

The Three Claims of Constitutional Pluralism

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Draft

It has become consensual to recognize that the European Union is governed by a form of constitutional law.¹ But, to a large extent, the constitution of Europe has developed without a constitutional theory.² There has been an important doctrinal effort in the dogmatics of European constitutional law, highlighting how constitutional concepts have been integrated into the law of the European Union and dominate its organization of power. At the same time, however, the constitutional theorization of the European Union has been limited, to a large extent, to a discussion on whether it deserves or not the constitutional label. More recently and following, in particular, the work of Joseph Weiler, there has been an increased discussion on the nature of European constitutionalism.³ But even this discussion appears more often as an upgrade on two old questions: Does Europe have a constitution? Does Europe need a constitution? Rarely do we see any work on the constitutional consequences of different constitutional conceptions of the European Union: what theories of fundamental rights, separation of powers or judicial review ought to dominate EU constitutional law? If European constitutionalism changes constitutionalism itself how does that impact on those aspects of a theory of constitutional law?

¹ Even skeptics of the constitutional authority of EU law such as Ugo de Basso (the well known judge of German Constitutional Court) recognize the constitutional character of EU law. Cited in Mayer (Komarek ed...)

² Look and cite my As Good as it gets or We the Court

³ Weiler, Walker, Pernice, Bogdandy, Tuori, mine.

Constitutional pluralism⁴ has been, perhaps, the most successful attempt at theorizing the nature of European constitutionalism. However, it has not yet provided a constitutional theory of EU law. Some understand it, in fact, simply as theory regulating conflicts of constitutional authority. In other words, constitutional pluralism would not identify European constitutionalism itself but the nature of its relationship with other constitutional orders (national and, possibly, international). In here, I want to discuss the real potential of constitutional pluralism as a constitutional theory. In this respect, constitutional pluralism is conceived not only as remedy for constitutional conflicts of authority but as the theory that can best embrace and regulate the nature of the European Union polity, in particular in light of its deep political pluralism and contested character.

I will start by discussing the extent of the claim made by constitutional pluralism. I will put forward three different possible claims of constitutional pluralism. Then I will develop each of these claims, arguing in favour on an ambitious conception of constitutional pluralism. This conception argues that constitutional pluralism can provide the basis for an ambitious theory of constitutionalism in general. In the process, I will compare different versions of constitutional pluralism and their possible consequences.

The Claims of Constitutional Pluralism

It has been stated that constitutional pluralism has emerged as a response to the Maastricht Judgment of the German Constitutional Court.⁵ This judgment brought to the fore the risks of constitutional conflicts between EU law and national

⁴ Including, in here, its German variant of multi-level constitutionalism (cite Pernice and others)

⁵ Cite Baquero, Mayer, Somek.

constitutions emerging from the claims of final authority embodied in the case law of the European Court of Justice and national constitutional courts. Constitutional pluralism is often presented as a reaction to this judgment, attempting simultaneously to describe that reality and accommodate those competing constitutional claims.

But it is also possible to construct a narrative that sees the in the seminal article by Neil MacCormick “Beyond the Sovereign State” (that preceded the judgment) the driving force behind the constitutional pluralism movement. The latter was certainly more important in my own path towards constitutional pluralism. My initial interest in the ideas that led to constitutional pluralism was not so much determined by the risks of constitutional conflicts but more by an inquiry into the character of the European Constitution itself.⁶ In this respect, also the analysis of European constitutionalism undertaken in the works of Joseph Weiler already hinted at other aspects of constitutional pluralism, particularly when he later articulated the principle of constitutional tolerance.⁷ In this second narrative, constitutional pluralism emerges as a theory of European constitutionalism and not simply as a theory of constitutional conflicts. The former focuses on the legitimacy of European constitutionalism and its model of organizing power while the later focuses in its relationship with other constitutional orders.

It must be recognized, however, that, to a large extent, it have been the risks of constitutional conflicts highlighted by the Maastricht judgment that have fed the interest in constitutional pluralism. This shaped its agenda. Most works on constitutional pluralism have focused on courts and the risks of constitutional conflicts of authority embedded in their respective case laws. But one does not

⁶ This is visible in *We The Court* (cite...) and *As Good as it gets* (cite pp...)

⁷ See Weiler, J.H.H., *The Principle of Constitutional Tolerance*, in Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration*, Hart Publishing, Oxford, 2000

need to limit constitutional pluralism to this. In my view, constitutional pluralism is both better understood and more useful if not limited to that. Furthermore any debate on how to solve or regulate constitutional conflicts of authority inherently involves a debate on the nature and legitimacy of the competing constitutional claims of final authority. As such, it always requires a broader understanding of the nature of European and national constitutions and their relationship with constitutionalism in general.

It is with this in mind that I will present possible different claims of constitutional pluralism in order to clarify what constitutional pluralism is and the extent to which it can help us develop a constitutional theory of EU law.

a) Empirical Claim

The starting point of constitutional pluralism is empirical. Constitutional pluralism identifies the phenomenon of a plurality of constitutional sources and claims of final authority which create a context for potential constitutional conflicts to be solved in a non-hierarchical manner. More broadly, it refers to the expansion of relevant legal sources, the multiplication of competing legal sites and jurisdictional orders, and the existence of competing claims of final authority. In EU law, where the current movement started, constitutional pluralism also mapped what is usually described as a discursive practice between the European Court of Justice and national constitutional courts, aimed at reducing the risks of constitutional conflicts and accommodating their respective claims of final authority.

If I had to summarize the core empirical claim of constitutional pluralism, it would be the following: constitutional pluralism is what best describes the current legal reality of competing constitutional claims of final authority among different legal

orders (or within the same legal order)⁸ and the judicial attempts at accommodating them. This thesis assumes that both the European Court of Justice and national constitutional courts are aware of constitutional pluralism and act accordingly, by accommodating their respective constitutional claims, so as to minimize the risks of constitutional conflicts. The most well known example of this regards the fundamental rights jurisprudence of the European Court of Justice⁹.

This empirical claim is challenged by some. Alexander Somek makes the most developed challenge to the empirical thesis of constitutional pluralism to date. He claims that pluralism does not fit the existing legal practice.¹⁰ For him, at best, there is nothing really new in constitutional pluralism. He actually conceives of constitutional pluralism itself as a form of monism under national law. The question of final authority is not open. There is, in his view, a legal answer. He starts by noting that:

“If national courts were to let Union law trump constitutional law, they would clearly act as agents of the supranational system and thereby sever their ties with the national system. Viewed from the national perspective, again, they would not act as courts and produce legally irrelevant statements”.¹¹

Instead, he argues that EU law does not prevent national judges from adopting decisions disrespecting EU law (what he calls “false decisions”) since ultimately

⁸ This leaves open the question of whether it is more appropriate to conceive of constitutional pluralism in the EU as a pluralism of legal orders (EU and national) or as a pluralism of constitutional claims of authority within the same legal order (with national legal orders being part of the EU legal order in its respective field of application). This would not necessarily entail a monism, so long as the incorporation of national legal orders were limited by the scope of the EU legal order itself. The best way to conceive this, however, may be by using Tuori distinction between legal order and legal system. CITE EU and national legal orders will remain autonomous but they both are part of the EU legal system. The importance of this will be highlighted below and resides on the hermeneutic requirements imposed on national courts when acting within the EU legal system.

⁹ For a classical account... de Witte, von Bogdandy, Weiler CITE. For a reassessment of this account see von Bryde... in Azoulai and Maduro (eds.) The Past and Future CITE.

¹⁰ Somek, p. 50

¹¹ Somek, p. 16

their decisions will not be void and the only consequence may be tort liability. In his own words: “it makes sense to say that Member States retain the power to have their judges adopt false decisions, at any rate, as long as States are willing to pay for it.”¹² To this, he adds the lack of effective EU powers to protect EU law against recalcitrant Member States.¹³ The conclusion is that “the overarching legal system vests the power to adjudicate supremacy conflicts in the national system”.¹⁴

It is clear that the core of Somek’s criticism of constitutional pluralism is empirical: what constitutional pluralism presents as conflicting claims of final authority is reconstructed by Somek as an actual recognition of the supremacy of national constitutionalism. I strongly disagree with his empirical assessment. First, the existence of false decisions is, as Somek himself recognizes, a usual feature of any legal system.¹⁵ Unfortunately, it is not uncommon for courts to wrongly interpret and apply the law. Under EU law, as under national law, those “false decisions” are not void because the national courts that taken them have been empowered to interpret and apply EU rule by EU law itself. It is because national courts are part of the judicial system set forth by EU law that their decisions (even when “false”) are valid and become final when all appeals have been exhausted. This is, therefore, a result of EU law and not national law. Second, the argument that the existence of liability for judicial acts violating EU law amounts to permit States to violate EU law so long as they are willing to pay for it is equally unconvincing. Such an argument can be extended to national law itself. Consider, to make comparison clear, the cases of liability of the state (including, in some cases, courts) for violations of the law, in particular the Constitution. Do we put into question the supremacy of the constitution in the national legal order

¹² Ibidem p. 17.

¹³ Ibidem, p. 18

¹⁴ Ibidem, p. 19.

¹⁵ Ibidem, p. 17.

whenever there is liability for state acts violating it? Liability is an additional instrument of enforcement and supremacy, not a price to be paid in order to be exempted from enforcement and supremacy.

The core of Somek's criticism must and does lay somewhere else. As others,¹⁶ he argues that constitutional pluralists give up precisely where an answer is most needed: what happens when the constitutional conflict cannot be prevented or solved?¹⁷ There are different possible replies to this critique and, to some extent, they depend on different approaches to constitutional pluralism that I discuss in more detail below. One can start by stating that the purpose of constitutional pluralism is precisely to legitimate leaving that question open or that the fact that the question remains open does not deprive constitutional pluralism from its value since its technique of accommodation of the competing constitutional claims helps decreasing the number of times that the question will pose itself.

At this stage, however, I only want to address the empirical challenge as articulated by Somek and others: that the question is not in fact open but will be ultimately decided (usually in favour of national constitutional law). For Somek, the decisive element is the lack of an effective enforcement instrument against recalcitrant Member States. But again he appears to measure the enforcement power of EU law in light of an "ideal" that does not correspond to the reality existing in many States. Usually courts do not have any material force to impose on the political process compliance with their decisions.¹⁸ That does not lead us to put into question their legal authority. Even if it can be stated that the European Union lacks the army at the disposal of federal governments, it has other alternative and perhaps more

Gelöscht.

¹⁶ See citations in Tuori.

¹⁷ Somek, p. 18.

¹⁸ There are even examples, at national level, of constitutional decisions that have not been complied with by the political process or only complied after extensive delays. CITE Italian Constitutional court decisions on pensions and broadcasting.

effective instruments in the day-to-day effectiveness of the law. It now has the power to impose fines on States not complying with EU law. This does not exist, for example, in the United States where moreover, and contrary to EU law, States cannot, subject to certain exceptions, be sued under federal law. If there may be greater compliance with the supremacy clause in the United States¹⁹ I don't think it is due to the enforcement mechanisms at the disposal of the federal government.²⁰

Others have given the example of the necessary amendments to national constitutions whenever a new Treaty of the EU (or any EU act for that purpose²¹) could collide with the national constitution as evidence of national constitutional supremacy.²² This would be particularly the case when such collision has been ascertained by a national constitutional court and the latter imposes amending the Constitution in order to eliminate the conflict.²³ For example, in national systems that allow ex-ante control of international treaties, any ratification of an EU treaty may be subject to judicial review to evaluate of its compatibility with the national constitution. This requirement of constitutional conformity before an EU Treaty can be ratified is presented by some as demonstrating that the final authority ultimately rests with the national constitutions. It can however be asked if, *de facto*, it is really EU law that depends on the national constitution being amended or, instead, it is the national constitution that must be amended in order to fit with EU law?²⁴ Whenever a possible conflict was detected between the national constitution and an EU Treaty it was the national constitution that was amended and not the EU Treaty.²⁵ The same happened ed when the Polish Constitutional Court

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¹⁹ Which has not always been the case. See CITE Schütze

²⁰ See below the discussion on the degrees of constitutional pluralism.

²¹ such as in the case of the arrest warrant in Poland, CITE Polish Constitutional Court decision

²² Cite Jorge Miranda. Others?

²³ Reference to the Polish case

²⁴ In this sense, Francisco Lucas Pires, "«Competência das Competências»: Competente mas sem competências?", *Revista de Legislação e Jurisprudência*, nº3885, 1998, at 356.

²⁵ Cite cases: Spain in Maastricht, France (also Maastricht?) Portugal, etc.

Gelöscht: What

declared the EU arrest warrant rules were contrary to its national constitution. The Polish Court did not declare the EU act inapplicable. Instead, it preserved its application while the Polish political process would amend the Constitution to eliminate the incompatibility.²⁶

It is for these reasons that some challenge the empirical claim of constitutional pluralism from the opposite direction: the supremacy of EU law is now the rule and an established fact even over national constitutional law.²⁷ This would amount to say that national courts have now changed their allegiance towards EU law and it is the latter that provides their rules of recognition. However both the statements and the practice of national courts (including both constitutional and ordinary courts) do not fit that reality either.²⁸

Empirically, the open question remains open. At the same time, the examples of a discursive practice among courts acknowledging this situation abound.²⁹ This should not be confused with courts using the language of constitutional pluralism. Constitutional pluralism does not require courts to talk about constitutional pluralism in their decisions. Those that say that courts do not actually endorse constitutional pluralism in their decisions miss the point. The fact that courts continue to narrate the law according to the internal viewpoint of their legal order does not mean that viewpoint is not impacted by constitutional pluralism. The primary example of that is how many national courts have interpreted their

²⁶ CITE Judgment and Komarek and also the article by... judge supreme administrative court

²⁷ Barents? Baquero? Check better. See also

²⁸ For a general overview and more detailed presentation of this argument see my *Contrapunctual Law*... See also Damian Chalmers article on *Modern Law Review* and his new piece on authority *MORE REFS?* Eg Granger. For recent decisions of national constitutional courts which only accept a conditional form of supremacy see: German Constitutional Courts decisions in the Lisbon Treaty and Honeywell, Czech Constitutional Court Decisions on the Lisbon Treaty, French Conseil d'Etat in Arcelor etc CITE. The approaches of the national courts to such conditionality vary however. For a case study of patterns of national judicial decisions openly disregarding EU law see Francisco Pereira Coutinho... CITE

²⁹ See cases cited in the previous note and my *Contrapunctual law*... CITE see also several examples in... Sarmiento, Komarek... Cite Some, however, deny this discursive practice actually exists. See, for example, Somek, p. 35...

constitutions so as to incorporate the demands arising from the supremacy claim of EU law without accepting an unconditional supremacy. The narrator is still the national constitution but the script has changed. Constitutional pluralism expects the actors that operate in a certain legal order to adopt the internal perspective of that order. But constitutional pluralism requires such internal perspective to be informed by constitutional pluralism. This is what I mean when I say that courts are not institutionally blind. Courts are aware of such a context of constitutional pluralism and react to it. A different issue is if they react in the best way. The later is a normative question, not an empirical one.

Matej

Kommentar [AK1]: Constitutional pluralism as “tranquilizing” theory; but what does this theory solve, beyond psychology?

b) Normative Claim

While the empirical thesis of constitutional pluralism limits itself to state that the question of final authority remains open, the normative claim is that the question of final authority ought to be left open. Heterarchy³⁰ is superior to hierarchy as a normative ideal in circumstances of competing constitutional claims of final authority. This normative thesis implies, in practice, another: that those competing constitutional claims are of equal legitimacy or, at least, cannot have their respective legitimacy claims balanced against each other in general terms. Therein lays another of the usual challenges to constitutional pluralism: that it recognizes a constitutional order where there is none. Such an unjustified extension of constitutionalism might even end up undermining constitutionalism itself. I will address this risk below and will limit myself, for now, to the other issues.

³⁰ To use the expression of Halberstam CITE

As stated, constitutional pluralism recognizes that there is a constitutional claim of final authority on the part of the European Union. As a normative thesis it assumes, furthermore, that such claim is legitimate. As stated before, that the claim exists is now largely undisputed.³¹ But is it legitimate? Questioning this legitimacy might be a way to address the risk of constitutional conflicts. Denying legitimacy to the constitutional claim made by the European Union would entail recognizing the supremacy of national constitutionalism (if considered the only legitimate form of constitutionalism). Constitutional pluralism implies, therefore, recognizing the legitimacy of the EU constitutional claim. This is, in my view, the real starting point of constitutional pluralism in the European Union.³²

There is, however, an important difference in recognizing that the European Union needs a constitutional form in order to govern its power and arguing that the Union has a constitutional claim of authority that can be opposed to that of national constitutions. I am stating this because I have noticed that rather often the constitutional argument for the European Union is limited to constitutionalism as a limit to EU power. Wherever there is power there ought to be constitutional empowerment and constitutional limits. As a consequence: since the Union has developed autonomous forms of power it ought to be subject to constitutionalism. This is true but it is not enough to grant the Union a constitutional claim of authority to be opposed to that of national constitutions. The latter requires more than that. It requires demonstrating that the constitutional claim of the European Union has a legitimacy that can be opposed to that of the States. This does not imply that its constitutionalism is the same as that of the States or even has the same comprehensive social ambition. It only requires demonstrating that the

³¹ I describe how this claim emerged in Contrapunctual law... For other narratives see...

³² As explained by Mayer and Wendel behind the emergence of the similar concept of multilevel constitutionalism was precisely the attempt to argue that the concept of constitutionalism should not be limited to the State and could be applied to the European Union.

European Union has, in certain respects, a stronger constitutional added value with respect to State constitutionalism and that it may be opposed to it.

In other works I have articulated where that added constitutional value may be.³³ In short, we can identify three main sources of constitutional and democratic added value that the process of European integration and EU Law can bring with respect to national political communities and their constitutional democracies. First, European constitutionalism promotes inclusiveness in national democracies by requiring national political processes to take into account out-of-state interests that may be affected by the deliberations of those political processes. By committing to European integration, EU states accept to mutually open their democracies to the citizens of other Member States. This amounts to an extension of the logic of inclusion inherent in constitutionalism. Second, European constitutionalism allows national democracies to collectively regain control over transnational processes that evade their individual control. While in the former case we could talk of outbounded democratic externalities (States impacting on out-of-state interests) in the later we can refer to inbound democratic externalities (out-of-state decisions and processes affecting domestic interests). Third, European constitutionalism can also constitute a form of self-imposed external constitutional discipline on national democracies. There are many instances where domestic political malfunctions can be better corrected by external constraints. These may force national political processes to rationalise national policies that have, for example, become locked in into certain path-dependences or captured by a certain composition of interests. In many such instances, EU law's discipline rationalises and, often, reignites a more informed and genuinely open deliberation in the national political process.

³³ Cite mines: We The Court..., Europe and the Constitution: What if this is As Good as it Gets..., Passion and Reason...

On the other hand, national political communities are still, in many respects, the best forum for pursuing the values of constitutionalism. In this light, national constitutionalism serves as a guarantee against possible concentrations and abuses of power from European constitutionalism and requires the latter to constantly improve its constitutional standards in light of the challenges and requirements imposed on it by national constitutions. The constitutional added value of European constitutionalism does not provide it with a general claim of supremacy over national constitutionalism. However, it does provide it with a claim. It is the constitutional added value arising from their mutual correction of each other's constitutional malfunctions that requires constitutional pluralism to be maintained between its national and European forms? As long as the possible conflicts of authority do not lead to a disintegration of the European legal order, the pluralist character of European constitutionalism in its relationship with national constitutionalism should be met as a welcomed discovery and not as a problem in need of a solution.

Constitutionalism is therefore both possible and necessary in the European Union. But, as stated before, it is so not only by virtue of the powers the Union has acquired. In other words, the constitutionalism of the European Union cannot be the simple product of a circular reasoning that would require the power claimed by the Union to be subject to constitutional control and then use the latter to legitimate the power being claimed. A deeper justification and legitimacy of European constitutionalism must be derived from its constitutional added value with respect to national constitutionalism . This is why the former can be opposed to the latter. European constitutionalism brings us closer to the ideals of constitutionalism. It is not, in itself, a closer representation of constitutionalism than national constitutionalism but their interplay is. This is what constitutional pluralism argues

Gelöscht: European constitutionalism

and therein lays its thicker normative claim, one that relates constitutional pluralism and constitutionalism in general.

c) Thick Normative Claim

As stated, the thicker normative claim of constitutional pluralism is that this state of affairs provides a better approximation to the ideals of constitutionalism than either national constitutionalism or purely EU constitutionalism. In this way, the pragmatic concern that appears to have dominated much of the earlier writings of constitutional pluralism is turned upside down. Constitutional pluralism is not simply a remedy for the risks of constitutional conflicts of final authority; it's a closer representation of the ideals of constitutionalism.³⁴

Pluralism is inherent in constitutionalism. In fact, constitutionalism aims to simultaneously guarantee and regulate such pluralism: a pluralism of ideas, interests and visions of the common good that is reflected in the paradoxes of constitutionalism and its balance between democratic deliberation and constitutional rights.

In a previous work I have argued that constitutionalism is related to three paradoxes: the paradox of the polity; the fear of the few and the fear of the many;³⁵ and the question of who decides who decides. They are paradoxical because they simultaneously embrace conflicting values in an attempt to reconcile them that is at the core of constitutionalism. With respect to all of them, national constitutionalism can be seen as both a promoter of and a limit to constitutionalism.

³⁴ It is unclear the extent to which most constitutional pluralists argue this. I am one who does it. I believe that at least Kumm and likely Halberstam will share the same view. Others, such as Walker, appear to keep a more external and agnostic view on this question.

³⁵ An expression originally crafted by Neil Komesar...cite

Gelöscht: that

The polity is the basic assumption of a Constitution. 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). The Constitution both defines and presupposes a polity or political community whose members are bound by such 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.³⁶ But what makes a people? And who has the right to be considered as part of the people? And why should participation and representation be limited by the requirement of belongingness to such a polity? It is the paradox of the concept of polity 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. It is not the existence of democracy at national level that is contested but the extent of that democracy.³⁷ There is a problem of inclusion faced by national polities.³⁸ Such problem of inclusion does not exist simply by not taking the others into account in decisions that affect them. National polities are often closed to many which would accept their political contract. National polities

³⁶ Dahl, *Democracy and Its Critics*, n..., at 3.

³⁷ The difference between the existence of democracy and the extent of democracy is highlighted by Jon Elster, *Deliberation and Constitution Making*, n..., at 99.

³⁸ 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', n..., at 119. See also David Held, *Democracy and the Global Order*, Cambridge and Oxford: Polity Press, 1995, mainly chapters 1 and 10.

tend to exclude many which would accept their political contract and are affected by their policies simply because they are not part of the *demos* as understood in a certain ethno, cultural or historical sense. In this way, if national polities can be seen as an instrument of constitutionalism, they also limit its ambitions of full representation and participation.

The same occurs with the paradox of the fear of the few and the fear of the many. 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). There are two basic fears underlying constitutional discourse and organisation: the fear of the many and fear of the few. Such fears translate into two biases in decision-making: majoritarian and minoritarian biases. 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.³⁹ 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

³⁹ Bellamy (The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy, in Bellamy and Castiglione (Eds.) Constitutionalism in Transformation: European and Theoretical Perspectives, Oxford, Blackwell Publishers, 1996, 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 component of constitutionalism, providing a normative legal framework within which politics operate', at 24.

minority protection.⁴⁰ 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.⁴¹ This has helped to challenge idealised visions of the workings of national democratic institutions. In this light, and as I have argued before, EU constitutionalism may be a better instrument for correcting instances of majoritarian or minoritarian biases in national institutions that national constitutionalism cannot adequately address.

The final paradox is that of who decides who decides? National constitutions have always been conceived as holding the answer to that question. In its relationship with the notion of State sovereignty highlighted above, national constitutions have 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. EU's constitutional pluralism appears challenges this. In fact, this challenges national constitutions but not constitutionalism itself. In reality, the question of "who decides who decides" has long been around in 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

⁴⁰ 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.

⁴¹ Other theories have contributed in same sense. Ackerman's "dualist democracy", for example, equates both the political process and the courts with the promotion and/or protection of democratic decisions. See, *We The People*, n...

mechanism of checks and balances. Though national constitutions may have developed historical answers to that question they are a contextual product of certain constitutional regimes and not a systemic feature of constitutionalism. On the contrary, the nature of the organisation of power inherent in constitutionalism requires the question to be open and periodically reassessed.

This is a normal consequence of the constitutional goal of both preserving and regulating political pluralism. Constitutions provide a, substantively partly fictional but rationally useful, common platform on the basis of which political conflicts assume the nature of competing rational arguments on the interpretation of shared values and not the character of power conflicts⁴² These conflicts are replaced by competing interpretations of the constitution. But in order for constitutionalism to perform this role such pluralism of interpretations is supported by institutional pluralism: different institutions that guarantee that no set of interests acquires a dominant role and that any definition of the common good can be, at any moment, reassessed and contested. Such pluralism of interpretations and institutions ensures the simultaneous expression and accommodation of political pluralism in a particular political community. It is the fact that this point is often missed that explains many misunderstandings in the never ending debate about the role and legitimacy of judicial review. Also there lawyers appear to be looking for the ultimate authority in determining the meaning of the constitution when what is taking place can better be described as a form of institutional competition expressly intended by the embedded pluralism of the Constitution.⁴³

⁴² Rational discourse through the constitution is the guarantee of a common identity and the stabiliser of the political community in a context of pluralism. (*Spinoza: reason is the only true form of shared identity*).CITE

⁴³ I develop this point in *Judicial Adjudication in the Context of Constitutional Pluralism...* CITE

To a certain extent there is a tension between the political project of constitutionalism and its legal form. The first favours pluralism and the second hierarchy. It would be too simple however to dismiss the second as normatively void and no longer useful. Instead, the importance of hierarchy for constitutionalism is linked to its adherence to the rule of law and universality in general. Therein lays the most powerful challenge to constitutional pluralism: that it ends up undermining the ideal of modern constitutionalism and, in particular, its connection to the rule of law and the ideal of universality in a certain polity. This is the core of the criticism that Baquero developed in a well known piece.⁴⁴ It is also inherent in some of the empirical criticisms mentioned above. In practice, these criticisms do not conceive as possible for courts to both adhere to the conception of the law internal to their legal order and recognise an external account that challenges that internal conception. That would undermine the authority of the law. The same legal order cannot claim to have authority to universally address all issues within its jurisdictional boundaries and, simultaneously, accept to negotiate that authority with others. As Alexander Somek puts it: “law is intrinsically monistic”.⁴⁵ It is here that the empirical criticism becomes normative: law can only exist in a monistic paradigm. But the reality is that the practice of courts challenges this paradigm: they ultimately determine legal validity in light of their domestic legal order but simultaneously reconstruct that legal order (and its conditions of validity) so as to accommodate it to the competing claims of others. Is law determined as such not valid law? The easy answer is to state that since it fits the new internal rules of recognition there must be no doubt, even for those critics, that it is valid law. But the real interesting questions in this respect are different: should courts (and other actors) develop law in that way and how can we still talk about

⁴⁴ The Maastricht Urteil and the Pluralist Movement CITE...

⁴⁵ Somek, p. 42.

law when confronted with competing and irreconcilable constitutional claims? These questions must acknowledge the current reality in which courts operate, one that confronts them with those competing claims.

Constitutional pluralism tries, in effect, to solve the constitutional paradoxes that result from the current practice of law in a pluralist context. As Neil Walker puts it: “the constitutional pluralist seeks to retain from constitutionalism the idea of a single authorizing register for the political domain as a whole while at the same time retaining from pluralism a sense of the rich and irreducible diversity of that political domain”.⁴⁶ This requires from constitutional pluralism to preserve the ambition of universality embedded in modern constitutionalism and expressed in its adherence to the rule of law and a coherent and integrated legal system.

To be continued...

⁴⁶ Constitutionalism and pluralism in global context, p. 1.