It is at least doubtful that their delicate internal equilibriums would sustain and survive a strong politicisation of the EU agenda. These types of Euro-parties, rather than being the key agencies of the politicisation, could be its first victims.

Third, if the more open and contentious exposition of different platforms and agendas generates the sense of a political mandate for the electoral winner(s), this should then be reconciled with the narrow policy boundaries of the Treaties and with the pre-defined goals of the EU (see section *supra* on 'constitutionalism'). Such mandates

²³ Føllesdal, A. and S. Hix (2005). Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik. *European Governance Papers* (EUROGOV) No. C-05-02, (<http://www.connex-network.org/eurogov/pdf/egp-connex-C-05-02.pdf>.); Hix S. (2006). Why the EU Needs (Left-Right) Politics: Policy reform and Accountability are impossible without it. Paper for *Notre Europe*, Paris (<http://www.notre-europe.asso.fr>).

might be frustrated by the autonomy of the European Central Bank, by the case law of the ECJ, by the blocking vetoes in the Council, or by Treaty-specified duties and competences. These Treaty obstacles may generate intense political frustrations that would immediately spill over to the institutional constraints that make it impossible to implement the mandate politically defined. The argument that the political mandate so defined will be accepted by those on the losing side in the expectation that in the future they may be on the winning side, is therefore rather fanciful and abstract, and it could raise expectations that cannot be satisfied.

Even the idea that political mandates can coordinate policy positions across EU institutions (the Council, Commission, and Parliament) and help to overcome institutional gridlocks among them is doubtful. The coordination of policy positions thanks to partisan alignments has to overcome the disturbing elements of Commissioners appointed by governments no longer in charge and of Councils changing political orientations during the life of a European Commission and Parliament. The different timing of formation and composition of these bodies will generate permanent and unstable 'divided government', changing directions and intensity in an unpredictable and relatively random way. As things stand, clear-cut partisan alignments may not solve problems of cross-institutional coordination, but may add problems of political and partisan coordination to the already existing problems of institutional coordination.

Finally, it is also unsure whether the emerging pattern of left-right politicisation will more solidly link citizens' interests and preferences to EU 'politics'. What is certain is that any politicisation of integration/independence issues would probably increase the gap between parties and voters, and would split and tear apart Euro-parties. In any case, politicisation may generate excessive hopes and expectations, to be frustrated later and widen the gap between normative expectations and reality.

4 Taking 'constitutionalism' and 'legitimacy' seriously

The distrust and mutual horizontal control among member states and the competition between authorities in a composite polity represent a source of effective control over the EU's activities. New forms of governance focusing on the participation of affected interests, corporatist agreements, expertise and competence evaluation, epistemic communities and policy networks may be enough to legitimate the output of the EU in a number of areas. If we conclude that the standards of national democratic legitimacy are too high and inappropriate for the EU, we may hope that increasing partisanship in appointments at the top and in the functioning of the Parliament/Commission may attenuate the public perception of distance and remoteness of the EU institutions, without raising excessive expectations. However, classic inter-governmentalism, modern technocracy, old and new forms of governance, and the drive toward partisan politicisation are insufficient, taken individually, to rationally argue the legitimacy of the growing political production of the EU. Taken together and combined, these principles reinforce each other and help to support such political production.

The accumulation of all these practices, however, is neither 'constitutionalism' nor 'legitimacy', and it does not provide a satisfactory solution for the political predica-

ment embedded in the definition of the goals and major activities and decisions within the EU. The terms are stretched, misused, and abused, but the underlying problem is hardly solved; perhaps it is even exacerbated. The resulting system is overly complex, arcane to the citizens, and unable to contribute to the normative construction of political responsibility which I have argued is the basic building block of 'constitutionalism'.

From a historical perspective, it is easy to understand how this came about. In the early period of the post-War integration project, the segmented definition of the competences of the Communities required only that the various programmes be developed through the cooperation of functional elites which, on the basis of specific criteria of economic rationality, enjoyed broad immunity with respect to public opinion and even, in some cases, with respect to their own national governments. The politics of integration took it for granted that the technical policies based on economic rationality were beneficial for all participants. Such politics neither required nor resorted to value representation and discourses of a non-economic type. A consensus growing toward the economic regulation of exchange relationships was sufficient to the building of this segmentary community guided by criteria of economic rationality.²⁴

The expansion from the early core, however, was pursued without clear-cut constitutional guidelines – such as those enshrined in the Spinelli's 1980s proposal – but with the same segmented logic. This eventually led to the pluralisation of the regimes and to the intertwining of the decisional levels in different sectors. This has progressively made more difficult the perception of the dynamic system, which is not only multi-level, but also multi-*loci*.

Indeed, in certain policy areas the competences, activities, and legislation of the EU have gone so far that any constitutional foundation cannot be achieved without accepting the idea that this *acquis* will be put into question, challenged, and eventually modified. In other areas, on the contrary, the *acquis* is so meagre and subject to member state approval and their mutual veto and mistrust that it can hardly be submitted to constitutionally legitimate procedures for collective decision. Having created a market as a set of predefined rights and goals against considerable national resistance and cheating, we need to recognise honestly and publicly the difficulty of 'constitutionalising' and 'legitimising' this *ex post*. The EU system is largely based on the internal disciplining and mutual mistrust and control among member states. Any attempt at effective constitutional legitimation is likely to upset and unbalance this delicate mechanism of inter-elite control.

In every process of 'constitutional legitimation', the normative construction of responsibility and a system of sanctions is necessary. The difficulty of identifying the rationality criteria in a complex system, the crumbling image of those who hold hierarchically ordered competences with territorial sovereignty, and the vagueness of the relationships of interdependence breaking up the specific value references, make the constitution of any element of political negative or positive identification – without

²⁴ Lepsius Rainer M. (1997). Integrazione economico-politica e pluralità culturale. *Il Mulino Europa* 2, February: 3-18, p. 8.

which 'politicisation' cannot occur – very hard if not impossible. Calling this system 'constitutional' can only contribute to the dissatisfaction and fears of citizens.

Euro-sceptical positions are often criticised for their lack of focus, their lack of specific grievances, lack of specific redress requests; they are criticised for being more a 'mood' than a programme, or for failing to identify a specific disagreement on issues, etc. However, this nature of euro-scepticism should come as no surprise. How could it be differently given the nature and the complexity of the system that has been created? How could it be different when the institutional architecture and the policy process make it difficult to distinguish who bears responsibility, or to whom expectations should be directed?

Perhaps a part of the European publics and elites want a constitutional foundation and a part of it does not, but I feel that both parts instinctively dislike the current tendency to cheat and not take constitutionalism seriously. The result is that continuing the debates and the reform attempts under this discourse and terminological ambiguity is likely to generate opposition and resentment on both sides. Those who fear or dislike a constitutional foundation feel that the increasing resort to these terms points to clear intentions and an unfolding reality. Those who aspire to a constitutional foundation perceive the ambiguity of intentions and the inadequacy of reality behind the abuse of words.

This paper does not propose practical solutions to move ahead and get out of the current difficult situation. The paper only warns against the dangerous tendency to hide the clear terms of the current critical juncture by stretching, adapting, abusing, and misusing concepts such as constitution, legitimacy, democracy, political mandates, etc. The misleading conceptualisation recently flourished in parallel with the attempt to reform the Treaties is appealing because it has proven successful at the national level. The European citizens and voters have done the only thing they could do: they have read these discourses with their national understanding of the terminology, while realising that the corresponding institutional underpinnings were, or should have been, absent in the EU. Therefore, this warning is not issued for the sake of theoretical coherence, conceptual clarity or linguistic purity, but because the persisting ambiguities and uncertainties about the European constitutional foundation *are a policy mistake*.

The beginning of a fresh debate about the future of the EU institutional architecture requires reflection on and understanding of the mistakes of the past before taking new actions, after an extended period of activism and advancement without adequate reflection and understanding. This is a formidable intellectual task, and scholarly circles have a crucial role to play in this of rigorous critical evaluation, toward which this paper is a modest contribution.