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Constitutional Failure or Constitutional Odyssey? What Can We Learn From Comparative Law?

by

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Abstract

According to many scholars, the rejection of the Constitutional Treaty and the disappointment caused by the contents of the Lisbon Treaty — defined by Somek (2007) as a mere post-Constitutional Treaty — mark the failure of any possible constitutional ambition for the European Union (EU). This point can be challenged both from a theoretical point of view — by describing the EU as an example of “evolutionary constitutionalism” — and a pragmatic one (i.e., looking at the functioning of concrete constitutional experiences), I will focus my paper on this second point, insisting on comparative argument. The research question of this work is: Can we compare the “constitutional crisis” of the EU to the constitutional difficulties encountered by other multinational experiences? My idea is that the latest attempts at amending the EU treaties — the period of the “Conventions” — can be traced back to the genus of mega-constitutional politics and starting from this parallelism I argue that the so-called constitutional “failure” of the EU is actually a confirmation of the current constitutional nature of the EU rather than the proof of the impossibility of transplanting the constitutional discourse to the EU level.

Key-words:

European Union, European Constitution, Canada, Switzerland, Comparative Law, Constitutional Odyssey.



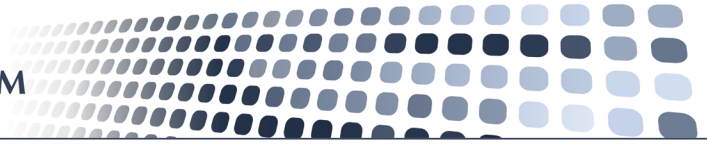
1. Goals of the paper

According to many scholars,¹ the rejection of the Constitutional Treaty and the disappointment caused by the contents of the Lisbon Treaty – defined by Somek (Somek, 2007) as a mere post-Constitutional Treaty – mark the failure of any possible constitutional ambition for the European Union (EU). This point can be challenged both from a theoretical point of view – by describing the EU as an example of “evolutionary constitutionalism”^{II} – and a pragmatic one (i.e., looking at the functioning of concrete constitutional experiences), I will focus my paper on this second point, insisting on comparative argument.

The research question of this work is: Can we compare the “constitutional crisis” of the EU to the constitutional difficulties encountered by other multinational experiences? My idea is that the latest attempts at amending the EU treaties – the period of the “Conventions”^{III} – can be traced back to the *genus* of mega-constitutional politics and starting from this parallelism I argue that the so-called constitutional “failure” of the EU is actually a confirmation of the current constitutional nature of the EU rather than the proof of the impossibility of transplanting the constitutional discourse to the EU level.

In order to do so, I have twisted the argument taken by the “discontents” of constitutionalism at the EU level in order to challenge their conclusion, by trying to show how the EU is suffering from a crisis common to that experienced by entities such as Canada and Switzerland, for instance, which are provided – no doubt about that – with a constitution and characterized by constitutionalism properly understood.

As for the focus of this article, three things should be clarified. First, a comparison does not mean that two things are identical and, of course, when comparing something with the EU one should keep in mind the international origins of the EU. In any case in this essay I am not going to compare the reform procedures of the Treaties and of the Swiss and Canadian Constitutions, I am not interested in “amendment” as such. It is not the subject of this work. The real issue at stake here is the comparability of the “constitutional processes”, a broader formula which also includes those transformative practices that happen without a formal change of the constitutional text. Secondly,



Switzerland and Canada represent just two of the federal experiences that can be compared with the EU. Another case might be Belgium, but in the interests of economy in this paper I am going to take into account only these two cases. Thirdly, this paper does not aim to offer strategies or proposals for overcoming the current impasse, it just limits itself to showing how the EU is facing challenges that are common to many other constitutional experiences.

2. The idea of mega-constitutional politics

In his masterpiece, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*^{IV}, Peter Russell describes the long striving for the “patriation”^V of the constitution, the constitutional failures of the Meech Lake and Charlottetown accords and the difficulty of recovering Québec after the constitutional rupture of 1980. By “constitutional odyssey” Russell refers to at least two different historical events that can be logically distinguished although they present themselves as historically connected: firstly, the struggle to “bring the constitution home” after the formal independence of Canada from the United Kingdom; secondly, the attempt to heal the constitutional rupture with Québec after the approval of the Constitution Act of 1982, decided without the consent of Québec and with the support of the Supreme Court of Canada.^{VI}

Although these two events are closely connected one can understand the first as the logical cause of the second, which produced a series of (failed) attempts at modifying the constitution and recovering Québec. The agreements of Meech Lake (1987) and Charlottetown (1992), with a “no” expressed by the people in a national referendum, seems to have slammed the door on mega-constitutional politics.

In order to explain the Canadian picture better, Russell devised the distinction between low and mega constitutional politics:

Virtually all constitutional democracies are constantly engaged in low level, piecemeal constitutional change, whether through formal constitutional amendments, informal political practice, or judicial interpretation. This is ordinary constitutional politics. Canada's constitutional politics fits this pattern through most of its first century after confederation in 1867. When constitutional politics moves well beyond disputing the merits of specific constitutional proposals and addresses the very nature and principles of the political community on which the constitution is based, it is a horse of a very different color. At this "mega" level, "precisely



because of the fundamental nature of the issues in dispute-their tendency to touch citizens' sense of identity and self-worth-mega constitutional politics is exceptionally emotional and intense" (Russell 1992, 75). The constitutional question tends to dwarf all other issues in public discussions and media coverage when a country's constitutional politics is at the mega level (Russell, 1993).

Russell's idea of mega-constitutional politics presents two premises: first, the idea according to which behind the constitution there is a pre-existing social entity: "That is, it makes no sense to attempt to create a constitution – or a state – for a group of people who do not share some minimum commonalities"(Kay, 2005). The second premise refers to the rise of popular participation in the constitution-making process and to the idea of a constitution as an act of the people, the real sovereign entity.

As Russell pointed out, mega-constitutional politics is not exclusive to Canada. It can be found in other legal experiences as well^{VII} and that is why some scholars have recovered this distinction and attempted to apply it to the supranational level to describe the process of semi-permanent revision of the EU Treaties which started after 1992.^{VIII} I am going to start from these considerations in order to specify why the EU can be compared to other domestic (although multinational) constitutional experiences, namely Canada but also Switzerland.

As a matter of clarification, it is better to specify what I mean by "constitutional odyssey". By this formula I refer to cases of tension between the "constitutional form" (i.e., the texts or texts representing the constitutional document in a given legal order) and its constitutional substance (i.e., the set of principles governing the equilibrium between powers in the frame of government and in the form of State – i.e. the relationship between centre and periphery – and the protection of fundamental rights). Canada and Switzerland represent two different examples of constitutional odyssey: while in Canada the tension between the constitutional form and the constitutional substance has produced a long series of failed attempts at amending the constitutional charter, in other cases (the Swiss case is the best example of this) this tension has produced a continuous series of revisions of the formal constitution.

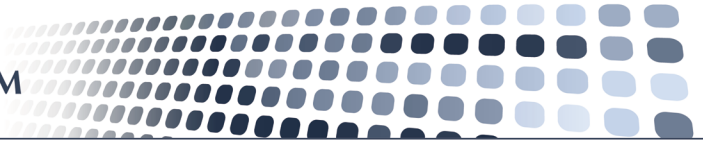


3. Can we compare?

Traditionally the word federalism has been seen as an “infamous f-word” (Puder, 2003) in European Studies and similar ostracism has been opposed to all those studies characterised by a comparative approach to the EU. Recently, this tendency seems to have been abandoned thanks to the works of Schütze (Schütze, 2009), Howse and Nikolaidis (Howse-Nikolaidis, 2001), Burgess (Burgess, 1991) and Laursen (Laursen, 2010). which can be understood as attempts to recover a comparative approach to the EU’s integration process. A similar approach will be followed in this paper, aware of the useful results that can be achieved through the comparison, since – as the authors of the “Integration through Law” project^{IX} emphasized – comparison serves as a laboratory which permits us to test and verify the theoretical constructions and the risks connected to the absolutisation of the EU.^X

With specific regard to the subject of this paper, undoubtedly the works by Fossum (Fossum, 2004) about the comparability between Canada and the EU are fundamental in order to expand the concept of “constitutional odyssey” beyond the Canadian boundaries. Fossum explained the reasons that allow us to compare Canada and the EU: among others, a high level of complexity in both cases, different coexisting conceptions of “belonging” (which caused the emergence of different forms of nationalism – from that in Québec to that of the “aboriginal people”). Fossum seems to compare what Russell called “mega constitutional politics”(Russell, 1992) with what de Witte defined as the semi-permanent Treaty revision process (de Witte, 2002), by showing their common features; lack of legitimacy and constitution making processes driven from the top, and exclusion of some actors from the constitutional dynamics (aboriginal people in the Canadian case):

In a similar manner, albeit not portrayed as constitutional by the key actors involved, just since the mid 1980s, the EU has gone through three major treaty changes, the Single European Act of 1985, the Maastricht Treaty of 1991 and the Amsterdam Treaty of 1997 and is in the process of ratifying the fourth, the Nice Treaty 2000. At present the EU is preparing further reforms to make itself ready for enlargement. This lengthy and continuous effort at polity-building is now explicitly referred to as constitution making (Fossum, 2004).



These constitutional processes thus display similarities: the necessity to involve citizens and national parliaments in order to overcome the democratic deficit of the Union, the difficulty of finding “a satisfactory and comprehensive constitutional settlement”, (Kay, 2005) and the important role played by courts in reshaping the relation between centre and periphery. Moreover, both Canada and the EU have discovered the importance of alternative sources of constitutional update: intergovernmental agreements for Canada (see the importance of the Social Union Framework Agreement^{XI}) and new governance products in the EU (de Búrca, 2003). The importance of these alternative and non-legally binding sources of constitutional update produced another common feature; the asymmetry and flexibility that characterises the two constitutional experiences. This explains why Bruno Theret (Theret, 2002)^{XII}, for instance, described Canada and the EU as two examples of multinational and asymmetrical federalisms.

Before analysing such analogies, we need to challenge any possible objection concerning the possibility of comparing the EU with federal experiences, by starting from a brief overview of the factors that make the EU and other pluricultural contexts (namely Canada and Switzerland):

- The coexistence of different languages, cultures and even legal systems
- The coexistence of different patterns of welfare
- The important asymmetries characterising the respective integration processes

(a) The coexistence of different languages and cultures

This point does not need to be explained in detail since it is self-evident. It refers not only to the factual co-existence of different languages and cultures in Canada, Switzerland and in the EU but also to the existence of particular forms of disciplines aimed at ensuring respect for and disciplining the use of such language diversity^{XIII}. This set of constitutional provisions makes a linguistic and cultural pluralism one of the fundamental principles of the constitutional core of these contexts.

As for Canada, such a multiculturalism has an impact on the nature of the domestic legal system, which has been often described as an example of mixed jurisdiction. The classical definition of *mixed jurisdiction* is that given by Walton, according to whom “mixed



jurisdictions are legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law” (Walton, 2000). The debate about the possibility of defining mixed jurisdictions in a clear and univocal manner is a very live one.^{XIV} According to Palmer,^{XV} for instance, a mixed jurisdiction is characterised by the presence of three factors: a mix of elements of the civil and common law traditions that co-participate in founding the core principles of a given legal system (Palmer 2001, 7-8.); and the legal actors’ awareness of the dualist character of the law in a given legal system or, rather, the existence of these dual elements should be obvious to the ordinary observer (Palmer 2001, 8). Thirdly, the last element is the structural one, namely the predominance of the civil law tradition in the private law domain and that of the common law tradition in the public law domain. As for the Canadian case the roots of this particular system can be found in the *Québec Act* of 1774 the real starting point of the dual nature of the Canadian legal system. This acknowledged that “in matters of property and civil rights (private law), the civil law tradition, inspired by French civil law, applied in Quebec in the same way that the common law tradition, inspired by British common law, applied in such matters of property and civil rights outside of Quebec” (Cuerrier-Hassan-Gaudreault, 2003). The bi-systemic nature of Canada has a great impact on the activity of the federal legislator as the example of *bijuralism* confirms. Bijuralism requires that “Canadian legislation must not only be drafted in both official languages (bilingualism) but it must also respect the duality of two Canadian legal traditions: common law and civil law (bijuralism)” (Cuerrier-Hassan-Gaudreault, 2003). In order to do that, a Legislative Committee of Bijuralism has been set up whose specific task is to “ensure the application and unfettered accessibility of federal legislation in a country in which two official languages and two distinct traditions of private law serve as a backdrop. The goal of legislative bijuralism is to ensure respect for the essence of each legal tradition in both language versions of the Act”^{XVI}

One could perceive how a similar necessity inspires provisions like Article 345 of the TFUE or even Article 4 of the EUT, concerning the national (here understood as national-legal) identity of the Member States and is present in all the debates about the possibility of a European Civil Code.^{XVII} The necessity to deal with these diversities has forced all the European institutions to devise mechanisms aimed at respecting both the linguistic and the legal peculiarities of the member States: examples of this can be found in



the legislation regulating the publication of the official acts^{XVIII} of the EU and even in the interpretative activity of the European Court of Justice.^{XIX}

Of course there also some differences between Canada and the EU, but the possibility to hazard the extension of the formula of “mixed jurisdiction” in order to define the EU has been endorsed by one of the major scholars of the notion, William Tetley:

Mixed jurisdictions and mixed legal systems, their characteristics and definition, have become a subject of very considerable interest and debate in Europe, no doubt because of the European Union, which has brought together many legal systems under a single legislature, which in turn has adopted laws and directives taking precedence over national laws. In effect, the European Union is a mixed jurisdiction or is becoming a mixed jurisdiction, there being a growing convergence within the Union between Europe's two major legal traditions, the civil law of the continental countries and the common law of England, Wales and Ireland (Tetley, 1999).

(b) The coexistence of different patterns of welfare

In their works on welfare policies, Esping Andersen (Esping Andersen, 1990) and Ferrera (Ferrera, 1998) have distinguished at least three or four worlds of welfare coexisting in Europe. This is one of the reasons for the difficulty of harmonization in the field of social policies, and partly explains why more recently the EU has resorted to soft law instruments and to the Open Method of Coordination (with questionable results in the majority of the cases^{XX}). A similar variety can be found in Canada, according to the studies by Bernard and Saint Arnaud (Bernard-Saint Arnaud, 2004). Remarkable differences exist among the Canadian Provinces and in this respect the Provinces of Alberta and Québec (Morel, 2002) represent two extreme points which can be traced back to the European patterns of welfare identified by Bernard and Saint Arnaud; the liberal, the familist, the social-democratic and the conservative regimes.

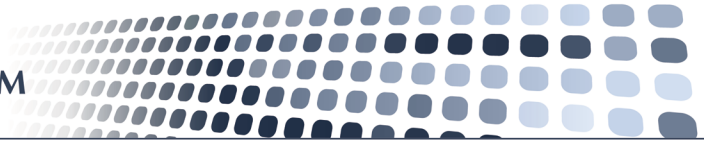
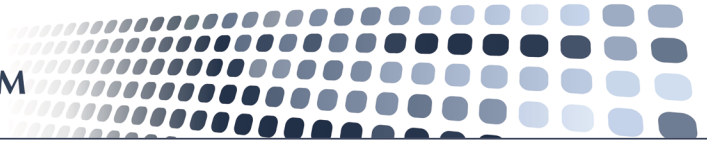


Table 3. Indicators for which Provinces are Similar to the Various Regimes (Except for the Liberal Regime, which They Belong To)

Characteristics for which the Province Is Similar to the Regime			
	Social-democratic	Conservative	Familist
Quebec	<ul style="list-style-type: none"> Final government consumption expenditure Payroll taxes as % of GDP (trend*) Education expenditure Rate of government employment (trend) Infant mortality rate Proportion of scientists and technicians 	<ul style="list-style-type: none"> General government expenditures General government receipts Percentage of public expenditure on health and public expenditure as % of total health expenditure Female labour participation rate (trend) 	<ul style="list-style-type: none"> Social security transfers Debt interest payments Unemployment rate Percentage of voter turnout Daily newspapers read
Ontario	<ul style="list-style-type: none"> Employment rate Proportion of scientists and technicians 	<ul style="list-style-type: none"> Final government consumption expenditure (trend) Rate of government employment 	<ul style="list-style-type: none"> Debt interest payments (trend) Rate of union membership
Alberta	<ul style="list-style-type: none"> Public expenditure on vocational training Female labour participation rate 		<ul style="list-style-type: none"> Debt interest payments (trend) Rate of union membership
British Columbia	<ul style="list-style-type: none"> Education expenditure (trend) Employment rate Female labour participation rate 	<ul style="list-style-type: none"> Public expenditure as % of total health expenditure Unemployment rate 	<ul style="list-style-type: none"> General government receipts Daily newspapers read Rate of union membership
<p>* The use of the word trend indicates that the province's level on this indicator diverges from the level of the liberal model in the direction of another regime, but does not reach the latter level.</p>			

Source: Bernard- Saint Arnaud, 2004

The coexistence of different worlds of welfare can be easily explained keeping in mind the identity implications of welfare policies as confirmed by several studies on Québec nationalism (Béland-Lecours, 2006). Welfare is a matter of identity and culture, the social policies in Québec are seen as a distinctive element of the local identity: “Solidarity conceptualised in terms of equality and social justice ties nationalism to the welfare state” (Béland-Lecours, 2006,79), as Béland and Lecours powerfully pointed out. Indeed the “jealousy” of Québécois for their social policies explains the reactions to some judgments



of the Canadian Supreme Court – like *Chaoulli v. Québec*^{XXI} for instance – perceived as imperialistic attempts to jeopardise the local specificity or the reluctance to participate in the *Social Union Framework Agreement*.

A similar variety of worlds of welfare can be found in Switzerland, as the studies by Armingeon, Bertozzi and Bonoli show (Armingeon- Bertozzi- Bonoli, 2004), focusing on social security, education, taxation and employment regimes (“The term denotes the patterns of employment and unemployment and the patterns of wage regulation”, Armingeon- Bertozzi— Bonoli, 2004). The results of their research can be summarised in the two following tables:

TABLE 3
SUMMARY OF THE OPERATIONALISATION OF VARIABLES FOR THE DIFFERENT
ASPECTS OF THE CANTONAL WELFARE STATE

	Dimension 1	Dimension 2	Outcomes
Employment (a)	Level of public employment	Continuity of female employment	
	High	High	Social democratic
	Low	Low	Conservative
	Low	High	Liberal
	High	Low	Unclear (statist-conservative)
Taxation (b)	Level of taxation	Progressivity of taxation	
	High	High	Social democratic
	High	Low	Conservative
	Low	Low	Liberal
	Low	High	Unclear (redistributive-liberal)
Education (c)	Education expenditure and share of diplomas		
	High		Unclear (social democratic or liberal)
	Low		Conservative
Social Security (d)	Number of cantonal social security schemes and per capita social security benefits paid by canton and municipalities	Degree of familism (birth grants, child benefits to 4th child minus expenditure on pre-school facilities)	
	High	Low	Social democratic
	High	High	Conservative
	Low	Low	Liberal
	Low	High	Unclear (liberal-conservative)

Source: Armingeon- Bertozzi - Bonoli, 2004

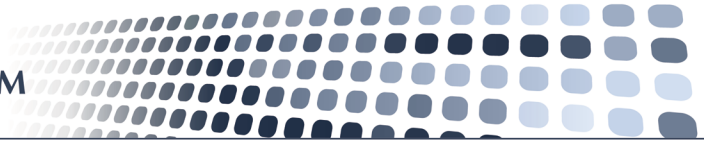


TABLE 3
WORLDS OF WELFARE IN SWITZERLAND: CLASSIFICATION OF THE 26 SWISS
CANTONS (EMPLOYMENT, EDUCATION, TAXATION AND SOCIAL SECURITY)

List of Cantons		Employment	Education*	Taxation	Social Security
AG	Argovia	2	2	1	1
AI	Appenzell Inner-Rhodes	2	2	1	1
AR	Appenzell Outer-Rhodes	1	2	2	1
BE	Berne	1	2	2	1
BL	Basle-Country	1	4	4	3
BS	Basle-Town	4	4	3	3
FR	Fribourg	3	4	3	2
GE	Geneva	3	4	3	3
GL	Glarus	1	2	1	1
GR	Grisons	4	2	1	1
JU	Jura	3	4	3	1
LU	Lucerne	2	2	2	4
NE	Neuchâtel	3	4	2	2
NW	Nidwalden	1	2	1	4
OW	Obwalden	1	2	2	4
SG	St Gall	1	2	2	1
SH	Schaffhausen	3	4	1	3
SO	Solothurn	1	2	4	4
SZ	Schweyz	1	2	1	4
TG	Thurgovia	2	2	3	1
TI	Ticino	4	4	4	3
UR	Uri	4	2	1	4
VD	Vaud	1	4	3	2
VS	Valais	1	2	2	2
ZG	Zug	2	4	1	2
ZH	Zurich	4	4	1	3

Notes:

1 = liberal

2 = conservative

3 = social democratic

4 = unclear, in case of employment 'statist-conservative', in case of education either 'liberal' or 'socio-democratic', in case of taxation 'redistributive-liberal', in case of social security 'liberal-conservative'.

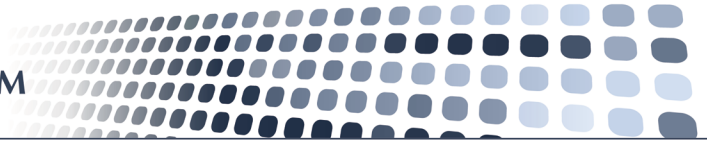
*only category 2 and 4 are possible under this dimension.

Source: Armingeon- Bertozzi – Bonoli, 2004.

According to these findings, it is not possible to trace back to any canton a precise univocal welfare pattern.

This variety in welfare models can also explain the social tourism which is due to the different quality and level of services performed by the cantons (Tabin -Keller Hofmann-Rodari-Du Pasquier.-Knüsel-Tattini, 2004). Some scholars argue that the strong autonomy of the 26 sub-systems has produced a series of inter-cantonal differences both in terms of financial effort and legal discipline passed (Filippini-Crivelli-Mosca, 2006). The welfare state of Switzerland is based on:

strong social security systems while also being coupled with a decent system of social assistance. The Swiss welfare state system does not apply large systems of general universal benefits, or social savings accounts. The Swiss health care insurance system is rather unusual, in the sense that public, subsidized private and fully private elements have been intertwined. Also, the decentralization of the health care system has been given rise to significant differences between cantons in terms of health care spending and provision (Wang-Aspalter, 2006).



The role of Cantons and communes in social policies is essential and has favoured the emergence of different systems of welfare (Filippini Crivelli Mosca, 2006; Crivelli-Filippini, 2003)^{xxii}.

(c) Important asymmetries characterising the respective integration processes

Flexibility and asymmetry are two of the most important features of Canadian federalism, elements partly explicable by taking into account the cultural and economic diversity present in the territory: ‘Federal symmetry’ refers to the uniformity among member states in the pattern of their relationships within a federal system. ‘Asymmetry’ in a federal system, therefore, occurs where there is a differentiation in the degrees of autonomy and power among the constituent units” (Watts, 2005). However, asymmetry does not refer to the mere differences of geography, demography or resources existing among the components of the federation or to the variety of laws or public policies present in a given territory.

The debate on the importance of asymmetry in federal contexts is also a live one and the word asymmetry has acquired a variety of meanings. When talking about asymmetries one can distinguish between *de jure* and *de facto* asymmetries^{xxiii}, or between financial^{xxiv} and constitutional – some arrangements, in order to combine the particular needs of some components of the federations and the principle of equality, are recognized in the constitutional text –, and between necessary or optional asymmetry (“... which stems from the different relations that develop between the federal government and the other governments within the federation. Some may choose to exercise all of their constitutional responsibilities, while others prefer to assign some of them to the federal government”). (Dion, 1999).

Canada presents all these three forms of asymmetry. The following table offers an overview of the different forms of asymmetry present in Canada.

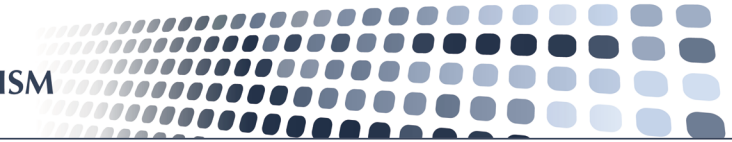


Table 2
Constitutional Asymmetry in Law: Selected Examples

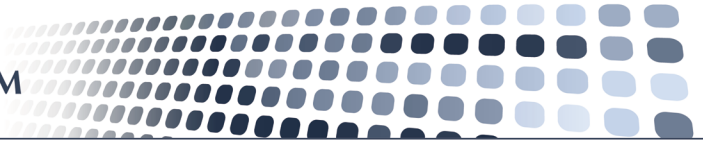
<i>Subject of Provision</i>	<i>Section</i>	<i>Notes</i>
<i>Constitution Act, 1867</i>		
denominational education	93(2)	extends minority education rights in Ontario to Quebec
language and civil law	133 129	bilingual legislative regime and civil law system only in province of Quebec
uniformity of laws in certain provinces (opting-in)	94	Ontario, New Brunswick, and Nova Scotia (but <i>not</i> Quebec) are invited to unify laws on property and civil rights and court procedure by opting for federal control
Senate representation	22, 23	unequal representation of provinces, different qualifications for senators from Quebec
judges' qualifications	97, 98	section 98 applies only to Quebec; different system of appointment of judges from other provinces if section 94 is activated
<i>Provincial Constitutions</i>		
natural resources	109	Alberta, Saskatchewan, and Manitoba are not given this jurisdiction until 1930
language	23 (Manitoba Act)	Manitoba joins Quebec with bilingual regime in its legislature
subsidies	118, 119	differential direct grants
denominational education rights	various	different denominational rights (some in section 93, others in provincial constitutions)
terms of union (British Columbia, Prince Edward Island, Newfoundland)	various	different constitutional commitments to provinces (e.g., P.E.I. steamship & telegraph service)

Table 3
Constitutional Asymmetry in Practice: Selected Examples

<i>Subject of Provision</i>	<i>Section (Act)</i>	<i>Form of Asymmetry</i>
pensions	94A (1964)	concurrence with provincial paramourty permits QPP and CPP asymmetry
amending procedure	38 (3), 40 (1982)	opting-out of constitutional amendments increases asymmetry
notwithstanding clause	33 Charter (1982)	provincial overrides permit unequal applications of the Charter
mobility	6(4) Charter (1982)	limit to mobility rights of Canadians in provinces with high unemployment

Source: Milne, 2005.

As Watts pointed out, “cultural, economic, social and political factors in combination have in all federations produced asymmetrical variations in the power and influence of different constituent units” (Watts, 2005), and this makes asymmetry a constant element present in all the federalising processes, even in Switzerland and the EU.



Switzerland is often described as an example of symmetric federalism but on closer examination it is characterised by strong asymmetries, given the important role acknowledged to the Cantons in many key sectors (education, fiscal federalism – each Canton has an its own fiscal regime) and a confirmation of its asymmetrical nature is given by the *Réforme de la péréquation financière et de la répartition des tâches entre la Confédération et cantons* (RPT)^{xxxv} approved in 2004, and by the importance of the equalization payments mechanism based on Article 135 of the Swiss Constitution.^{xxxvi} Further evidence of the asymmetric nature of Switzerland's federalism can be found in the wording of the Constitution which acknowledges great organisational autonomy (Art. 37 Const.)^{xxxvii} with the only limitation being the necessity to have a constitution (Art. 51 Const.)^{xxxviii} and to guarantee the exercise of political rights (Art. 39 Const.)^{xxxix} and by the constitutionalisation of the Communes (Art. 50 Const.)^{xxx}

In the European Union among the main factors of asymmetry are enhanced cooperation,^{xxxxi} the opting out mechanism (Miles, 2005), and the open method of coordination (Scharpf, 2007).^{xxxii}

4. European mega-constitutional politics: the conventional method and its constructivism

The last phase of the EU constitutionalisation process has been dominated throughout by the attempt to give the Charter of Fundamental Rights a binding nature, a goal achieved thanks to the entry into force of the Lisbon Treaty. The Charter of Fundamental Rights has represented a turning point. This is not just in terms of contents (Rubio Llorente, 2003), since it represents a codification of many principles already taken into account by the ECJ in its case law or already codified in other international conventions from which the ECJ has taken inspiration over the years. It is also important for the attention created around the EU among continental European scholars interested in constitutional law (traditionally committed to more domestic themes of investigation) and for the procedure followed in its preparation. The latter is due to the introduction of the so-called conventional method, then adopted even in the draft of the Constitutional Treaty.



As many authors have pointed out, the Convention has represented a rupture in the traditional European “constitutional politics”:

Legal and political science scholars have for a long time propounded the notion that the EU has a constitution, even though both this notion and its connotations remain disputed. The European constitution resulted from a gradual process of interaction—between primary norms and the case law that interpreted them. The European Court of Justice (ECJ) acted as the leading ‘constitutionalizing actor’ by extracting constitutional principles from a body of law that also encompassed national constitutions. In parallel, Intergovernmental Conferences (IGCs) were largely treated as episodes of Treaty reform. The intellectual hegemony of ‘liberal intergovernmentalism’ in the explanation of Treaty changes, and its emphasis on a model of preference aggregation that came closer to the model of normal pluralistic politics (Moravcsik 1991, 1998), had the effect of removing their consideration from the prism of ‘constitutional politics’. The Convention on the Future of Europe has subtly modified this landscape. Nominally at least, the Convention has expressed a larger constitutional ambition, the most evident trait of which is the naming of its product a draft constitution” (Closa, 2004).

Another “rift” caused by the conventional method is given by the language adopted in that particular phase: the decision to name this body “Convention” made the comparison with the US federalising process evident and recalled the American analogy. Hoffmann, in his works on the Convention, attempted to summarise the novelties introduced by the conventional method, by reading the activity of the second Convention in light of three features: *socialisation*^{xxxiii}, *institutional involvement*^{xxxiv} and *consensus rule*.^{xxxv} Other authors, like Karlsson (Karlsson, 2010. See also Karlsson, 2008), have insisted on the partial innovativeness introduced by the conventional method, since “it has not done much to increase the quality of responsiveness and accountability in EU treaty reform. The main problems from a democratic viewpoint are therefore left unresolved”.

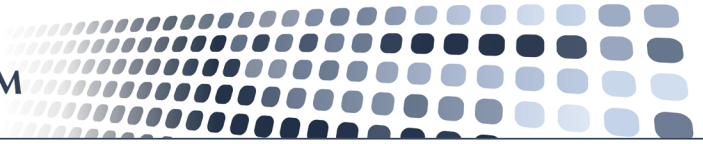
At the end of this spectrum of opinions one could also recall Magnette who pointed out that: “*Although a number of political leaders described it as the victory of a new ‘constitutional doctrine’, the Laeken Declaration, which created the Convention and raised a long list of questions its members would had to address, was the result of a classical intergovernmental compromise*”.(Magnette, 2005): In any case, all the scholars interested in this phenomenon have emphasised the new communication strategy adopted by the Convention, the great announcements, the constitutional rhetoric, the publicity, a new symbolism^{xxxvi} fostered by the use of words like “constitution”, “law” and “minister”:



Although it was the Treaty establishing a Constitution for Europe that first gathered together these basic rules and principles in a treaty-based written constitution, its content was largely a codification (or recodification) of the existing treaties and case law; only a small number of its provisions were actually new. These provisions were partly prompted by dissatisfaction with the functioning of the EU, and were designed to improve it. However, the main difference between the Treaty establishing a Constitution for Europe and the earlier amending treaties, such as the Treaties of Maastricht, Amsterdam and Nice, lay not so much in its content as in the constitutional symbolism that it was meant to convey, with a strong emphasis on democracy and fundamental rights, and hence on European citizenship.^{xxxvii}

The Conventions phase reminds me of the definition of mega-constitutional politics given by Peter Russell in his works, its attention to the policy of big announcements, its obsession with involvement and participation (despite its élitist nature). As mentioned above, Russell's idea of mega-constitutional politics presents two premises. The first is the idea according to which behind the constitution there is a pre-existing social entity. The second premise refers to the rise of popular participation in the constitution-making process and to the idea of a constitution as an act of the people, the real sovereign entity. This implies that mega-constitutional politics presents an emotional grasp, it talks to the soul, to the heart and even to the stomach of the people (conceiving the constitution as the product of a professed *Volksgeist* even in those cases where the existence of such a common culture is problematic and questionable). It presents itself as an identity-based concept. Mega-constitutional politics wants to involve the people, it is obsessed with this idea of popular participation. Why? Mega-constitutional politics aimed at curing a sort of original sin present in Canada's constitutional history: a sort of democratic deficit, consisting of the fact that the first Canadian Constitution was a document approved by a foreign parliament. Mega-constitutional politics attempted to achieve a sort of *a posteriori* legitimacy that was missing at the beginning of Canadian constitutional history. In order to do so, constitutional politics created another constitutional wound by excluding Québec, and this created a new round of mega-constitutional politics aimed at curing this wound.

I think similar elements can be found in EU history: the Convention was conceived as an attempt to react to the democratic deficit of the Union, to present the EU as closer to the citizens, by involving them, by creating a common constitutional and rhetorical language (see also at the discussion concerning the possibility of identifying some common European roots to be mentioned in the Preamble of the Constitutional Treaty^{xxxviii} which triggered a debate on the commonalities of the Europeans). Another similitude is given by



the end of the current round of mega-constitutional politics both in the EU and in Canada and by the role played by the instrument of referendum in this respect. In the following passage taken from a piece written by Russell, in which he describes the sense of frustration and fatigue of Canadians after the failure of the mega-constitutional politics rounds, one could replace the words “Canadians” or “Canada” with “European Union” or “Europeans”, such are the similarities between the two contexts:

The recent referendum may have demonstrated that Canadians are deeply divided in their sense of identity and political justice but it has, nonetheless, left them united in their constitutional fatigue. There are no politicians of any consequence in post-referendum Canada with any stomach for resuming the effort to fashion a grand constitutional restructuring designed to strengthen national unity... There are still some well-meaning intellectuals and some constitutional junkies who would like to have another kick at that can. But they will find no support from political leaders or the general public (Russell, 1993).

Europe seems to be suffering from a similar reaction after the “referenda rounds” involving both the Constitutional Treaty and the Lisbon Treaty. However, again, this should not be understood as a signal of the impossibility of constitutionalisation of the EU; rather it seems to be a problem shared by other constitutional experiences characterised by cultural plurality and diversity.

However, despite these similarities there are also important differences. While the Canadian attempts to modify the constitution after 1982 have been unsuccessful, since 1992 the European Union has experienced a long series of approved amendments to the original Treaties. In any case, Canada is just one of the two examples that can be taken into account in this respect: another pattern of constitutional odyssey might be represented by the Swiss case, where it is possible to count two total revisions of the constitution and more than 140 partial revisions (*sic!*). How can we explain such a constitutional instability? First of all, this is due to the absence of a real constitutional court able to give fluidity and flexibility to the wording of the constitution: in fact, constitutional interpretation is a valuable and soft alternative to the constitutional revisions in many constitutional experiences. Secondly, I refer to the very detailed contents of the Swiss Constitution (and the same applies to the EU Treaties and to the text of the Constitutional Treaty) – the Constitution disciplines almost all the institutional life of the Swiss Confederation. In this way it does not present itself as adaptive and flexible, it codifies social changes, presenting



itself as a “constitution-achievement” (Carrozza, 2007)^{xxxix} or a “snapshot constitution” (Besselink, 2007). Against this background both the European Treaties and the Swiss Constitution seem to be unable to lead social forces: they can only “reflect the historical movements” (Besselink, 2007), thus seeming to be mere *snapshot constitutions*, creating a sort of never ending sense of frustration, since the constitutional form seems not to be able to catch, entirely at least, the constitutional substance (resulting finally in a form of constitutional odyssey).

The ideas of the semi-permanent revision process of the EU Treaties and that of the mega-constitutional politics rest on the view that the political sources of law are the sources *par excellence*, the “normal” sources in a constitutional context which aims at being democratic. This reveals the constructivist nature of this politics, since it implies a “constructivist” nature in every “real” constitutional moment, that is, “a conception which assumes that all social institutions are, and ought to be, the product of deliberate design”.^{xi} According to this view, in order to be binding and normative (and not merely descriptive), constitutions are supposed to be “constructivist”, since they are directed at the achievement of an ideal society characterised by those values deemed fundamental.^{xli} The constructivism that seems to accompany modern (continental, at least) constitutionalism seems to be oriented towards the political sources of law, which are the conclusive result of a debate where opposing political forces struggle to influence the manifestation of states’ wills, represented by the *loi* (*legge, ley, statute*). The *loi* resulting from political sources of law is an act characterised by abstractness and generality, and in this sense laws are the product of a rational legislator moved by a clear intent to build coherence, unity and order, conceived as τὰξίς (constructed order). From this perspective, the (second) European Convention gave us the illusion of a strong and constructivist will at a supranational level, which has failed miserably. The consequence of this failure could have been the absence of legitimacy and unity, or, in other words, fragmentation, disorder and obscurity.

This is a view that often accompanies the idea that in a system characterised by a separation of powers – a principle characterising the democratic system^{xlii} – the legislative monopoly should be exercised by the legislature. This is of course understandable, but history is very rich in examples of constitutionalisation processes driven by forces and sources other than political ones, namely examples of “evolutionary constitutionalism”.^{xliii}



5. Final Remarks

The last few centuries are rich in examples of constitutions *octroyée*^{XLIV} or, at least, not completely democratically decided. Of course the mission of constitutional lawyers should be to improve the constitutional design that already characterises the EU, but nevertheless this does not mean that a European constitution does not currently exist or that a supranational constitutionalism cannot exist. Against this background one should wonder whether we really need mega-constitutional politics at the EU level. Russell himself seemed to advocate the abandonment of the idea of mega-constitutional politics after the failure of Meech Lake and Charlottetown (Russell, 1993).

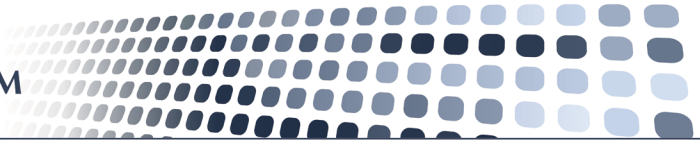
Indeed, if we enlarge our perspective we can see how the difficulties encountered by the EU are common to those lived by many other multinational entities, like Canada and Switzerland, and how probably the Treaties' semi-permanent revision process and the Canadian constitutional odyssey are two consequences of the general crisis of the constituent power.^{XLV} This is a power that is not able to express itself *uno acto* and in a disruptive way and that cannot be considered as really sovereign because of the international pressures imposed by the international community on the new constituent moments (Lollini -Palermo, 2009). In this respect, perhaps, the EU is not as special as the inventors of supranationalism would argue.

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^I "What do we ultimately make of the demise of EU constitutionalism? Does its swan song ring as an elegy or as an ode to joy? Well, none of it. The demise of EU constitutionalism is neither a cause to regret nor a reason for joy. Constitutionalization of [the] EU, while possible, was obviously premature, insufficiently reflected upon and not well prepared. Its failure can be hailed only to the extent that it has made clear that EU is not destined to become a state, at least not any time soon" (M. Avbelj, 2009).

^{II} See my considerations in Martinico, 2009, For the application of the idea of evolutionary constitutionalism to the EU, see: Besselink, 2007; Brunkhorst, 2004; Peters, 2006; Westlake, 1998.

^{III} Shaw, 2003; Maurer, 2003; Pollak - Slominski, 2004; Fossum - Menéndez, 2005; Magnette, 2005; Risse - Kleine, 2007. Hoffmann, 2009



^{IV} Russell, 1992.

^V “The word ‘patriation’, a genuine Canadian invention, refers to Canada’s final ‘bringing home’ of its constitution from Westminster, with full patriotic fanfare, on 17 April 1982. Although Canada enjoyed sovereignty since at least 1931, it nonetheless continued to depend on requests to the United Kingdom Parliament for making amendments to its constitution. The reason for this anomaly was clear: Canadian governments had proved unable to agree on an internal amending procedure by which legal changes to the constitution could be made at home without having recourse to Britain”, Milne

^{VI} Re: objection by Québec to resolution to amend the constitution, 1982, 2 SCR, 793.

^{VII} “Mega constitutional politics is not peculiar to Canada. The United States knew this kind of politics last in the Civil War. Recently, much of eastern Europe passed through mega constitutional upheavals”, Russell, 1993, 33.

^{VIII} “First, mega constitutional politics goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based. Mega constitutional politics, whether directed towards comprehensive constitutional change or not, is concerned with reaching agreement on the identity and fundamental principles of the body politic. The second feature of mega constitutional politics flows from the first. Precisely because of the fundamental nature of the issues in dispute – their tendency to touch citizens’ sense of identity and self-worth – mega constitutional politics is exceptionally emotional and intense. When a country’s constitutional politics reaches this level, the constitutional question tends to dwarf all other public concerns.” Fossum, 2004.

^{IX} Cappelletti- Seccombe – Weiler, 1985.

^X Dehousse, 1994.

^{XI} Lazar, 2000; Gibbins, 2001; Philips, 2001; Mendelsohn McLean, 2000

^{XII} Theret also points out the differences existing between the two processes : “Au Canada, un État-nation, le Québec, cherche à se constituer. L’État nation est sans doute également en gestation chez les nations autochtones qui revendiquent leur reconnaissance institutionnelle et son émergence remet en cause un ordre politique fédéral constitué à l’origine sur un mode centralisateur. La question de la reconnaissance du caractère multinational de la fédération y est ainsi de plus en plus souvent posée¹⁸. Dans l’UE, où l’État-nation est le point de départ, c’est l’inverse : le palier fédéral en devenir cherche à se faire une place en réorganisant l’ordre politique régional sans pour autant pouvoir en dépasser le caractère multinational. On peut alors considérer que, sauf accident de parcours, l’UE et le Canada se dirigent tous deux vers une reformulation similaire des principes du fédéralisme, reformulation par laquelle un compromis stable serait trouvé entre supranationalisme et intergouvernementalisme, ce que le schéma i1 veut illustrer.”

^{XIII} See Arts. 4, 18, 70 and 175 of the Swiss Constitution. Arts. 16–23 of the Canadian Charter of Rights and Freedoms, for example, Arts. 3 TEU, 4.2 TEU, 165 TFEU, in the European Treaties.

^{XIV} See, for instance, Öricü, 2001. Tetley defines a mixed legal system as “one in which the law in force is derived from more than one legal tradition or family”, and a mixed jurisdiction as “a country or a political subdivision of a country in which a mixed legal system prevails” (Tetley, 1999). Milo and Smits state that the adjective “mixed” may mean many things: a “combination of various legal sources”, a “combination of more than one body of law within one nation, restricted to an area or to a culture”, and “the existence of different bodies of law applicable within the whole territory of a nation” (Milo- Smits, 2000). As for the origin of a mixed jurisdiction, Tetley wrote: “It is my view that mixed jurisdictions are created when one culture, with its law, language and style of courts, imposes upon another culture, usually by conquest. The imposition on Québec of the English common law, together with England’s administrative, judicial and legislative system, leaving the French civil law to continue unchanged, is an example. The intrusions of other cultures by armies and treaties, as seen in Belgium and much of the rest of Europe at the time of Napoleon, as well as in the cases of South Africa and Louisiana, provide further examples. Mixed jurisdictions may also be created by the voluntary ‘reception’ of foreign law.” Tetley, 1999.

^{XV} Palmer 2001, 7-8.

^{XVI} “Aside from the need to reconcile linguistic differences that may exist between the French and English versions of legislation, there is a further requirement to reconcile the differences that result from our different private law systems. How does the drafter of tax legislation ensure that it applies to Francophones and Anglophones alike and also applies equally to taxpayers whether in the civil law tradition or the common law tradition? To meet this challenge, federal tax legislation must use terminology that is compatible with each of the two legal systems, in both official languages”, Cuerrier-Hassan-Gaudreault, 2003.

^{XVII} See, for instance, Collins, 2008; Hesselink, 2004; Study Group on Social Justice in European Private



Law, , 2004.

^{xviii} For the sources concerning multilingualism in the EU, see: http://eur-lex.europa.eu/it/dossier/dossier_11.htm; Fernández Víttores, 2010, Bobek, 2007.

^{xix} See, for instance, cases like C-449/93, *Rockfon A/S v. Specialarbejderforbude*, *Racc.*, 1995, 4291; C-30/77, *Regina/Bouchereau*, *Racc* 1977, ECR, 1999. On this see Vaiciukaitė-Klimas, 2005.

^{xx} Hatzopoulos, 2007.

^{xxi} *Chaoulli v. Québec (Attorney General)* [2005] 1 SCR 791, 2005 SCC 35, Bateman, 2006. See also Maioni, , 2006, 135.

^{xxii} More info available at www.socialinfo.ch.

^{xxiii} “The former refers to asymmetry embedded in constitutional and legal processes, where constituent units are treated differently under the law. The latter, de facto asymmetry, refers to the actual practices or relationships arising from the impact of cultural, social and economic differences among constituent units within a federation, and as Tarlton noted is typical of relations within virtually all federations”, Watts, 2005

^{xxiv} “This consists in establishing intergovernmental transfer mechanisms that are specifically designed to assist the less wealthy components of the federation. The objective is to ensure that, despite the inequality of their autonomous revenues, the components are more equal in actual fact”, Dion, 1999.

^{xxv} On this see: Mottu, 1997; Cornevin-Pfeiffer, 1992, 185-263; Dafflon-Della Santa, 1995; Departement federal des finances, 1996; Frey- Spilmann- Dafflon Jeanrenaud-Meier, 1994; Bullinger, 2007 Dafflon, 1999.

^{xxvi} “The Confederation shall issue regulations on the equitable equalisation of financial resources and burdens between the Confederation and the Cantons as well as among the Cantons.

2. The equalisation of financial resources and burdens is intended in particular to:

- a. reduce the differences in financial capacity among the Cantons;
- b. guarantee the Cantons a minimum level of financial resources;
- c. compensate for excessive financial burdens on individual Cantons due to geo-topographical or socio-demographic factors;
- d. encourage intercantonal cooperation on burden equalisation;
- e. maintain the tax competitiveness of the Cantons by national and international comparison.

3. The funds for the equalisation of financial resources shall be provided by those Cantons with a higher level of resources and by the Confederation. The payments made by those Cantons with a higher level of resources shall amount to a minimum of two thirds and a maximum of 80 per cent of the payments made by the Confederation.”

^{xxvii} Art. 47: Autonomy of the Cantons. “The Confederation shall respect the autonomy of the Cantons.

It shall leave the Cantons sufficient tasks of their own and respect their organisational autonomy. It shall leave the Cantons with sufficient sources of finance and contribute towards ensuring that they have the financial resources required to fulfil their tasks.”

^{xxviii} Art. 51: Cantonal constitutions. “Each Canton shall adopt a democratic constitution. This requires the approval of the People and must be capable of being revised if the majority of those eligible to vote so request.

Each cantonal constitution shall require the guarantee of the Confederation. The Confederation shall guarantee a constitution provided it is not contrary to federal law.”

^{xxix} Art. 39 “Exercise of political rights. The Confederation shall regulate the exercise of political rights in federal matters, and the Cantons shall regulate their exercise at cantonal and communal matters”.

^{xxx} Art. 50 “Communes. The autonomy of the communes shall be guaranteed in accordance with cantonal law. The Confederation shall take account in its activities of the possible consequences for the communes.

In doing so, it shall take account of the special position of the cities and urban areas as well as the mountain regions”.

^{xxxi} Art. 20 TEU, Arts. 326–335 TFEU. See the recent decision in the fields of divorce and unitary patent. On this, see J.M. Beneyto, 2009 C. Cantore, 2011. See in general, de Burca Scott , 2000. From a slightly different perspective, Bauböck, 2001.

^{xxxii} “Le Canada et l’Union européenne peuvent ainsi être vus comme des espace politiques où, plus intentionnellement qu’intentionnellement, une nouvelle forme d’organisation des pouvoirs publics et de la société internationale est en train d’être inventée. Y émergent en effet des formes similaires de fédéralisme multinational asymétrique mêlant supranationalisme et intergouvernementalisme, fédéralisme fondé non plus sur une hiérarchie de pouvoir entre l’État fédéral et les entités fédérées, mais sur une hiérarchie de valeur entre ordres de gouvernement égaux et en compétition pour l’allégeance des citoyens.” Theret, 2002. Theret



also points out the differences between the two processes : “Au Canada, un État-nation, le Québec, cherche à se constituer. L’État nation est sans doute également en gestation chez les nations autochtones qui revendiquent leur reconnaissance institutionnelle et son émergence remet en cause un ordre politique fédéral constitué à l’origine sur un mode centralisateur. La question de la reconnaissance du caractère multinational de la fédération y est ainsi de plus en plus souvent posée¹⁸. Dans l’UE, où l’État-nation est le point de départ, c’est l’inverse : le palier fédéral en devenir cherche à se faire une place en réorganisant l’ordre politique régional sans pour autant pouvoir en dépasser le caractère multinational. On peut alors considérer que, sauf accident de parcours, l’UE et le Canada se dirigent tous deux vers une reformulation similaire des principes du fédéralisme, reformulation par laquelle un compromis stable serait trouvé entre supranationalisme et intergouvernementalisme, ce que le schéma 11 veut illustrer”.

xxxiii “The Convention membership was more coherent than that of an IGC, allowing for members to socialise and cooperate more closely than is possible in the environment of an intergovernmental conference. Socialisation took place in and around the Convention and led to changes in government positions because it clarified and emphasised different viewpoints and thereby highlighted the importance of certain issues during the Convention negotiations. Sebenius points out that when there is a ‘perceived conflict’ dynamics in groups come into play that may enable negotiated results because ‘a powerful norm towards reciprocity operates in most groups’. Socialisation in the Convention, especially compared with an IGC, was further reinforced by the group dynamics that developed as a result of different meetings at different levels with often overlapping”, Hoffmann, 2009.

xxxiv “The Convention membership consisted not only of government representatives but it included members of national parliaments, the European Parliament (MEPs) and the European Commission. So institutional participation led to changes in government positions because it created additional value through an increase in knowledge. In multi-actor negotiations knowledge is of great importance. As Sebenius points out, the different ‘histories, personalities, motivations and styles’ of negotiators affect the outcome. Positions will change depending on how much knowledge participants have. This refers to knowledge about the issue at hand, possible solutions and the positions and preferences of other negotiators. The participation of representatives from institutions other than member state governments added a substantial amount of knowledge to the negotiations in the Convention. Most of the non-governmental Convention members, especially participants from the European Parliament and the Commission, brought well-informed views to the negotiating table, thereby greatly enlarging the pool of knowledge available to the conventionnels in general and the member state government representatives in particular (compared to an IGC).” Hoffmann, 2009.

xxxv “Consensus rule: the fact that the Convention Praesidium determined the Convention outcome by consensus mean that the veto power of that member state governments was removed and the power of non-agreement was reduced if not removed. As Tsebelis and Proksch point out, the Convention Praesidium was responsible for the determination of where the consensus in the Convention laid. The lack of voting meant that conventionnels were able to voice their disagreement on individual issues but not to vote them down. The Praesidium also established that the final document was submitted to the Convention as one draft treaty, thereby presenting participants with two options: giving their consent to the document or rejecting it in its entirety.” Hoffmann, 2009.

xxxvi “The main novelty brought in by the Constitutional Treaty, and abandoned by the Lisbon Treaty, was precisely that constitutional symbolism, rhetoric and publicity”, Itzcovich, 2009.

xxxvii *Raad van State*, opinion on the ICG mandate to revise the EU Treaty and the EC Treaty, 12 September 2007,

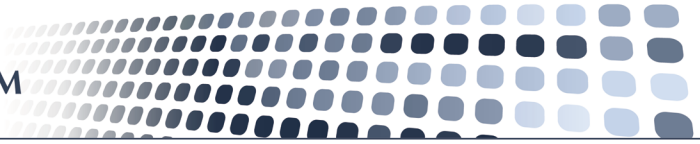
http://www.raadvanstate.nl/adviezen/zoeken_in_adviezen/zoekresultaat/?zoeken_veld=&advicelib_id=7694.

xxxviii For instance, the long debate on the Christian roots: Weiler, 2003.

xxxix Carrozza, 2007.

xl Hayek, 1973. The dualistic structure of Hayek’s thought links the idea of constructivism to that of order, which can be conceived in two different ways; order (“... the situation where one author could argue with regard to a given phenomenon that it was artificial because it was the result of human action, while another might describe the same phenomenon as natural because it was evidently not the result of human design”, *Ibid.*) as *κοσμος* (spontaneous order) and order as *ταξις* (constructed order).

xli For example, the concept of constitution (and constitutionalism) inferred from Article 16 of the Declaration of the Rights of Man and of the Citizen is to pursue the division of powers and the protection of



rights, strive for change and address the social forces that lead to a common goal. Declaration of the Rights of Man and of the Citizen, Art. 16: “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all”.

^{XLII} Today the principle of separation powers knows many exceptions, however; see, for instance, the “legislative” power conferred on the executive in many constitutional systems, or the rise of the judicial review of legislation as an exception to the pure idea of separation of powers.

^{XLIII} “As just pointed out, the European Constitution was not ‘given’ in a specific constitutional moment by a single authority. There was no single event which created a European Constitution, but only an accumulation of steps of diverse legal character. Constitutionally relevant innovations were in part reactions to acute crises, in part the consequence of gradual changes in power constellation of the Union.

Often, *de facto* arrangements were formalised only *ex post*... But who is the *pouvoir constituant* in that multi-dimensional process of constitutionalisation? Empirically, a number of actors can be discerned. There are first of all the Member States governments, which dominate the Treaty revision procedure and which agree on informal arrangements. We have the national parliaments which ratify the Founding Treaties and Treaty amendments. There are the European bodies and institutions which participate in the formal Treaty revision procedure and which may also effect autonomous Treaty modifications. Finally, the European citizens elect the members of the European Parliament and the Member States’ governments, represented in the European Council. The citizens also occasionally express their views in referendums on European issues. These empirical findings support the idea of a ‘*pouvoir constituant mixte*’ or even of multiple *pouvoirs constituants*. The concept of constitutional evolution (as opposed to punctual constitution-making) abandons the neat distinction between the *pouvoir constituant* (understood as the pre-constitutional power creating the constitution) and the *pouvoir constitué* (the legalised powers, notably the institutions which act within the constitutional system any which may, *inter alia*, effect constitutional change). That classic distinction cannot be upheld when speaking of a process of constitutionalisation of the Union. In that process, all actors just mentioned, notably the Member States, are in a way both *pouvoir constituant* and *pouvoirs*”, Peters, 2006.

^{XLIV} See, for instance, the Italian Statuto Albertino of 1848, the French Constitution of 1814 etc.

^{XLV} On the recent evolutions of the constituent power, see: Loughlin- Walker, 2008.

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