

Europe and the Constitution: *What if this is As Good As It Gets?*

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Introduction – A Paper About Nothing?¹

In *Alice in the Wonderland* there is a moment where Alice gets to an intersection between two roads. On the top of a tree she sees a Cheshire cat and asks him: “what road should I take”. The cat answers: “that depends on where you want to go”? As always in the works of Lewis Carrol, the answer is so logic as to be obvious but frequently forgotten. Constitutional lawyers are the cats of European integration. There are limits to what cats and lawyers can do and the central theme of this essay is about knowing those limits as a starting point to provide meaningful normative proposals for European constitutionalism.

In this essay, I argue that national constitutionalism is simply a contextual representation of constitutionalism whose dated and artificial borders are challenged by European constitutionalism. In themselves, constitutional ideals are not dependent nor legitimised by the borders of national polities. As a consequence, there is often no a priori claim of higher validity for national constitutionalism *vis-à-vis* European constitutionalism. My first objective at this point is to question the artificial supremacy of national constitutionalism and argue for a new form of

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constitutionalism. At the same time, I believe it will be possible to derive from a new analysis of constitutionalism a form of legitimation for the European Union arising from its constitutional and democratic added value in facing the present atomisation and deterritorialisation of normative power. The deconstruction of constitutionalism required by European integration may actually promote an extended application of its ideals. We will see that, in many respects, the problems of the European Constitution are simply reflections of the limits of national constitutionalism that we have for long ignored.

It is becoming increasingly clear how artificial it is to conceive national constitutionalism as the ideal form of constitutionalism.² There is a growing deterritorialisation and atomisation of power.³ As a consequence, the conception of national constitutionalism centred in the power of the State and organising society towards pre-defined social goals is in crisis. This conception has hidden, under an idealised construction of the “common good”, the true nature of constitutionalism: that of balancing among diverse and often conflicting interests and fears.⁴

We need a different conception of constitutionalism which is no longer the prisoner of abstract models and artificial boundaries. We should challenge the absolute conception of many constitutional values whose inherent paradoxes are frequently ignored.⁵ A constitution may constantly re-design its borders without necessarily falling into relativism or nihilism.⁶ To highlight the artificial character of abstract models and concepts of constitutionalism does not undermine constitutionalism itself if we can derive from constitutional ideals criteria to help us balance between

² Jo Shaw talks about ‘the unexamined conventions and traditions of modern constitutionalism, which crucially include an assumption that there is a single comprehensive form of constitutional dialogue’, in ‘Postnational Constitutionalism in the European Union’, (1999) 6 *Journal of European Public Policy* 579, at 591.

³ Gustavo Zagrebelsky talks about a pluralist revolution, *Il diritto mite*, Torino: Einaudi, 1992, notably pp. 4-11 and 45-50.

⁴ See: Michele Everson, ‘Beyond the Bundesverfassungsgericht: On the Necessary Cunning of Constitutional Reasoning’, (1998) 4 *European Law Journal* 389 at 390; Jo Shaw, ‘Postnational Constitutionalism’, above n.2; Cohen and Sabel, ‘Directly-Deliberative Poliararchy’, (1997) 3 *European Law Journal* 313.

⁵ Zagrebelsky, above n.3 at 17 refers to the mitigation and “relativisation” of constitutional concepts as a result of intrinsic conflicts. As the same author states, at p. 171, “conceived in absolute terms, principles will rapidly become enemies of each other” (my translation).

⁶ The work of Stanley Fish is exemplary in this regard. He argues that constitutional concepts and principles are never absolute and lines are always being drawn but refuses the idea that this recognition will lead to a form of relativism or nihilism. See *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, Durham: Duke University Press, 1989 and *There’s No Such Thing As Free Speech, and It’s a Good Thing Too*, New York: Oxford University Press, 1994.

different constitutional authorities and principles. Whatever the solutions to Europe's constitutional problems they will probably pass by a variety of constitutional and democratic steps to be undertaken at the national and European level. Most of the proposals which have been put forward so far focus on democratic reforms of the European political process and decision-making or the rights of the European citizen with regard to the European institutions. One of the possible advantages of the approach undertaken in this essay is that it will promote a different kind of proposals arising from the role of European integration in the reform of national political processes and democracy and the particular rights of European citizens relevant in a context of a plurality of polities. This will also protect the plurality of democratic claims and constitutional authority of the national and European polities.

I will start with a brief review of the problems of European Constitutionalism and the usual responses. The remaining sections of the paper will focus on three paradoxes which are at the core of constitutionalism and highlight the artificial character of the borders and concepts with which it is applied to national constitutionalism. I will review what I call the three paradoxes of constitutional law: the polity; the fear of the few and the fear of the many; and the question of who decides who decides. They will be related both with Europe's constitutional problems and national constitutional limits. The aim is to demonstrate that the current European constitutional problems are not that special but actually reflect constitutional problems which already exist in the context of national constitutionalism. As a consequence, I will re-state my claim that there is no *a priori* higher claim of legitimacy of national constitutions in relation to the European Constitution. Furthermore, the paradoxical character of constitutional concepts determines that there are no ideal solutions and that different polities and/or institutions may come closer to constitutional ideals depending on different real-life settings. I attempt to identify the constitutional criteria necessary to make these institutional and polity choices. The approach undertaken will allow me to show the added value of European constitutionalism even with regard to purely national constitutional problems.

The Existential Crisis of the European Constitution

The European Constitution suffers from an existential crisis, reflected in a growing dissatisfaction with the current state of the affairs both at the level of constitution-making and constitutional interpretation. There are growing tensions arising from a constitution which was largely developed as a function of economic integration. The constitutionalisation of the Treaties created a constitutional body without discussing its soul. Therefore, the European Constitution appears as a simple functional consequence of the process market integration without a discussion of the values it necessarily embodies: it has been taken as a logical constitutional conclusion without a constitutional debate. The legitimacy of the process of

constitutionalisation is therefore under challenge highlighting the democratic and constitutional deficits of European integration:

- The spillover of market integration rules into all areas of national regulation raises a conflict between the functional legitimacy of market integration and the democratic legitimacy of national rules. The goal of market integration is no longer capable of explaining and legitimating the reach of EU law in national legal orders.
- The increased competencies of the European Union have led to claims of a democratic deficit since powers previously under the control of national parliaments are transferred to the European Union level and subject to a lower degree of parliamentary participation and majoritarian decision-making coupled with higher concerns over transparency and accountability.
- Euro-sceptics argue that there is no underlying European political community (no *demos*) that can support the existence of a European Constitution. On the other side of the spectrum, European federalists argue for an exercise of constituent power (*pouvoir constituant*) from the European people(s) creating and legitimating a true European Constitution.
- Finally there are increased fears of conflict between national legal orders (mainly national constitutions) and the EU legal order. Both national and European constitutional law assume in the internal logic of their respective legal systems the role of higher law. In this way, there is no agreement as to the “*Kompetenz-Kompetenz*” between national legal orders and the EU legal order. The recent decisions by national constitutional courts, reviewed in the first part of this book, demonstrate a “clear and present danger” of constitutional conflict. In effect, the editors of this book talk of a counter-revolution, grounded in a revolt against European constitutionalism. But is the counter-revolution a claim for reform of the European Constitution or a rejection of the idea altogether. And why is the debate spreading to public opinion? Out of concern over the existence of a European Constitution or out of concern about what that Constitution is?

Three approaches can be detected in the debates on European integration. One of the most frequently heard thesis, usually supported by the European Parliament, is the claim for a formal European Constitution. The replacement or complement of the Treaties by a legal text establishing Europe’s constitutional principles, fundamental rights and political organisation. This is expected to clarify the present constitutional system, give a voice to European citizens (*le pouvoir constituant*) and create mechanisms to control the increased powers transferred to the Union. This constitutional alternative is often linked with the usual response to Europe’s Democratic deficit: that which argues for a reinforcement of European institutions (in particular, the European Parliament) and their democratisation (mainly through an extended application of the principle of majority decision-making). In other words, to the erosion of national powers and representative democracy we should respond with increased EU powers and an enhanced role for the European Parliament and majoritarian mechanisms. In this way it will also be possible

reinstate the political control over market integration (economic integration would be followed by political integration). This constitutional model answers to the challenges on national democracy by developing European democracy but in doing so, replaces the national polity for the European polity.

The most common objection raised to the previous proposals is that there is no European polity. A polity requires a community with a high degree of cultural, ethnic or historical cohesion, what is not the case of the European Union. Instead, this type of community is still identified with the national state. Here, the problem of European Constitutionalism is not identified with the absence of a written constitution and a traditional majoritarian democratic system but with the absence of a demos capable of legitimising such Constitution. This view is at the origin of the arguments in favour of limits to the growth of EU powers, a return to inter-governmentalism and, where necessary, a role for national parliaments at the European level. It is an analysis which still sees national democracies as the highest source of constitutional legitimacy. As a consequence, the final authority between national and European “constitutionalism” belongs to national constitutions.

There is a third alternative, albeit less popular than the two most classical views described above. It is a conception of European Constitutionalism deriving from a particular ideal of constitutionalism and its limits on power coupled with an historic understanding of the process of European integration. This alternative supports the erosion of national powers arising from European integration but claims that this should not correspond to an increase of powers for the European Union. The European Constitution’s ultimate goal should be to limit power and protect individual freedom. This vision arises from ordo-liberal and neo-liberal conceptions of federalism and its application to Europe after the drama of World War II. Federalism is seen as a new form of separation of powers to supplement the traditional (and not totally efficient) horizontal separation of powers. The goal is the creation of a free market economy constitutionally protected. There is no need of a transfer of powers to the European Union, since it are free market transactions, protected through the rules of free movement and free competition, that constitute the true legitimating source of the European Constitution. According to this vision what we need is a system of rules limiting state and, in general, public and private power in the market.⁷ This vision of European integration conceives the constitutional functional result of European market integration not has given rise to a constitutional deficit but has the last and ideal stage of constitution-making. This constitutional “solution” is not exclusive of European integration and it is a becoming a standard answer to the current democratic problems detected in national

⁷ See the discussion in M. Poiars Maduro, *We The Court, The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998, especially chapter 4.

institutions (in particular, the political process): the best way to save the State is to have less of it.⁸

A starting paradox is that all of the alternatives discussed are argued in similar democratic grounds. They depart from the same legitimating factor but reach quite different conclusions on the model of governance that ought to be adopted in the European Union. The reason lies in their open or hidden assumptions regarding, for example, the relevant polity to be taken into account (Europe or the Nation State) and the different constitutional ideals and fears that should govern the relations within that polity. Namely, the balance between the interests of the many and the few or, in a more well known constitutional law jargon, between majority decision making and individual rights. A discussion of these concepts and their paradoxes will help us to highlight some of the limits of constitutionalism and democracy at the national level and review the impact of European integration for constitutionalism and democracy in general.

Before advancing I need, however, to disclose three assumptions which underlie my analysis of the three paradoxes of constitutionalism. First, in this essay I will assume a bond between democracy and constitutionalism. They will be taken to be two sides of the same coin (one focusing on the democratic organisation of power, the other on the limits to that power). When I will use the word constitutionalism, in this context, I am referring to constitutional democracy. This will also help to deal with the fact that most of critiques to the European Constitution concentrate in its possible lack of democratic legitimacy. The second assumption is that the best form of legitimation for national and European constitutionalism derives from representation and participation. In this, I do no more than follow a basic concern that democratic theories have always reflected.⁹ The third assumption is probably the most contentious one. The major differences among democratic theories tend to arise in the conception of the institutions and processes conceived as necessary to provide representation and participation and in the notions of the individual and political communities that precede or result from such processes and institutions. My view is that the broader goals of political communities derive from the co-

⁸ Sabel and Dorf, 'A Constitution of Democratic Experimentalism', <http://www.columbia.edu/~cfs11/Recon.html>, at 2.

⁹ In this regard I follow closely the criteria developed by Robert Dahl in *Democracy and Its Critics*, New Haven and London: Yale University Press, 1989, especially at 108-115 or what Bobbio in *Il Futuro della Democrazia*, Torino: Einaudi, 1984, at 13 has referred to as the "minimum definition of democracy". The fashionable deliberative and discourse based theories of democracy are also mainly about participation. See, for example, Jurgen Habermas, *Between Facts and Norms*, Cambridge: Polity Press, 1998, for instance at 110, 166-7 and also Roberto Gargarella, 'Full Representation, Deliberation and Impartiality', in Jon Elster (ed.) *Deliberative Democracy*, Cambridge: Cambridge University Press, 1998, 260, and Jon Elster, 'Deliberation and Constitution Making', in *ibid.*

ordination and satisfaction of individual preferences as judged by individuals themselves. This means that I oppose organic or communitarian conceptions of the polity whereby the political system is devoted to the pursuit of goals which are independent from the aggregation of individual preferences. This is a liberal and individual-centred conception of democracy which I assume even at the epistemological level. In my view, not only outcomes but also process is to be measured in terms of individual representation and participation. As a consequence, the democratic character of the political form of organisation of the polity is not assessed on the basis of whether its results meet the interests of individuals (which would always be measured by a criteria independent of the individuals preferences...) but on whether such process grants effective representation and participation to all affected individuals.

Paradox I – The Polity

Constitutions are understood as found on a contract, an agreement or any other form of social consensus, through which popular sovereignty is exercised. Members of a polity define their common interests, empower common institutions, and establish the rules and the limits to the exercise of public and private power. The Constitution both defines and presupposes a polity or political community whose members are bound, in solidarity, by the constitution. It is from this political community and its people that the democratic process draws its legitimacy and that of the majority decisions reached in the democratic representative process. The basis of the polity is normally referred to as “the people”. Constitutional and democratic theory scholars normally presuppose that “a people” already exists.¹⁰ But what makes a people? And who has the right to be considered as part of the people? A polity may be determined in different ways (including liberal or communitarian conceptions). That determination will, in turn, define citizenship (or vice versa), giving a right to representation and participation in constitution-making and the political process.

The European integration process disturbs this constitutional construction by introducing into the picture different polities or by assuming a constitution without a traditional polity; a constitution without a people. What is, if any, the polity behind European constitutionalism and how thus it fit with the traditional conception of polities in Constitutional law? One of the usual critiques to the European Constitution departs from the “absence” of a “European people”. It is the ‘no *demos*’ thesis.¹¹ There is no European *demos* (people), therefore there can be no European Constitution. The debates about the democratic deficit also have much to do with

¹⁰ Dahl, above n.9 at 3.

¹¹ J. Weiler, ‘Does Europe Need a Constitution?’, (1995) 1 *European Law Journal* 219 and J. Weiler, U. Haltern and F. Mayer, ‘European Democracy and Its Critics’, (1995) 18 *West European Politics* 4.

the uncertainty as to relevant polity to be taken into account in measuring European democracy. A majority is so with reference to a certain polity. A majority in national terms may well be a minority in European terms and vice versa. Those claiming for more majoritarian decision-making in the European Union are, in effect, transferring the application of the democratic criterion from the national to the European level. In other words, they are moving the constitutional centre from the national to the European polity. On the contrary, those opposing a transfer of powers to the European Union often do it on the basis that there cannot be a truly democratic European political process once, in their view, there is no European demos to support it.

Much of the criticism regarding the constitutional developments of the European Union is based on a simple assumption: national constitutionalism is superior to European constitutionalism because democracy and constitutionalism can only take place in the presence of a demos and this only exists at the level of nation states.¹² It is a view that correlates constitutionalism with a *demos* and the *demos* with the nation state. It conceives the political community has based on a people bound by a high degree of cultural, historical and ethnic identity and cohesiveness. But there are several possible critiques to this view. The first important critique is that a polity does not necessarily require a demos as traditionally understood at the national level. It is possible to conceive the European polity as based on a civic understanding of the European demos independent of belongingness to an ethno-cultural identity.¹³ What forms the European polity is our voluntary agreement to share certain values and a form of political organisation open to anyone wishing to enter into this social contract. The second important critique derives from constitutionalism itself: why should participation and representation be limited by the requirement of belongingness to a ethno-cultural identity? It is the paradox of the concept of polity

¹² This is the view underlying the German Constitutional Court Maastricht Decision (English translation published in (1994) 33 *International Legal Materials* 395, see, mainly, para. C-I-3). For a discussion of the decision see J. Weiler, above n.11 and S. Boom, ‘The European Union After the Maastricht Decision: Will Germany Be the “Virginia of Europe”’, (1995) 43 *American Journal of Comparative Law* 177. For J. Jacqué (‘La Constitution communautaire’, (1995) *RUDH* 397 at 409) the German Constitutional Court might change its view with the development of European political parties and a European public opinion. It is also possible to argue that such already exists in Europe. For a view in this sense (though the point is not absolutely clear) see Peter Häberle (‘Existe Un Espacio Público Europeu?’, (1995) *Revista de Instituciones Europeas* 113, especially at 121 *et seq*) which identifies an emerging European public sphere based on a European common culture.

¹³ See Weiler, above n11 and Weiler, Haltern and Mayer, above n11. Weiler has consistently argued for a European polity not dependent on a community defined on the basis of ethnic, cultural or historical criteria, speaking instead of a civic polity. In the same sense, also F. Lucas Pires, *Introdução ao Direito Constitucional Europeu*, Coimbra: Almedina, 1997, at 68-69 and Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, 2nd. Ed., Coimbra: Almedina, 1998, at 1221-1225.

in its relation with constitutionalism and democracy. Isn't a national *demos* a limit to democracy and constitutionalism? In fact, participation in national democracies is not granted to all those affected by the decisions of the national political process but only to those affected which are considered as citizens of the national polity.¹⁴ It is not the existence of democracy at national level that is contested but the extent of that democracy.¹⁵ There is a strong problem of inclusion faced by national polities.¹⁶ National polities tend to exclude many which would accept their "constitutional contract" and are affected by their policies simply because they are not part of the *demos* as understood in the ethno-cultural sense mentioned above. But the dependence of democracy and constitutionalism on these ethno-cultural polities is in contradiction with the founding principles of constitutional democracies which aim at full representation and participation.

National polities have a twofold deficit: on the one hand, they do not control many decision-making processes which impact on those national polities but take place outside their borders; on the other hand, national polities exclude from participation and representation many interests which are affected by its decisions. The borders of national democracy no longer correspond to the scope of action of the 'modern citizen'.¹⁷ They have probably never corresponded but it becomes increasingly obvious how artificial are the jurisdictions of democracy, and the lack of correspondence between the democratic polities in which one participates and the democratic polities that affect us. National constitutional democracies cannot cope with our desire to be involved in different polities and do not legitimise the different decision-making processes that affect our lives.

¹⁴ Christian Joerges comments in this way on the German Constitutional Court conception of Community law exposed in the Maastricht judgment: 'Foreign sovereign acts, so the Court argues, must not claim superior validity to democratically legitimised law. What if we turn this argument around? Constitutional states must not unilaterally impose burdens on their neighbours (...) "No taxation without representation" - this principle can claim universal validity even against constitutional states'. See 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', (1996) 2 *European Law Journal* 105, at 117 (footnote omitted).

¹⁵ The difference between the existence of democracy and the extent of democracy is highlighted by Jon Elster, above n9 at 99.

¹⁶ Dahl points out that polities have a twofold problem: '1 - The problem of inclusion: What persons have a rightful claim to be included in the *demos*; 2 - The scope of its authority: What rightful limits are there on the control of a *demos*', above n9 at 119. See also David Held, *Democracy and the Global Order*, Cambridge and Oxford: Polity Press, 1995, especially chapters 1 and 10.

¹⁷ As noted by Lucas Pires, national constitutional democracies are no longer able to satisfy the needs of the new 'multiple and supranational individual' which corresponds to the "modern citizen", above n.13 at 67.

David Held has highlighted this global challenge to Nation-State democracy and the need for a new model of democracy (which can be extended to constitutionalism). In his words:

‘the problem, for defenders and critics alike of modern democracy systems, is that regional and global inter-connectedness contests the traditional national resolutions of key questions of democratic theory and practice. The very process of governance can escape the reach of the nation-state. National communities by no means exclusively make and determine decisions and policies for themselves, and governments by no means determine what is appropriate exclusively for their own citizens’.¹⁸

There are thus both pragmatic and normative arguments in favour of a broader form of constitutionalism and democracy “overseeing” national constitutional democracies.¹⁹ First, nation states can no longer (perhaps never could) contain the impact of outside policies inside their borders and therefore need to acquire forms of constitutional control over decision-making taking place outside those national borders. Second, nation states never fully fulfilled the democratic and constitutional ideals of full representation and participation. It is no longer possible sustain the illusion of a symmetric relationship between national political decision-makers and the recipients of political decisions.²⁰

Two important consequences should be taken from the discussion made so far: first, there is no valid general claim of democracy for national constitutionalism with regard to European constitutionalism; second, constitutionalism and democracy should not be understood only with reference to their nation state ideal. This is not to say that the ideal polity for constitutionalism and democracy is always that where the broadest representation and participation can be achieved. The paradox of the polity means that smaller jurisdictions may often provide less extensive but better representation. In other words, the simple expansion of the scope of the polity does not determine an increase in democracy and constitutional legitimation. This is so because constitutionalism and democracy are also about the quality of representation and participation.²¹ It is not only the scope but also the degree and intensity of representation and participation that need to be promoted. There is a frequent trade-

¹⁸ Held, above n.16 at 16-17 (footnote omitted).

¹⁹ The use of the word ‘overseeing’ is not to be understood as defining a form of hierarchical control and supremacy as will be clearer below.

²⁰ Held, above n.16 at 224.

²¹ Further, from a liberal perspective constitutionalism also guarantees to individuals (separated or aggregated in smaller groups) the possibility of original constitutional self-exclusion in certain areas from the forms of political organization that require democracy and representation. This raises complex questions that cannot be addressed in here.

off between these two aims. Small communities may increase the degree and intensity of representation and participation by diminishing information and organisation costs. They also increase the relative value of each individual participation.²² Therefore it would also not be correct to state that whenever European constitutionalism would provide a broader representation it will have a higher claim of legitimacy. Many questions remain open on what and when each polity will provide the best basis for constitutionalism and democracy. But my argument is precisely that there is no abstract ideal polity for constitutionalism and that this is a consequence of the constitutional paradoxes involved in the concept of the polity.

Constitutional questions have always been addressed within a pre-existing polity (normally the nation state). It is that polity that has served as the yardstick of constitutionalism. Relations within the polity are regulated by constitutional law. Relations among polities, instead, have been dominated by a different set of actors (the States) and a different set of rules (international law). Before, constitutional questions addressed the source of legitimacy within a polity, and democracy was limited to that polity. European integration makes this picture more complex by introducing competing polities and a larger polity. But this may be seen as bringing an added value to democracy and constitutionalism. First, we are no longer prisoners of our original polity and can choose to live among a variety of polities. While benefiting from national communities as our original polity we are also granted a new form of social contract that includes the (still limited) right to choose among those different national polities in the European space. Second, we also gain rights of representation in the other national polities with regard to their decisions which affect our interests: many of the rights granted by EC market integration rules and the principle of non-discrimination on the basis of nationality can be conceived as such. As I have argued elsewhere, EU economic law should be conceived as providing the European citizen not only with economic rights but with political rights to have their interests taken into account in non-domestic national political processes.²³ In this sense, EU rights promote the constitutional ideals of full representation and participation. Moreover, the competition between the different national polities generated under the larger European polity may promote an overall improvement of all national polities even from their internal perspective. On the down side, the introduction of the new European polity increases the costs of decision-making and, as a consequence, may decrease the quality of representation

²² The democratic value of small communities can be easily explained through the costs involved in decision-making. On these see Buchanan and Tullock, *The Calculus of Consent*, Ann Arbor: University of Michigan Press, 1965, at 63 *et seq.*

²³ For an example, see Pórigues Maduro, above n.7 especially at 169-173 (or see M. Pórigues Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights', (1997) 3 *European Law Journal* 55. In the same sense see Joerges, above n.14 at 117.

and participation. We may also be prevented from exercising some of our preferences as they have now to be compatible with those of a larger jurisdiction. The relative value of our representation and participation is reduced within a larger polity.

The paradox of the polity implies a challenge to the supremacy of national constitutionalism over European constitutionalism by stressing how much the critiques of European constitutionalism ignore the constitutional and democratic limits of national polities. Furthermore, it highlights how the debates on European constitutionalism need to be related to the paradoxical concept of the polity and how constitutionalism and democracy may require different polities in different circumstances depending on a comparative analysis of their representation and participation relative value in different contexts.

Paradox II – The Fear of the Few and the Fear of the Many²⁴

Constitutionalism is normally presented as a two-edge concept: empowering and limiting power. All major constitutional arguments and doctrines gravitate around a complex system of countervailing forces set up by constitutional law to promote the democratic exercise of power (assure that the few do not rule over the many) but, at the same time, to limit that power (assuring that the many will not abuse of their power over the few). Constitutionalism is all about these difficult balances between values or institutions that it, simultaneously, advances and fears: the balance between the common values of the polity and the individual preferences of its members; the balance between the democratic will of the majority and the rights of the minority. There are two basic fears underlying constitutional discourse and organisation: the fear of the many and fear of the few. The core of constitutional law is the balance between the fear of the many and the fear of the few. Constitutional law sets up the mechanisms through which the many can rule but, at the same time, creates rights and processes to the protection of the few. Separation of powers, fundamental rights, parliamentary representation are all expressions of these fears.²⁵

²⁴ These expressions (such as those of minoritarian and majoritarian biases to be employed below) are borrowed from Neil Komesar. They form the basis of what he has coined the two-force model which is applied to the judicial review of the political process. See: *Imperfect Alternatives - Choosing Institutions in Law, Economics and Public Policy*, Chicago and London: Chicago University Press, 1994; and 'A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society', (1981) 86 *Michigan Law Review* 657.

²⁵ R. Bellamy ('The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy', in R. Bellamy and D. Castiglione (eds.) *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford, Blackwell Publishers, 1996 at 24) highlights three principles who have defined constitutionalism: rights, separation of powers and representative government. However, in his view, the first has come to predominate in recent years: 'Rights, upheld by judicial review, are said to comprise the prime

Traditionally, the many have been associated with the decisions taken by the majority through the political process while the protection of the few is associated with individual rights. The function of judicial review of legislation has frequently been argued on substantive or procedural conceptions of minority protection.²⁶ This classical picture of constitutional law has been challenged by the multiplication of social decision-making forums and the insights brought by new institutional analyses. Interest group theories of the political process have demonstrated, for example, how democratic decision-making may, in effect, be controlled by a few against the interests of the many.²⁷ It is no longer possible to associate a particular institution with a particular fear of the few or the many.

However, many of the current constitutional analyses still depart from idealised notions of institutions as a simple reflection of their abstract models constitutionally defined. Changes in the composition and distribution of interests, the multiplication of alternative forms of participation and the dependence of representation and participation from information and transaction costs are frequently ignored in much of the standard constitutional law literature. Even more frequent is the tendency to concentrate the analysis in a single institution and/or on only one of the fears mentioned. This forgets that constitutionalism requires the fears of the few and the fears of the many to be understood as two sides of the same coin. Often, constitutional lawyers assume that normative goals can be translated into “real-life” in a sort of causal relationship that ignores the institutions that will interpret and specify such goals. When they do pay attention to institutions it is common for constitutional scholars to concentrate their normative assessments in one institution, arguing for a different institutional alternative simply on the basis of the institutional malfunctions (related to a fear of the few or a fear of the many) detected in the institution reviewed. This obvious but diffused problem of legal analysis has been identified by Neil Komesar as “single institutionalism”.²⁸ For example, most analyses on the judicial review of legislation focus exclusively on the malfunctions detected in the workings of the political process. Once a malfunction is highlighted in the political process, the claim is made for the courts to step in and “correct” (review) the decisions of that political process. However, it may well happen that in many cases in which the political process operates badly the courts operate even worse. As Komesar has consistently argued, institutional choices should be made by

component of constitutionalism, providing a normative legal framework within which politics operate’ (ibid at 24).

²⁶ For the first see Ronald Dworkin, *Taking Rights Seriously*, Cambridge: Harvard University Press, 1977. For second see John Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge: Harvard University Press, 1980.

²⁷ Other theories have contributed in same sense. Bruce Ackerman’s “dualist democracy”, for example, equates both the political process and the courts with the promotion and/or protection of democratic decisions. This is elaborated further in Poiares Maduro, above n.7.

²⁸ Imperfect Alternatives, above n.24.

comparing the different alternative institutions and not solely on the grounds that a particular institution suffers from serious institutional malfunctioning. Single institutionalism could also be referred to as single constitutionalism, since it represents a form of constitutional analysis which ignores the constitutional paradoxes which I have been referring to. In other words, it identifies a constitutional problem and proposes an alternative without enquiring on the potential constitutional problems hidden in that alternative. This is in great part due to the fact that while the present alternative is reviewed in a “real life setting”, the proposed alternative is assumed to correspond perfectly to its constitutional ideal. This is the case with much of the constitutional analyses of the European Union. Normally, authors tend to identify a constitutional deficit in a current institution (for example, the Commission or the Council) and propose a transfer of decision-making to an alternative institution (for example, the European Parliament) without comparing the relative ability of these institutions in the specific settings under analysis (assuming, for example, that the European Parliament will always reflect the democratic ideal). In doing so, they ignore the constitutional paradox of the fear of the few and the fear of the many. My argument here is not only that the analyses of the European Constitution ought to be more sophisticated. I expect that the nature of Europe’s constitutional discourse will force constitutional scholars to uncover new forms of fears of the few and the many. This must depart from an understanding of the institutional choices inherent in the interpretation and application of the law, the introduction of a contextual analysis of those institutions and a more sophisticated conception of the interests which are assumed to be reflected in the decisions of those institutions. It further means, that the identification of one of those fears in a EU institution cannot constitute, by itself, a sufficient claim for an institutional alternative.

An example will make these ideas clearer and also help to highlight its normative power in reconstructing legal analysis and, in this specific case, the debate on the European Constitution. I will review the classic critiques of the European democratic deficit and highlight how they have been dominated by single institutionalism or single constitutionalism. They focus on particular types of fear of the few ignoring both the fear of the many and other forms of the fear of the few. This, it will be argued, is not only a failure in constitutional analysis but tends to hide the value that European Constitutionalism may have in correcting less known forms of those fears and promoting new mechanisms of participation and representation.

There are, at least, two facets of the European democratic deficit: one relates to the “insufficient degree” of majoritarian decision-making in the Council; the other, refers to the low level of parliamentary control over that decision-making. Both correspond to fears of the few but they are of different type. The first can be seen in

the well known thesis of the “joint-decision trap” developed by Scharpf.²⁹ Unanimous decision-making tends to support sub-optimal policies because policies cannot be created, abolished or changed so long as there is a single Member State preferring the status quo.³⁰ This can also be presented as another aspect of the democratic deficit: “the ability of a small number of Community citizens represented by their Minister in the Council to block the collective wishes of the rest of the Community”.³¹ However, from the fact that there are serious risks of malfunctions and fear of the few under unanimity does not follow that majority decision-making will produce more representative or efficient outcomes. There is nothing to suggest that decisions taken by majority voting will have a more balanced representation of the affected interests. Decisions taken by a majority of states will not take into consideration the distribution of costs and benefits in all states, but only in the states that compose that majority. What changes under unanimity or majority rules is only the distribution of the costs and benefits arising from unequal representation in the decisions. Under unanimous voting the risk is that a decision will be taken only if it favours all states independently of the intensity of their needs, and that it will be maintained even though the benefits that it brings to one state are lower than the costs imposed on the others (minoritarian bias or a form of fear of the few). Under majority voting the risk is that a decision is taken or maintained even though the cumulative benefit it gives to the majority of states is lower than the cumulative costs burdening the minority of states (majoritarian bias or a form of fear of the many). We move from minoritarian bias to majoritarian bias. Scharpf falls into the trap of single institutional or single constitutional analysis by reviewing only the malfunctions arising under unanimous vote.³²

The democratic deficit literature which concentrates on the limited role of the European Parliament in the decision-making process focuses on two problems: first, there is a transfer of power from a directly representative institution (Parliaments) to an indirectly representative institution (Governments acting in the Council); second, there is a transfer of power from an institution where all individuals are (approximately) proportionally represented to an institution where there is low proportional representation and some minorities may block the will of the majority. Both of these concerns correspond to fears of the few but, in this case, the majority is defined cross-nationally (it’s individuals not States that constitute the “measure” of the majority). The risk is that a non-directly representative and non-majoritarian political process may be dominated by the interests of a minority. It would suffer

²⁹ Fritz Scharpf, ‘The Joint-Decision Trap - Lessons From German Federalism and European Integration’, (1988) 66 *Public Administration* 239 at 255.

³⁰ *Ibid.*, at 257.

³¹ J. Weiler, ‘The Transformation of Europe’, (1990) 100 *Yale Law Journal* 2403 at 2467.

³² At the same time, he also appears to confuse the aggregation of individual preferences with the aggregation of governmental preferences.

from minoritarian bias. The focus is on democratic representation through parliaments. This is certainly a necessary condition for the democratic legitimacy of the Union.³³ The question is: to which extent?³⁴ As stated, underlying the democratic deficit literature is the concern with the fear of the few. However, if the powers of the European Parliament become dominant in the European legislative and political process (what is increasingly the case in the post-Amsterdam era) the opposite fear is raised: that of the control of the political process by the majority even against an overwhelming interest of a minority.³⁵

The dilemma between the fears of few and the many is visible in the discussions on institutional reform. The conception of these fears tends to depart, however, from a conception of the European political process as exclusively dominated by State actors. This is a consequence of the functional model which is based on 'on the idea that the controllers of the public realms of the Member States are able to represent the totality of the national interests of the participating people, and hence that the public interest of the EU (...) is nothing more than the aggregate of the public interests of the Member States, mediated through the collective willing of the public-realm controllers'.³⁶ The fears of the many and the few are dealt with in a

³³ See, for example, K. Lenaerts and P. de Smijter, 'The Question of Democratic Representation', in J. Winter, D. Curtin, A. Kellermann and B. de Witte (eds.), *Reforming the Treaty on European Union - The Legal Debate*, Kluwer Law International, The Hague, 1996, 173, at 175. These authors, however, recognize that the democratic deficit will not be solved on the basis of a simple transfer of parliamentary democratic representation to the European Union level. Indirect representation of this kind is also envisaged through national parliaments for example. See especially at 178.

³⁴ See R. Dehousse, 'Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?', (1995) 18 *West European Politics* 118 at 122.

³⁵ It is the balance between these two fears that dominates the discussions on majority decision-making versus unanimous decision-making. This is a very contentious point in constitutionalism which I cannot address in here. Buchanan and Tullock, for example, have worked extensively on this problem and distinguished between constitutional choices and political choices. Ideal decisions should be based on a non-coercion principle and be decided according to unanimity (thus achieving a kind of Pareto optimum where no one would be harmed by the decision). But unanimous decisions also involve many costs on decision-making. Therefore, the distinction is made between constitutional decisions which require unanimity and other decisions which can be taken according to majority decision-making. See Buchanan and Tullock, above n22. For an application to the European Union see F. Vibert, 'Non-coercion, Decision Rules and Europe's Constitutional Debate', in Schmidtchen and Cooter (eds.), *Constitutional Law and Economics of the European Union*, Edward Elgar, Cheltenham and Lyme, 1997, 258. On this topic in the European Union see also Pistone who argues societal core decisions which have to be taken by consensus occur more and more frequently and lead to increased discussion on the mandatory character of majority decisions even at the national level. See 'Il Trattato di Unione Europea e la Legittimità delle Decisioni Democratiche a Maggioranza', (1985) 27 *Il Federalista* 178 at 178-179 (referring to Gerda Zellentin, 'Überstaatlichkeit statt Bürgernahe?', *Integration* 1/1984),

³⁶ Philip Allott, 'The Crisis of European Constitutionalism: Reflections on the Revolution in Europe', 34 *Common Market Law Review* 439, at 477.

context of States representation. The impact of other actors in the European political process and the importance of alternative forms of participation in the European context (such as the market or the judicial process) are often ignored. In the same way, though many recognise in abstract that individual and group interests are no longer divided across national lines few take this into account when discussing specific problems of European Constitutionalism.

The transfer of power to the European Parliament is normally argued to prevent the fears of the few already mentioned. However, the fear of the few (minoritarian bias) can also increase with a transfer of power to the European Parliament. Moving from inter-governmental decision-making to European Parliament decision-making may not reduce the risks of minoritarian bias in Europe's political process. What changes is the type of minoritarian bias or fear of the few. A transfer of power to the European Parliament will shift representation from an institution where representation is aggregated mainly through the different national governments to a institution with a much larger and distant constituency of representation. The problem is that the larger it is the constituency to be taken into account in representation the higher tend to be the transaction and information costs of participating in the political process. This is not simply related to the lack of public visibility of the European Parliament; it involves a more complex set of factors. The higher the number of represented people the more difficult will be to organise dispersed interests due to the low stakes of individual members and the information and organisation costs involved. In areas where the interests of the majority tend to be dispersed, national levels of representation may perform better in organising and mobilising the majority. The information and transaction costs of participating in the European political process at the level of the European Parliament may be higher than participating in the European political process through the national governments. As a consequence, in issues where the European majority interests are quite dispersed it may be easier for a minority of concentrated and organised interests to capture the European Parliament political process than the inter-governmental political process.³⁷ In these cases, we still have risks of minoritarian bias or fears of the few, only they arise from the actions of cross-national interest groups and not particular Member States.. Thus, depending on the issues and the interests at stake, the European Parliament may actually be subject to an higher risk of minoritarian bias than the inter-governmental process. What varies is the type of minoritarian bias or, if you prefer, the few to be feared.

There is no single solution or abstract model of constitutional democracy that can be adopted. What is needed is a more sophisticated constitutional analysis which understands the different versions of the fears of the few and the many and adopts a comprehensive comparative institutional analysis to Europe's constitutional

³⁷ In the later, national governments may act as catalytic elements of the cross-national majority.

problems. This will allow us to highlight, for example, that even from a purely European point of view national institutions may perform closer to our constitutional ideals. In other words, even if one accepts the European polity as the relevant polity it does not follow that a European institution will perform better in representing all the affected interests in the European polity. As the discussions on the European Parliament and majority decision-making were intended to show, there may be circumstances in which greater national input will help prevent European institutional malfunctions and bring about more representative and participated decisions from the point of view of the larger European polity. But the opposite may also occur: European integration and institutions may help improving the constitutional democratic character of national institutions even from a purely national perspective.

The inclusiveness promoted by European constitutionalism in national polities will also help to correct instances of purely national minoritarian and majoritarian biases which are often ignored because deeply embodied on national institutions and excluded from the sphere of public deliberation.³⁸ Most instances of discrimination against (or under-representation of) foreign nationals in national political processes are, at the same time, instances of capture of the national political process by a national interest group against the interests of a dormant national majority. The typical example is trade protectionism that tends to occur where concentrated national interests try to conserve their economic privileges at the cost of foreign competitors and national consumers. Because of the concentrated interests and high stakes of the small minority they can easily dominate the national political process

³⁸ This can be described as a consequence of the relation between lifeworld and system developed by Habermas in his *Theory of Communicative Action*, vol. 2, Cambridge: Polity Press, 1989. Systems are “genetically” embodied with certain values and assumptions that are excluded from communicative action (that is, discourse). What happens is that systems tend to take control over lifeworld (where communicative action and rationality dominate) in this way reduce the area of normative action subject to discourse and deliberation. In other words, reducing the scope of democracy. This can be conceived as one of the negative side-effects of constitutional dogmatics and its apparent neutrality. A good discussion of the problems posed by the constitutional status-quo and its artificial neutrality can be found in Cass Sunstein, *The Partial Constitution*, Cambridge and London: Harvard University Press, 1993 (see, mainly, pp. 1-10). As Sunstein states, right at the beginning, ‘the status quo, like everything else, should be subject both to deliberation and to democracy’. Whether one agrees or not with the specific challenge brought by Sunstein to the *status quo* is another issue. Another form of conceiving the problem of different degrees of democratic deliberation is through the theory of dualist democracy and constitutionalism developed by Bruce Ackerman. He conceives a two-track democracy: the higher law-making track (corresponding to constitution-making) is that were we would be closer to an ideal form of full participation in deliberation. In a sense, European constitutionalism forces us to bring traditional national constitutional paradigms to the higher law-making track and, in doing it, broadens the scope of deliberation. See Ackerman, *We The People, I - Foundations*, Cambridge: Harvard University Press, 1991; and ‘Neo-Federalism’, in J. Elster and R. Slagstad (eds.), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press, 1988, at 153.

even against the interests of the dispersed majority of consumers whose low per capita stakes and high transaction and information costs prevent them from being aware of their interests and exercising pressure in the political process. The obligation for national political processes to take into account foreign interests may bring those issues back into the sphere of public deliberation and promote a broader and more active representation of domestic interests. It is this that explains why many cases of EU law are raised by nationals against their own State. EU law is often used by individuals as a new form of voice in the national political process. The Sunday trading saga³⁹ is a good example of how EU law re-introduces certain issues into the national public sphere leading to a new political agreement within the national polity. In this way, EU law raises the voice of some domestic actors in national political processes.

The fears of the few and the many can also be detected in alternative forms of participation and representation such as those involved in the regulatory model⁴⁰ and the European market⁴¹ which ought to be subject to the same constitutional analysis. Again, none of these institutional alternatives fits perfectly with an ideal constitutional model of full representation and participation. What I have done is to highlight their diversity and advanced a method and criteria to be used in the complex institutional and constitutional choices before us. The departing point will continue to be the old constitutional fears of the many and the few. Only now this debate takes place in a context of competing polities and must take into account the

³⁹ Regarding legislation prohibiting Sunday trading which was challenged under Article 30 of the EC Treaty. Article 30 EC (now 28) has been called, in that context, the 'European defense' of domestic actors against national policies See R. Rawlings, 'The Eurolaw Game: Deductions from a Saga', (1993) 20 *Journal of Law and Society* 309 at 313.

⁴⁰ For an analysis of the possible benefits of the regulatory model in the European Union, see Renaud Dehousse, 'Europe Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure?', (1998) 35 *Common Market Law Review* 595, especially at 600-601 and 625. On the Regulatory model, its legitimation and its own democratic deficits see also: G. Majone (ed.), *Regulating Europe*, London: Routledge, 1996; M. Shapiro, 'The Problems of Independent Agencies in the United States and the European Union', (1997) 4 *Journal of European Public Policy* 1997, 262; C. Joerges and E. Vos (eds.), *EU Committees - Social Regulation, Law and Politics*, Oxford: Hart Publishing, 1999. Broadly, on the virtues and problems of deliberative democracy see: J. Cohen and C. Sabel, 'Directly-Deliberative Democracy', (1997) 3 *European Law Journal* 313 and Jon Elster (ed.), *Deliberative Democracy*, Cambridge: Cambridge University Press, 1998.

⁴¹ On the democratic virtues and problems of the market see Poiares Maduro, above n.7 especially at 136-143; and *ibid*, 'Striking the Elusive Balance Between Social Rights and Economic Freedoms', in Philip Alston (ed.), *The European Union and Human Rights*, Oxford: Oxford University Press, 1999. The departing point for a constitutional analysis of the market is a recognition (often made but rarely taken seriously by lawyers) that 'the market and the State are both devices through which co-operation is organized and made possible' (Buchanan and Tullock, above n.22 at 19). In other words, social decision-making institutions.

cross-national nature of interests representation and the requirements of comparative institutional analysis.

Paradox III – Who Decides Who Decides?

Constitutional law has usually been considered as the higher degree and ultimate source of legitimacy of the legal system and its rules. Independently of one's conception of constitutional law as a "grundnorm", a set of rules of recognition, positivized natural law, an higher command of a sovereign supported by an habit of obedience, or other, constitutional law has always been conceived as the higher law of the legal system, criterion of legitimacy and validity of other sources of the law. European integration 'attacks' this hierarchical understanding of the law. In reality, both national and European constitutional law assume in the internal logic of their respective legal systems the role of higher law. According to the internal conception of the EU legal order developed by the European Court of Justice, Community primary law will be the "higher law" of the Union, the criterion of validity of secondary rules and decisions as well as that of all national legal rules and decisions within its scope. Moreover, the Court of Justice is the higher court of this legal system. However, a different perspective is taken by national legal orders and national constitutions. Here, Community Law owes its supremacy to its reception by a higher national law (normally constitutions). The higher law remains, in the national legal orders, the national constitution and the ultimate power of legal adjudication belongs to national constitutional courts. In this way, the question of who decides who decides has different answers in the European and the national legal orders⁴² and when viewed from a perspective outside both national and Community legal orders requires a conception of the law which is no longer dependent upon an hierarchical construction. Such form of legal pluralism has already been convincingly argued by Neil MacCormick.⁴³ However, the Maastricht Decision of the German Constitutional Court and the possibility of this Court striking down a Community legal act on its decision on the Bananas regulation,⁴⁴ have again raised fears of actual conflicts between national courts and the ECJ

⁴² Rossa Phelan has made a detailed analysis of the different viewpoints on the relationship between national and the European legal order depending on whether it is observed from the perspective of EC law, national constitutional law or even public international law. See D. Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, Dublin: Sweet & Maxwell, 1997.

⁴³ N. MacCormick, 'Beyond the Sovereign State', (1993) 56 *Modern Law Review* 1.

⁴⁴ See, for example, M. Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe?', Harvard Jean Monnet Chair Working Papers 10/98. Among other relevant issues (mainly, the direct effect of the GATT rules in the German legal order), the argument is made by some German Companies which traditionally imported Bananas from Latin-American countries that the EC Regulation discriminates against those importers in favor of intra-EC Bananas producers (mainly from Canarias and Madeira) and importers from ACP countries.

disrupting the European Union legal order and ultimately the process of European integration.

In my view, the question of “who decides who decides” has long been present within constitutionalism. It is a normal consequence of the divided powers system inherent in constitutionalism. In fact, it can be considered as an expected result of the Madisonian view of separation of powers as creating a mechanism of checks and balances. The conflicts surrounding the exercise of judicial review, for example, are linked to this question: when a Court strikes down a piece of legislation according to its interpretation of a constitutional norm which could be object of different interpretations two opposing positions can be argued: one, arguing that the Court has done nothing else but apply the higher law; another, arguing that the Court has overstepped its role since the indeterminacy of the constitutional norm meant that it was for the legislator to choose one among several possible interpretations of that norm. Of course, in the operation of national constitutions and where constitutional judicial review exists it is expected for the legislator to accept the Court’s decision and therefore it is stated that it is the later that has the “right to decide who decides”. But that is a more a result of the historical development of separation of powers than a logical conclusion to be derived from the foundations of constitutionalism. Moreover, the reality is that the political system can still impact upon the judiciary (for example by changing the members of the constitutional court)⁴⁵ and, in this way, still has an important share of the power “to decide who decides”. I am not going to address the complex questions involved in judicial review and separation of powers. What I want to stress is that the paradox of “who decides who decides” is inherent to the values of constitutionalism as one of its guarantees of limited power. If the question of ‘who decides who decides’ was constitutionally allocated to a single institution all the mechanisms of countervailing powers and checks and balances would be easily undermined. Therefore, in a multi-level or federal system it is the vertical or federal conception of constitutionalism (as a form of limited government at the State and federal level) that requires for the decision on “who decides who decides” to be left unresolved. The open question should be left open. What then, are conflicts unavoidable? Should the conflicts between EU law and national constitutional law be subject to a *primus inter pares* (for example, international law)⁴⁶ or a new Constitutional Court composed of EU and National

⁴⁵ An exemplary case, is Roosevelt’s “re-packaging” of the American Supreme Court to change the classical economic due process interpretation of the American Constitution.

⁴⁶ N. MacCormick, ‘Risking Constitutional Collision in Europe?’, (1998) 18 *Oxford Journal of Legal Studies* 517. Although, MacCormick suggests subjecting such conflicts to the arbitration of international law as a possible direction he does not really take that path a prefers to remain faithful to a totally legal pluralistic solution where the question of conflict is left open.

constitutional judges⁴⁷)? Can't different legal orders coexist in the same sphere of application under different claims of legitimacy?⁴⁸ And if they can, how can conflicts be avoided or dealt with?

The general tendency may be for national courts to comply with the "European Constitution" but, as the first part of this book shows, there is still on the part of several national high courts a challenge to the absolute supremacy of EU law. This is visible either in the description that national constitutionalism makes of itself or in the dependence of EU law effectiveness upon national law and national courts. National law still holds a veto power over national law⁴⁹ and that is important even when not used. It is well known that many developments in EU law can be explained by the European Court of Justice perception of the possible reactions by national courts. A hierarchical alternative imposing a monist authority of European law and its judicial institutions over national law would be difficult to impose in practical terms and could undermine the legitimacy basis on which European law has developed.⁵⁰ Though the grammar used by EU lawyers in describing the process of constitutionalisation may assume a top-down approach, the reality is that the legitimacy of European constitutionalism as developed in close co-operation with national courts and national legal communities which have an increasing bottom-up effect on the nature of the European legal order.⁵¹

We have to start reasoning in the realm of what could be called counterpunctual law. Counterpoint is the musical method of harmonising different melodies that are not in a hierarchical relationship among them. The discovery that different melodies could be heard at the same time in an harmonic manner was one of the greatest developments in musical history and greatly enhanced the pleasure and art of music. In law we too have to learn how to manage the non-hierarchical relationship between different legal orders and institutions and to discover how to gain from the diversity and choices that offer us without generating conflicts that ultimately will

⁴⁷ J. Weiler, 'The European Union Belongs to Its Citizens: Three Immodest Proposals', (1997) 22 *European Law Review* 150.

⁴⁸ Rossa Phelan, above n.42, for example, argues that 'revolt or revolution' is unavoidable unless Community law partly redraws its claim of supremacy over national law. For a critical review of Rossa Phelan's position see MacCormick, above n.46 and Póitres Maduro, 'The Heteronyms of European Law', (1999) 5 *European Law Journal, Annual Review of Books*, Weiler and Póitres Maduro (eds.), at 160.

⁴⁹ See D. Chalmers, 'Judicial Preferences and the Community Legal Order', (1997) 60 *Modern Law Review* 164 at 180.

⁵⁰ In the words of Chalmers, "the regime is able to develop provided it does not significantly disrupt the egalitarian relations enjoyed between national courts and the Court of Justice", *ibidem*.

⁵¹ Kamiel Mortelmans, 'Community Law: More than a Functional Area of Law, Less than a Legal System', *Legal Issues of European Integration*, 1996/1, 23, at 42-43.

destroy those legal orders and the values they sustain. There is much to be gained from a pluralist conception of the EU legal order. In a world where problems and interests have no boundaries, it is a mistake to concentrate the ultimate authority and normative monopoly in a single source. Legal pluralism constitutes a form of checks and balances in the organisation of power in the European and national polities and, in this sense, it is an expression of constitutionalism and its paradoxes. But, to take full advantage of this legal pluralism we need to conceive forms of reducing or managing the potential conflicts between legal orders while promoting exchanges between them and requiring courts to conceive their decisions and the conflicts of interests at hand in the light of a broader European context. This will also highlight the trans-national character of much of these conflicts which is often ignored by national constitutional law.

Catherine Richmond has proposed an attractive framework for the 'legal indeterminacy' entailed in the non-hierarchical relationship between national and European legal orders. She argues that each legal order has its own viewpoint over the same set of norms⁵² and that each is to take into account the changes in that set of norms arising from the other legal orders: 'each time a norm is created or amended in one particular legal order, the cognitive arrangement of norms must, from our one particular viewpoint, be shuffled around in order to accommodate the change'.⁵³ However, no legal order should be forced to abandon its own viewpoint (or, if you prefer, its own cognitive framework). In her own words:

'A state of legal indeterminacy is only stable, however, as long as no *normative* challenge is made to it which challenges the *political* basis of the cognitive model adopted (...). Therefore it is in all parties' interest to preserve the indeterminacy in the Community, enabling each to latch on to the model of legal authority that is politically most comfortable'.⁵⁴

Identity is lost if it is not self-determined. On the other hand, such self-determination should not dispute the self-determined identity of the other legal orders. In my view, one of the consequences ought to be that each time a legal order changes the set of norms shared with the broader European legal community it ought to do it in a manner that can be accommodated by the other legal orders (a good example being the introduction of fundamental rights protection in the Community legal order). The EU legal order should be conceived as integrating both the claims of validity of national and EU constitutional law. Any judicial body (national or

⁵² In the suggestive expression of Jo Shaw: 'each national constitution creates a different "gateway" for the EU legal order'. *Postnational Constitutionalism*, n.2.

⁵³ Catherine Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law', (1997) 16 *Law and Philosophy* 377 at 417.

⁵⁴ *Ibid.*

European) would be obliged to reason and justify its decisions in the context of a coherent and integrated EU legal order. In this way, I do not share the view that the best form of safeguarding legal pluralism is to recognise, pragmatically and normatively, the possibility for national constitutional authorities to derogate from EU law so long as that would not itself be recognised by EU law and will be valid under national constitutional law but not EU law. For Kumm, who has powerfully argued in favour of such a view,⁵⁵ the fact that the deviations will take place under national law and not EU law will mean that the integrity and uniformity of EU law would be safeguarded. But this will be so from a purely formal perspective. Further, the fact that the deviations would be legitimised on purely national grounds and “not affect” EU law may promote the use and abuse of that national constitutional exceptions without any form of EU control. Ultimately, it could lead to a “race to the bottom” between national courts in the uniform application of EU law.

I argue that national deviations can still be possible but they need to be argued in “universal” terms, safeguarding the coherence and integrity of the EU legal order. The idea is to promote the universalisability of national decisions on EU law and integrate them into a coherent system of interpretation of EU law by national courts. In other words, national decisions on EU law should not be seen as separated national interpretations and applications of EU law but as decisions to be integrated in a system of law requiring compatibility and coherence. This may raise fears of corrosion of EU law since it appears to promote and multiply national deviations from the European rule of law. However, this assumption must be confronted with the dynamics of law and legal reasoning. If a national constitutional court is aware that the decision that it will take becomes part of European law as interpreted by the “community” of national courts, it will internalise in its decisions the consequences in future cases and the system as a whole. This will prevent national courts from using the autonomy of their legal system as a form of evasion and free-riding and will engage the different national courts and the ECJ in a true discourse and coherent construction of the EU pluralist legal order. At the same time, we should improve European legal pluralism by raising in each legal order the awareness of the constitutional boundaries of the other legal orders. And, in here, an important role is to be played by the changes in constitutional thinking which I have been arguing for, particularly the abandoning of single constitutionalism which has dominated the conceptions of national constitutionalism.

The conception of European legal pluralism or contrapunctual law argued for in here safeguards the constitutional value of the paradox of who decides who decides by preserving the identity of each legal order while at the same time promoting its inclusiveness through what, following Luhmann’s and Teubner’s autopoiesis, could be described as a process of reflexivity. It is not only identity but also communication that needs to be fostered between national and European legal orders. In this case,

⁵⁵ Kumm, above n.44.

‘the fact that we define our identity by exclusion from the other does not ultimately exclude because there is no way of knowing where the next redefinition will go’.⁵⁶ This discourse between different legal orders and different institutions resulting from the emerging European polity is a further promotion of constitutionalism, broadening its deliberative elements beyond the exclusive deliberative communities involved in each national institution.

Conclusion

I have tried to show the hidden assumptions of national constitutionalism and how much they have of artificial. It is artificial to assume the national polity as the natural jurisdiction for full representation and participation. It is artificial to always take the parliamentary system as the default form of representation and its decisions as a simple expression of the “*volonté générale*”. It is artificial to conceive interests has homogeneously divided according to national borders and, within those, according to particular institutions. It is artificial to make institutional choices on the basis of single institutional analysis. Finally, it is artificial to think that constitutionalism can allocate a final authority on who decides when constitutionalism is precisely about dividing (and, in this way, limiting) authority. As a consequence of the limits of national constitutionalism, there is no *a priori* higher claim of validity for national constitutionalism *vis-à-vis* European Constitutionalism.

I have also stressed that many of the perceived European Constitutional problems are simply reflections of three paradoxes that are at the core of constitutionalism: the paradox of the polity; the fear of the few and the fear of the many; and the question of who decides who decides? I related those paradoxes with the limits of national constitutionalism and the problems of its European version. The reconstruction of the tools of constitutionalism to be employed in framing the European Constitution must depart from those paradoxes. In this process, European integration may promote the reformation of national constitutionalism, challenging old habits such as single constitutionalism. The diversity of interests and forms of institutional representation and participation is not compatible with single constitutionalism and its focus on the political process as the default form of representation. We have to develop a more complex constitutional analysis which can help us in making the difficult choices identified in this essay. These choices should assess the different institutional alternatives according to a common constitutional criterion, creating a constitutional language that will allow us, not only to assess better institutional alternatives such as the political process or the courts, but also to integrate in this discourse phenomena such as “regulatory models” and decision-making by the

⁵⁶ Z. Bankowski and E. Christodoulidis, ‘The European Union as an Essentially Contested Project’, (1998) 4 *European Law Journal* 341 at 351-352.

market. The overall consequence is an extension of the scope of constitutionalism allowing us to face the growing atomisation and deterritorialisation of power. As Zagrebelsky has noted: we may be moving from the “sovereignty of the State” to the “sovereignty of the Constitution”.⁵⁷

European Constitutionalism will continue to be in crisis...However, there are good reasons to also look at the “bright side of the street”. Some of the problems of European Constitutionalism are old problems of constitutionalism that constitutional lawyers have, to a large extent, ignored. As constitutional lawyers, we have to take seriously the task of facing these problems without some of the traditional medicines that may now be showed to be artificial panaceas that have been killing the patient by hiding the disease.

⁵⁷ Zagrebelsky, above n.3 at 9.