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Altneuland: The EU Constitution in a Contextual Perspective

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How Constitutional Can the European Union Be? The Tension Between
Intergovernmentalism and Constitutionalism in the European Union

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How Constitutional Can the European Union Be?

The Tension Between Intergovernmentalism and Constitutionalism in the European Union

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The currency of constitutionalism has become the dominant currency of the debates on European integration. But do we really know what we mean by constitutionalism in the European Union? We have moved from talking about a process of constitutionalisation to question whether such process represented a European Constitution (does Europe has a Constitution?). We have then discussed whether the Union required a formal Constitution (does Europe need a Constitution?). Two issues underlie the discussion on both of these questions: whether constitutionalism is the best form of power² for the European Union and whether the European Union has the constitutional authority (in the form of a *pouvoir constituant*) to adopt such form of power.

These constitutional questions can also be linked to two different types of legitimacy identified by Bellamy and Castiglione:³ regime and polity legitimacy. The first relates to

¹ Advocate General at the Court of Justice of the European Communities. The views expressed are, naturally, purely so in a personal capacity. I would like to thank Kieran Bradley and Carlos Closa for comments on this paper.

² The definition of constitutionalism as the form of power belongs to Francisco Rubio Llorente: *La forma del poder*, Madrid: Centro de Estudios Constitucionales, 1993.

³ The distinction between regime legitimacy and polity legitimacy (see below) was advanced by Bellamy and Castiglione (see R. Bellamy and D. Castiglione, “Normative Theory and the European Union: Legitimising the Euro-Polity and its Regime,” in L. Tragardh (ed.) *After National Democracy: Rights, Law and Power in the New Europe*, Oxford: Hart, forthcoming, cited in Neil Walker) and recently also used by Neil Walker, The

the legitimacy of the institutional and procedural mechanisms through which power is exercised in a polity. The second refers to the need to justify the existence of that polity.⁴ In part, the Constitutional Treaty aims at providing the Union with these two forms of legitimacy. The way in which one answers these different questions in the context of the European Union is, in turn, influenced by the way we conceive constitutionalism in general (what does constitutionalism serves for) and the notion of a political community we embrace (what kind of social and political relationship must it embedded). Understood as a normative theory,⁵ constitutionalism has been conceived as a set of legal and political instruments limiting power (constitutionalism as limit to power). But it has also been conceived as a repository of the notions of the common good prevalent in a certain community and as an instrument organising power so that it pursues that common good (constitutionalism as polity expression). In between, it is possible to stress instead the role of constitutionalism in creating a framework in which competing notions of the common good can be made compatible or arbitrated in a manner acceptable to all (constitutionalism as deliberation).⁶

White Paper in a Constitutional Context, part of the Jean Monnet Chair Working Paper 6/01 (available in <http://www.jeanmonnetprogram.org/papers/01/011001.rtf>). The meaning in which these expressions will be used in here does not totally coincide with the meanings attributed to the expressions by these authors.

⁴ See also Neil Walker's five orders of constitutional pluralism questions.

⁵ With this I mean a notion of constitutionalism that embraces a particular form of organizing power and not a neutral label for any fundamental document setting the organization principles of a particular system or organization (in this latter sense, one can find constitutions in the most diverse settings from the United Nations Charter to the statutes of a golf club as a conventioneer at the Convention on the Future of Europe remarked).

⁶ These notions of constitutionalism can, *prima facie*, be linked to different conceptions of the polity. The first appears to correspond to the liberal emphasis on the protection of freedom and private autonomy. The second, to the communitarian assumption of a thick form of association capable of supporting a notion of the common good. The third, to a republican ideal of a constestatory and fully deliberative polity whose identity is secured by engagement in its permanent discussion. Such associations should not, however, be overemphasised. It is possible, for example, to adopt the latter version of constitutionalism in the context of a liberal polity.

Those three core conceptions of constitutionalism and their partial affinity with certain notions of the polity allow me to present the key purpose of this paper: to identify the changing nature of European constitutionalism and its relationship with the intergovernmental aspects of power in the European Union. My argument will be that the role of constitutionalism is changing in the European Union and that its function depends on the relationship between constitutional regime and polity legitimacy and, more generally, between constitutionalism and intergovernmentalism. The prevailing character of European constitutionalism has, so far, been determined by its instrumental relation to intergovernmentalism. However, this relationship may have to be changed in light of the regime changes introduced by the current constitutional processes of the European Union. For these purposes, a distinction will be made between constitutionalism (where individual interests are directly aggregated and deliberation is based on the promotion of universal rules guaranteed, ex-ante, by its generality and abstraction and, ex-post, by non-discrimination) and intergovernmentalism (where interests are aggregated through the State and deliberation does not aim at universal rules based on the individual status of citizens but reflects the bargaining power of States and generates accommodating agreements between their perceived conflicting interests).

I will start by revisiting the process that Joseph Weiler has described as the “transformation of Europe”. This process included both a dynamic of constitutionalisation and of europeanisation leading to a claim by Europe to normative and political authority expressed in the doctrines of supremacy and direct effect and its emergency as a community of open and undetermined political goals. The legitimacy of this process was founded on a functional understanding of the original Communities and linked with a limited form of constitutionalism (what I would describe as low intensity constitutionalism). But this process did not affect the deliberative nature of the European Communities that remained predominantly intergovernmental. The constitutional form of power adopted was strictly limited to the adoption of the instruments of constitutionalism necessary to limit and, at the same time, legitimise the constitutional authority claimed but did not affect the nature of

Moreover, constitutional reality often presents us with a mix of those different constitutional and polity conceptions.

political deliberation. Its polity legitimacy was either ignored, inspired by references to private autonomy or functionally linked (in different ways) to that of the States. As a consequence, its regime legitimacy was dominated by the form of constitutionalism as a limit to power and its polity legitimacy by private autonomy and functional legitimacy.

The incremental nature of normative and political authority acquired by the EU and the pressures created by enlargement have led to a crisis in the form of European constitutionalism and an increased tension in its relation with intergovernmentalism. After presenting this crisis I will discuss the nature of the Convention process entrusted with the resolution of this crisis. It is in the light of this discussion that I will review the main changes introduced by the new Constitutional Treaty paying attention to the relationships between regime and polity legitimacy and constitutionalism and intergovernmentalism. My overall argument is that those relationships have not been given sufficient attention by the constitutional process of the Union with the consequence that the Union may not have sufficient polity legitimacy to support the regime adopted and that a paradigmatic tension is created between constitutionalism and intergovernmentalism.

"The Transformation of Europe" Revisited:

InterGovernmentalism and Constitutionalism in the Processes of Constitutionalisation and Europeanisation

In 1991, Joseph Weiler published what has probably become the most famous piece describing the evolution of the process of European integration in its legal, political and economic context. The title of such piece was "The Transformation of Europe".⁷ In his article, Joseph Weiler explained the constitutionalisation undertaken by the European Communities and how it had been possible. Following his previous thesis on the dual

⁷ Yale Law Journal 100 (1991), p. 2403-2483.

character of supranationality,⁸ Weiler explained how the adoption of normative supranationality (the adoption by European rules of constitutional federal authority over State rules) was linked to intergovernmental decision-making (States control and veto power over the decision-making process). But in that piece and in his following work,⁹ Weiler has also highlighted how some of the constitutional doctrines adopted by the Court (notably the protection of fundamental rights) could be linked to the supremacy and direct effect acquired by European rules (what Weiler identified as normative supranationality). In other words, the claim of normative authority by Community law required the adoption of some constitutional doctrines to legitimise but also control that authority. One can therefore add to the two-dimensional model of Weiler (normative supranationalism with intergovernmental decision-making) the dimension of constitutionalism. But, this constitutional dimension is exclusively linked to the area dominated by normative supranationalism. It is with respect to the areas subject to normative supranationalism that constitutional doctrines appear to both sustain and control that normative supranationalism. This limited the nature of European constitutionalism. As Weiler noted with regard to fundamental rights protection, this constitutional doctrine was 'designed to control a *gouvernement des fonctionnaires*'. It was not primordially directed to control intergovernmental decision-making as this was perceived to benefit from the traditional indirect democratic and constitutional legitimacy provided by the States. Where States still fully controlled the process of decision-making no real question of legitimacy was raised. This was bound to determine the nature of constitutional review in the new European Community. No one conceived, for example, as a priority to review under European constitutionalism a unanimous decision of the Member States in the Council.¹⁰

⁸ "The Community System: the Dual Character of Supranationality", 1 Yearbook of European Law, 1981, 267-306

⁹ Notably, in his early writings on fundamental rights: J.H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities', Washington Law Review (1986), 1103.

¹⁰ It is this circumstance that may explain another interesting fact in the case law of the Court on fundamental rights. The Court of Justice has usually been much deferent towards legislative measures adopted by the

Constitutionalism in Europe emerged to, on the one hand, build an European polity by preventing States from evading from the interests of the broader European Community whenever such interests conflicted and, on the other hand, to control the emerging bureaucracy and autonomous centres of power arising from the European Community which could no longer be controlled by the constitutional orders and democratic constituencies of the Member States.

In order to highlight how this resulted in a particular form of constitutionalism I would like to revisit the process of transformation of Europe identified by Weiler to try to identify in it the trademarks of European constitutionalism and its relation with the constitutional questions currently faced by the Union. The purpose is not to describe once more the process of constitutionalisation but, instead, to highlight how its normative foundation lies in a claim of independent normative authority whose connection with a process of Europeanisation lies at the basis of the current constitutional questions faced by the Union. Furthermore, I will try to show how the legitimacy of the process of constitutionalisation was linked to a particular notion of constitutionalism and its relationship with intergovernmentalism.

Council than to the administrative measures adopted by the Commission. In reality, the Court has, so far, only twice struck down Council legislative acts and, even there, in marginal instances (Case C-49/88, *Al-Jubail Fertilizer Company (Samad) and other v Council* [1991] ECR 3187 - right to a fair hearing; Joined cases C-364/95 and C-365/95T, *Port GmbH & Co. v Hauptzollamt Hamburg-Jonas* [1998] ECR I-01023 - non-discrimination). There are several possible reasons for this some of which have to do with the particular deference that an intergovernmental political process deserves in the context of a hybrid polity as the European Union: first, the Court may be recognising the higher democratic legitimacy of the Council when compared to that of the Commission; second, the Court could also be recognising the peculiar bargaining nature of the decisions reached through the Council inter-governmental deliberations when compared with those of the Commission; third, the fact that the Council legislation was during a long period hampered by unanimous decision-making also made its decisions more consensual from a point of view of State interests (not necessarily, however, from the point of view of opposing interests within the States). The perceived risk was, instead, that of blockades in the Council's decision-making process. However, the move towards majority voting in the EU decision-making and other instances of increased European politics beyond the States may require a shift from this traditional constitutional deference towards intergovernmental politics.

The classical literature on European integration has described how the case-law of the European Court of Justice developed a constitutional architecture for Community law founded on the principles of direct effect and supremacy, complemented with the adoption of constitutional law concepts such as fundamental rights, implied competences, State liability, enforcement mechanisms, separation of powers and, broadly, the notion of a community of law (the EU equivalent of *Statsrecht* or the rule of law).¹¹ According to Weiler:

‘The constitutional thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a Treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law’.¹²

This constitutional construction was legitimised by the Court on the basis of what one could call an epistemological shift in the understanding of EC law and the source of its normative authority. When the Court of Justice, in its path-breaking decisions, assumed EC law as an autonomous legal order, it did it on the basis of a direct relation with the peoples of Europe.¹³ It was this that granted to the European Communities (later the EU) and its legal order a claim of independent normative authority. It would have been possible to base the supremacy and direct effect of Community law on some form of interpretation of international law. In fact, as Bruno de Witte as powerfully explained, even the principles of supremacy and direct effect, usually identified as the cornerstones of the

¹¹ There is no shortage of references to these body of literature but here goes one more footnote with some classic texts on the constitutionalisation of Community law: J. H. H. Weiler, *The Constitution of Europe – “Do the new clothes have an emperor?”* and other essays on European integration, Cambridge: Cambridge University Press, 1999; K. Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ 1990 *American Journal of Comparative Law* 38, 205; E. Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ *American Journal of International Law* 1981, 1; G. F. Mancini, ‘The Making of a Constitution for Europe’, *CMLRev.* 1989, 595.

¹² J. H. H. Weiler, ‘The Reformation of European Constitutionalism’, 35 *Journal of Common Market Studies* 1997, 98, at 98. Some authors go further than talking about the constitutionalisation of EU law.

¹³ See Case 6/64, *Costa v. Enel* [1964] ECR 585 and Case 26/62, *Van Gend en Loos* [1963] ECR 1.

constitutionalisation of Community law, could be developed and applied without changing, in a substantial manner, the character of the Treaties and Community norms as international law.¹⁴ There are other instances where international norms enjoy direct effect and supremacy without that implying any challenge to the ultimate authority of the States and their national law (particularly, constitutional law). On the contrary, it is often those Constitutions that confer that power to international rules. It would indeed have been possible to explain the supremacy and uniform application of EU law without challenging the traditional conception of sovereignty and its *locus* on the State. However, this vision was not the one embraced by the Court of Justice and by the national courts that, in entrusting the European Court with the resolution of the conflicts of authority between national and European norms, implicitly recognised that such conflicts were to be decided at the European level itself.

The Court of Justice, supported by national courts, founded the direct effect and supremacy of Community law on a direct relation between Community norms and the peoples of Europe. The treaty is presented as much more than an agreement between States; it is an agreement between the peoples of Europe that established a direct relationship between EC law and those peoples.¹⁵ That source of direct legitimacy established a political link authorising a claim of independent normative authority. Legal authority was therefore to be derived from an autonomous conception of the European legal order. This corresponded, in fact, to a claim of independent normative authority that meant that the European Communities were, in the words of the Court, endowed with sovereign rights.¹⁶ And this normative authority entitled the European legal order to set its borders with regard to national legal orders. It further granted to European rules the authority to derogate from the

¹⁴ B. de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in Craig and de Burca (eds.), *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, mainly pp. 181 and 209.

¹⁵ Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 3.

¹⁶ *Ibidem*.

application of national rules corresponding, de facto, to an attribution of constitutional supremacy vis a vis those national rules.

The epistemological turning point on the construction of the normative authority of EC law lays in the direct relation found by the Court of Justice between the peoples of Europe and that legal order. Once this direct relationship was established between European law and the peoples of Europe, it was clear that it was to be constructed autonomously from national and international legal orders and that its basic legal framework should be based on constitutional law and not international law. The latter regulates the relationship between States and their sovereign powers. Its impact upon the peoples is, as a consequence, legitimised and mediated by the States. The former regulates the relationship between the citizens and it controls and legitimises power whenever it impacts directly on the people. The assumption of independent normative authority required the adoption of constitutional doctrines to constrain and legitimise that authority. In the process of European integration, constitutionalism as the form of power followed the claim of normative authority and not vice-versa. It was thus a constitutionalism instrumental to and limited by that claim of constitutional authority. The constitutional supremacy of EC rules did not reflect therefore the assumption of a constitutional authority in the sense of a *pouvoir constituant* (the power of a polity to define its own destiny).

Nevertheless, the normative autonomy of Community law, founded on a source of legitimacy flowing directly from the peoples of Europe and, therefore, not dependent on the States, also allowed the expansion of the political ambitions inherent in the process of European integration. This has been reinforced by the functional dynamics of the process of economic integration and by the slow but increased shift of political action from the national to the European arena. As a consequence, independent normative authority has been complemented by increased independent political authority (the autonomy to define the forms and goals of its political action). This is visible in a series of phenomena that can be classified under the general heading of europeanisation.

The process of constitutionalisation by itself would not have raised important constitutional challenges if the use of the normative authority assumed by Europe would have remained within the boundaries of clearly delimited competences, traceable to express delegations

from the States or strictly controlled by these. What raised the current constitutional challenges was the association between constitutionalisation (a claim of independent normative authority) and Europeanisation (the emergence of a community of open and undetermined political goals subject to increased majoritarian decision-making). Europeanisation took three main forms that I will briefly describe next.

The first element of Europeanisation relates to the growth of Community and EU competences. In parallel to the process of constitutionalisation, EU law has also seen its scope of action and EU competencies extend well beyond the initial limits of the Treaties. This means that the European Union has taken over many traditional functions of governance and, even with regard to those still retained by the States, it exercises an increased supervisory role, limiting the self-governing powers of the States in their definition. Any analysis of the extension of EU powers will emphasise the growth of Community and EU competencies through the successive Treaty revisions (which expressly created new areas of EU action), the use of the implied powers provision of the Treaty Rome,¹⁷ or the expansive interpretation given by European Court of Justice to Community competences (either through an extensive interpretation of the functional competencies related to the internal market or through the doctrine of implied competences).¹⁸ These developments have turned the European Union into a new space for political action regarding the framing of open and undetermined political goals. The borders of the Union action are no longer defined by the express competences that the States have attributed to it and are, instead, the flexible product of the political action of a broad variety of social actors that attempt to promote their interests in a new level of decision-making whose political authority is such as to allow for the pursuit of a broad and highly undetermined set of public goals. Inherent in this is a conception of the European Union as a political

¹⁷ Current Article 308 that has been interpreted by both the EC political process and the ECJ as granting almost any competence that can be argued as necessary to achieve one of the broad goals of the European Community.

¹⁸ Articles 95 and 96.

community that could take over many of the traditional functions of governance of the States and where many of the policies of the later could be subject to new deliberations.¹⁹

But this Europeanisation did not take place only with regard to the extent of competences transferred from the States to the European Union. Also the way in which such competences are exercised has been progressively Europeanised through the move from unanimous decision-making to majoritarian decision-making. The increase in majoritarian voting in the EU has resulted from the successive Treaty amendments but also from the interpretation given of the appropriate legal bases for EU action (with preference being given to the legal bases involving both majority voting and an higher input from the Commission and the Parliament).²⁰

The growing majoritarian definition of EU policies means that they are no longer the result of a cooperative process between Member States. Member States have gradually decreased their individual control over the decisions of the European Union. These are increasingly the product of a European political process determined not only by the will of a majority of States but of a majority of Europeans. Moreover, States have also progressively loose their dominant status in representing those Europeans. As a consequence, Europeanisation reflects not only the extension of EU competencies but also the Europeanisation of the way in which they are exercised. The degree of control by individual States on EU policies decreases as EU decision-making moves from unanimous to majoritarian decisions in three ways: majoritarian voting rules; increased proportionality representation; and the appearance of new political actors beyond the States. Europeanisation occurs not only when a transfer of competences from the States to the Union takes place but also when the exercise of those competences becomes the product of a European majority and no longer of a consensus among States. Even if States continue to play a major role in the politics and policies of the Union, the intergovernmental process has, to some extent, been

¹⁹ In this regard, such Europeanisation also challenges the national constitutional definition of the rules of the game with regard to the way the different interests of the polity are balanced and deliberation takes place between its members.

²⁰ Compare for example, Article 95 and Article 308.

majoritarianised both in the sense that States can no longer individually control the process of decision-making but also in the sense that they are no longer the exclusive or even dominant sphere of representation in the deliberative processes of the Union.

There is a final element of the process of europeanisation that is related, instead, to the degree of EU control and impact on those policies that continue to be pursued by the States (either exclusively or concurrently with the Union). A key role in the europeanisation of Nation States has been played by the market integration rules of the Treaty and by the simple dynamics generated by economic integration itself. The europeanisation of national policies through market integration can, in the first place, be seen in the way in which the Court of Justice and, to a lesser extent, the Commission control the exercise of many national competences through the application of the rules of market integration. A good example regards the interpretation of the free movement rules. The broad scope of application conferred to these rules meant that they could, *de facto*, be used to challenge almost any area of national legislation that impacts on the market. The broad interpretation given to the free movement rules led to a spill-over of EU law and its rationale of market integration into other political and social spheres at the national level.²¹ National legislation regulating the market became subject to review under EU law and assessed under its criteria of necessity and proportionality, independently of any protectionism intent or effects. This meant that EU law would often second-guess the reasonableness of national policies on areas such as consumer, environmental or health protection.

Another example of this indirect europeanisation of national policies through the powers of control given by EU rules on collateral policies is the use by the Commission of its discretionary power to authorise State aids to *de facto* develop certain elements of an EU industrial policy. The possibility for States to grant aids to companies in economic difficulties was, for example, made dependent on the national adoption of a series of criteria regarding the economic viability and restructuring of those companies. In this way,

²¹ See mine. *We The Court, The European Court of Justice and the European Economic Constitution*, Oxford, Hart Publishing, 1997.

States aids rules were used to impose on the Member States a general EU policy on the economic restructuring and reform of industrial sectors in crisis.

All these examples are part of a process to which Sabino Casesse referred to as “*comunitarizzazione*’ *di funzione nazionali*” (the communitarisation of national functions).²² Such a process is further reinforced by the mechanism of regulatory competition among States generated by the internal market and the mobility it entails. The “forum shopping” of companies, consumers and tax-payers allowed by economic integration and market competition challenges the autonomy of States even in the realm of policies thought to be of their exclusive domain, such as those shaping their criteria of distributive justice. Even if social security or tax policies, for example, are only limitedly regulated at the EU level their national definition must now taking into account the constrains arising from the mobility of companies and persons among Member States. They are, to this extent, also Europeanised. As a consequence, it is increasingly difficult to define an area of the traditional functions of governance of the Member States that is not, directly or indirectly, impact by the European Union. Once that happens, the political question of constitutional relevance is who and how should regulate that impact once it can no longer be legitimated though the mechanisms of democratic deliberation and constitutional control of the States.

Low Intensity Constitutionalism

Much of the legal writing has, for long, limited itself to describe the process of constitutionalisation and uncritically accept its results.²³ However, the constitutionalisation

²² “La Costituzione Europea”, (1991) *Quaderni Costituzionali*, 487, at 487.

²³ See for a critical review and some exceptions: J. H. H. Weiler, ‘Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration’, 31 *Journal of Common Market Studies* 1993, 417, and *The Reformation of European Constitutionalism* (1997) *JCMS* 97; Martin Shapiro, ‘Comparative Law and Comparative Politics’, 53 *Southern California Law Review* 1980; Schepel and Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing’ 3 *ELJ* 1997, 165. See also mine *We The Court, The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998, at 20-23.

of the Treaties created a constitutional body without discussing its soul. The constitutionalism emerging from the development of European integration was a peculiar type of constitutionalism that was never clearly identified but I would define as low intensity constitutionalism. Such constitutionalism was characterised by several elements. In the first place, this was an incremental and bottom-up constitutionalism. Not the product of a constitutional moment²⁴ but of a judicial and political step by step development often constructed by reference to national constitutional sources. It was a product of both inter-governmental developments, in the form of Treaty revisions, and constitutional interpretation by the European Court of Justice in cooperation with a constituency of legal and political actors of national and supranational character (in particular national courts and the European Commission).²⁵

This nature of European Constitutionalism is reflected in the absence of a two-track democracy. There was no substantial difference between the legislative and constitutional processes. Both were dominated by intergovernmental legitimacy. This further helps explaining the extent of judicial deference towards the legislative process in the Council.²⁶

It was also a constitutionalism whose authority was constantly questioned by national constitutions and dependent on the “veto right” of national courts.²⁷ It is therefore not surprising that it was, in part, a “defensive” constitutionalism. It did not purport to reflect a social or political contract that would empower and organise the Union so as to promote a vision of the common good or, in alternative, resolve conflicts between competing visions of the common good. Instead, it consisted more on the adoption of a series of constitutional doctrines necessary to justify and legitimise the assumption of normative and political

²⁴ B. Ackerman, *We The People – Foundations*, Cambridge, Mass. : Harvard University Press 1993.

²⁵ I develop these points in ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker (ed.), *Sovereignty in Transition*, Oxford: Hart, 2003.

²⁶ As mentioned above, a different story occurred with regard to executive process dominated by an independent bureaucracy that did not benefit from the same intergovernmental legitimacy.

²⁷ D. Chalmers, ‘Food for Thought: European Risks and National Ways of Life’ (2003) 66 *Modern Law Review* 523.

authority by the European Communities. Concepts such as fundamental rights, separation of powers (embodied in the notion of institutional balance) and the rule of law (“a Community of law” in the words of the Court)²⁸ were seen as guaranteeing that the power assumed by the European Communities was subject to the same limits and constraints as when exercised at the national level. But these constitutional concepts did not affect the way the political process operated and how it aggregated the different interests at stake. This was the domain of intergovernmental politics. It was States that were to aggregate individual interests through the mechanisms of universal and democratic deliberation at national level. Community decision-making and its policies was, instead, dominated by the logic of intergovernmental bargaining among the national interests expressed by the States. Constitutionalism as a form of deliberation was left in the domain of national political communities.

When European constitutionalism was used as an instrument for the promotion of the authority of the Communities in encroaching upon the sovereign spheres of the States that was legitimated either through the degree of voice of the States in the process of deliberation or through the conception of that encroachment as protecting freedom and individual rights. It is notable, with respect to the latter, that the areas where the Community started to evolve towards more majoritarian decision-making were those directly related with the internal market. These were easier to legitimise by both a functional construction of the Communities and a link to a conception of constitutionalism simply as a limit to power.

European Constitutionalism is, in this way, linked to two different visions of the legitimacy of the process of European integration. The first is that embodied by a functional and technocratic conception of the European Union as an efficiency oriented and problem-solving entity to whom States delegate the resolution of collective action problems they can no longer address individually.²⁹ The second is that which follows the tradition of limited

²⁸ E.g. Case C-50/00P, *UPA v Council* [2002] ECR I-6677, point 38 and Case 294/83, *Les Verts*, [1986] ECR 1339, point 23.

²⁹ G. Majone, *The European Community as a Regulatory State*, Academy of European Law, 1995.

government and conceives the process of European integration as a new constitutional constraint on public power, protecting freedom and private autonomy.³⁰

Functional legitimacy fitted well with intergovernmental deliberation. Limited goals that were instrumental or complimentary to the State and did not have redistributive effects justified and were justified by a form of deliberation centred on the aggregation and conciliation of State interests. Moreover, a limited form of constitutionalism provided an appropriate constitutional guarantee to the bureaucratic powers emerging from such a project. Where the Union encroached upon State's sovereignty, that construction of legitimacy was supplemented by the appeal to the protection of freedom and private autonomy in the face of power. European constitutionalism appeared, in this light, like an external but self-imposed constitutional constraint aimed at reinforcing the domestic constitutional limits imposed on the power of the State. In this case, European constitutionalism is, in effect, perceived like an instrument of State constitutional values.

As mentioned above, this construction of European constitutionalism and of the legitimacy of European integration left the aggregation of individual interests to the States. The common good was either a product of an agreement between States or conceived as the protection of private autonomy and freedom enshrined in the logic of market integration and efficiency enhancing policies. This also explains for the priorities and agenda of judicial review: This was to be focused on market integration, the review of State action and the control of the executive power exercised by a European bureaucracy. Instead, an higher deference was to be given to the intergovernmental process (legitimated by States consensus).

Constitutionalism existed as a set of legal instruments to solve conflicts of power between the Communities and the States and to set limits to those powers. But constitutionalism was not adopted as the form of deliberation in the political sphere. The nature of deliberation remained intergovernmental, based on the aggregation of interests through the States and

³⁰ See, for example, E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, Fryeburg: University Press, 1991 and the classic work of Hayek, *The Road to Serfdom*, Routledge 1944.

on policies expressing a bargaining between them. Individuals were not conceived as the political actors and principals of the European Communities and this was reflected in the conception of its political process. Policies were not drafted, as a consequence, under the constitutional values of universality, generality and abstraction with regard to European citizens. European citizens were treated by European policies in accordance to the bargaining reached by their respective Member States. Intergovernmentalism and constitutionalism as a limit to power dominated the arena. Deliberative and polity constitutionalism were left to the States. This was also due to the nature of the European political community and its public sphere. It was thought (and still is, to a large extent) that they did not fulfilled the necessary conditions for such forms of thicker constitutionalism.

This two-fold strategy of legitimation has, however, been progressively challenged by the extent and nature of the powers assumed by the Union. Functional legitimacy is not really capable of adapting itself to an emerging polity of open ended goals, whose policies have increasingly redistributive effects and in which the political dynamics increasingly evade the control of the State. Further, the growing impact of European policies on national democratic deliberations cannot continue to be justified by the protection of freedom and private autonomy without transforming these goals in the dominant societal goals. But such a conclusion is naturally opposed by many.

The Existential Crisis of European Integration

Slowly, the Union has become unsatisfied with its traditional form of low intensity constitutionalism. As the Laeken Declaration defines it: “(T)he Union stands at a crossroads, a defining moment in its existence”. The political transformation of Europe that was described in the previous section has challenged some of the conditions for political organisation in Europe both at the level of the Union and the States themselves. The claim to independent political and normative authority linked to an emerging community of universal goals was not sufficiently legitimised by the functional *rationale* and the low intensity constitutionalism highlighted above. At the same time, The Union challenged the constitutional basis of the States without providing a clear deliberative alternative for the

definition of the common good. The processes of constitutionalisation and Europeanisation raised new claims for legitimacy in the European Union, challenged the conditions for the political subsistence of the States and changed the traditional mechanisms of participation and representation in place in the States. The diversity of the constitutional challenges raised by these processes composes what could be described as a kind of existential crisis in the process of European integration.

The constitutional challenges faced by the Union were however perceived in many different ways and often by exclusive reference to the frame of constitutionalism and democracy borrowed from the Nation State. Moreover, and more dangerously, such constitutional analysis is often applied in a piecemeal manner without taking into account a systemic perspective. Therefore, a tendency emerges to borrow aspects of national constitutional regimes without assessing whether certain polity and deliberative requirements assumed by those national constitutional regimes are in fact fulfilled at the European level. A brief review of the main constitutional challenges composing the existential crisis of European integration may be helpful in this respect.

a) The Democratic Challenge and the Question of the Polity

The constitutional problem most often highlighted in the current European Union is the “democratic deficit”. The agenda set forward for the convention on the future of Europe expressed this concern in different items such as national parliaments participation, transparency and fundamental rights protection. It also shaped the debate on the institutional reform which, contrary to the initial plans, turned out to be one of the key issues addressed in the context of the new Constitutional Treaty.. In reality, there were and there are different discourses on the democratic deficit. The most common presents the democratic deficit of the European Union as arising from the secondary position of the European Parliament vis a vis other European institutions in the decision-making process of the Union. In spite of the legal and political developments that have reinforced the position of the European Parliament in the institutional framework of the European Union, its role still reflects a lower degree of parliamentary representation and majority decision-making

in the European political process than in national democracies.³¹ The focus is then on democratic representation through parliaments.³² The latter express a form of direct democratic representation and are, in that respect, more legitimated than governments. The increased competencies of the European Union lead 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. This is so because EU decision-making is, in great part, controlled by the national governments and the Commission. The role of the European parliament in the European legislative process is lower than that usually played by national parliaments in the national legislative processes. The consequence is an overall decrease of parliamentary control over the legislative process what is foreseen as a democratic deficit undermining the legitimacy of the European Union and the powers exercised therein. There are two underlying fears: the first is the fear that non-directly accountable government officials may be more easily captured by interest groups and less accountable to the general interests of the people. It is usual in this context to argue for stronger European parliamentary powers in order to reflect at the European level the forms of parliamentary control existent at national level. But this solution tends to replace the Union for the States as the relevant jurisdiction to measure democracy. Such a

³¹ There are other issues which can be pointed as examples of the lower 'quality of democratic representation' in the European Parliament such as different national voting procedures and the unproportional representation of nationals of some member States. See Lenaerts and de Smijter, 'The Question of Democratic Representation', in *Reforming the Treaty on European Union - The Legal Debate*, Winter, Curtin, Kellermann, de Witte (eds.), Kluwer Law International, The Hague, 1996, 173, at 180-182. Another important handicap in the development of representative democracy and the operation of the European Parliament is the absence of real European political parties. See Lucas Pires, *Introdução ao Direito Constitucional Europeu*, Almedina, Coimbra, 1997. This can be related to a more general political/ideological deficit in the process of European integration whose developments take place in a context without any ideological debates. See Weiler and Shapiro, *op. cit.*, n. 12.

³² See, for example, Lenaerts and de Smijter, cited above, 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 mainly at 178.

logic and political leap requires, however, a previous recognition of the polity character of the Union and a clarification of its relationship with the national polities and their respective democratic claims.

The relationship between the democratic and polity questions is even clearer in the second fear exposed by the theories of the European democratic deficit: that a small minority constituted in a State will be over-represented in the inter-governmental process and able to impose its preferences even against an overwhelming European majority. Here, the argument turns into a second form of democratic discourse in Europe. One that focus on the non-majoritarian character of decision-making. This can 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”.³³ Such non-majoritarian character is also increasingly being linked to a third democratic deficit discourse: the lack of appropriate proportional representation. Nice was emblematic on the growth of a democratic rhetoric that stressed the need to organise representation in Europe according to a principle of equal representation among citizens and not among States. Therefore, follows the claim for a stronger proportional representation to the population of each State.³⁴ Some Europeans, constituted in a small State, should not have more power than other Europeans, composing a larger State. Representation in Europe should move closer to the principle of one person one vote.

All these different versions of the democratic deficit argue in favour of bringing the Union closer to the traditional forms of democratic deliberation. But, in reality, there are profound divergences on how to democratise the Union. For some, the solution lays in democratising the Union by adopting a democratic model such as that of the States. For others, democratic legitimacy of the Union can only be provided through the States. It is through national democracies that the Union can be brought back under democratic control. What varies appears to be the relevant polity which is taken into account to "measure" democracy. A

³³ J.H.H. Weiler, ‘The Transformation of Europe’, 100 Yale Law Journal 1990, 2403, at 2467.

³⁴ Whether, however, the second statement follows from the first is very doubtful and will be discussed below.

democratic model conferring regime legitimacy would thus depend on the polity legitimacy necessary to justify that such democracy (European, for example) would prevail over other democracies (the States).

In reality, the proposals advanced in the context of the current constitutional discussion did not even respect this symmetry between regime and polity legitimacy. Some argue, indeed, for an institutional system mirroring that of federal States. But others argued for retaining or even reinforcing the logic of intergovernmental deliberation (strengthening the role of the European Council for example) while, at the same time, supposedly reinforcing its democratic character by measures such as increased proportional representation, higher transparency and stronger political leadership.

There are also those that argue that any democratic development is illegitimate either because the Union still does not have a demos capable of legitimating such democratic regime³⁵ or, even more strongly, because it will never have one. For this perspective, what is wrong with the Union is not the absence of a democracy to regulate and legitimise its growing powers but the expansion of those powers in the first place. What is needed, therefore, to correct that democratic deficit, is to impose stricter limits and controls on the exercise and growth of EU powers. This would be the equivalent of “putting the genius back in the bottle”. Furthermore, it ignores the democratic deficits that can be pointed in national polities.³⁶

Much of these conflicting visions derives from both different notions of what democracy means and what is the relevant polity to “measure” it (the State or the Union). Moreover and, as we will see in more detailed below, the compatibility of some of the elements of

³⁵ D. Grimm, ‘Does Europe need a constitution’, 3 (1995) ELJ 282.

³⁶ I describe such national democratic deficit and the legitimacy of European integration in that respect in M. Poiares Maduro, *We The Court, The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998 and ‘Europe and the Constitution: what if this is as good as it gets?’ in: J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State*, Cambridge: Cambridge University Press, 2003.

democracy with intergovernmental deliberation is not straight forward and raises important constitutional questions.

b) The Challenge of Judicial Review and the Nature of European Constitutionalism

But Europe's constitutional problems do not limit themselves to the rhetoric of the democratic deficit. Another problem which is pointed by some sectors regards the degree of judicial control over the political process which arises from European integration and EU law. This is only the case in regard to countries which traditionally have judicial review of legislation. It is thought by some that EU law, which, according to the principle of supremacy, takes precedence over national law (including constitutional law), is not subject to the same intense scrutiny of constitutional judicial review to which national legislation is normally subject to.³⁷ This can be seen in much of the rhetoric on the need for a better system of fundamental rights protection in the Union that preceded the Charter of Fundamental Rights and still subsists in light of its lack of legal binding character.³⁸ What is often ignored is that the patterns of judicial review in Europe may be a consequence of the limited nature of European constitutionalism and the importance of intergovernmentalism in the political process. When the Court was confronted with European legislation it was often confronted with legislation agreed by all the States or product of a complex bargaining and trade-off process between them. One thing was the legitimacy of the Court to oppose the individual will of a Member State against the collective interest of the Union (in the form, for example, of market integration). Another thing was its perceived legitimacy to oppose the collective will of the States ("masters of the Treaties") expressed through the intergovernmental process.

c) The Challenge to the Welfare State: Negative and Positive Integration

Another major constitutional challenge brought by European integration regards the underlying conditions for assuring certain functions of governance typical of the welfare

³⁷ See Weiler, Haltern and Mayer, *op. cit.*, at 8-9.

³⁸ Curiously, however, the debate on fundamental rights also contained elements in favour of these arguing for more and not less Europe. In fact, fundamental rights have also been put forward as an instrument for polity building, promoting an expansion of the Union's actions in the internal and external domains.

State. Europe's economic integration has limited the capacity of States to pursue traditional functions of governance, in particular those regarding market regulation and distributive policies. Internal market rules, for example, have impacted on national regulatory policies well beyond trade considerations, in effect constraining national policies in areas as different as social, environmental and consumer policies. Moreover, in some cases, the increase mobility and economic regulatory competition also affects national redistributive policies. These limits on the pursuit of traditional functions of governance at the national level are not compensated by the potential for EU intervention to secure those functions. The Union as yet does not fulfil the conditions nor has the capacity to perform those functions of governance. Fritz Scharpf has presented this as a result of the gap between negative integration (economic integration through national markets deregulation) and positive integration (economic integration through Community wide re-regulation).³⁹

The consequence is that the process of European integration is seen not simply as challenging the capacity of States to perform those functions of governance but, more broadly, has challenging those functions of governance themselves. For some, the process of European integration challenges the conception of the Welfare State that has supported the subsistence of national political communities and moulded our conception of public power. Others, notably Jurgen Habermas, perceive that challenge as resulting from broader global processes and, instead, conceive the European Union as an opportunity to answer to that challenge and protect the values of the Welfare State instrumental to the subsistence of political communities and civic solidarity.⁴⁰ In this case what would be required from the Union is the adoption of a social contract clarifying the forms of civic solidarity on which the European polity ought to be based. But this would require the Union to both address the question of finality and get involved in an in depth discussion on opposing visions of the common good which have normally been discussed at the level of national political communities.

³⁹ F.W. Scharpf, 'Balancing Positive and Negative Integration: The Regulatory Options for Europe', Policy Paper 97/4, Robert Schuman Centre of the European University Institute, Florence.

⁴⁰ See *The Postnational Constellation*, London, Polity Press, 2001.

d) Redistribution and the Goals of Integration

The debate on a European social contract is also promoted by the increased redistributive consequences of the EU policies. The assumption of economic integration was increased growth without interference in the distributive function. But a viable and sustainable integration is only workable if the economic growth is fairly distributed. The issue of redistribution is therefore present from the outset of any project of economic integration. It is well known in economic theory that, although all may gain from economic integration and trade liberalisation, it is to be expected that richer and more competitive countries may gain more than less developed countries.⁴¹ Still the focus of the project of European economic integration has been on efficiency enhancing and wealth maximization. The economic growth to be expected from market integration was beneficiary to all albeit not in equal terms. Moreover, the degree of economic and social cohesion of the starting members of the project also reassured all that redistributive effects would not impose an undue burden to any of the members. Mainly, as in most economic integration agreements, States make their cost/benefit analysis at the time of signing in and, if necessary, obtain specific compensations for agreeing to certain areas of economic integration. The fact that redistributive effects have taken place as a consequence of the developments in other policies of the Union could also be legitimised in light of the adoption of unanimous voting for decision-making in the European Community. In this case, States could either prevent policies which could have adverse redistributive effects for their own citizens or could subject their agreement to receive some form of compensation in other areas of European policies (something referred to as issue linkage).⁴² The redistributive impact of current European policies and the claims for a just distribution of the gains arising from economic

⁴¹ See Mestre and Petit, “La cohésion économique et sociale après le Traité sur l’Union européenne”, RTD eur. 31(2), 1995, 207, at p. 241.

⁴² According to Shlomo Weber and Hans Wiesmeth, “an international regime (...) provides a political environment that naturally promotes issue linkage: by affecting ‘transaction costs’, the costs associated with acts of non-co-operative behaviour, it makes it easier to link particular issues and to negotiate side-payments that allow some actors to extract positive gains on one issue in return for the favours expected on another”, “Issue Linkage in the European Community”, JCMS, 1991, 255, at 258.

integration have therefore been addressed as a State matter. First, economic integration is mainly about wealth maximization as redistribution is to take place at the level of the State. Second, both the limited directly redistributive policies of the Union and the redistributive impact of other policies is legitimated through the bargaining occurred between States and is seen as occurring between them and not between European citizens.

It is this that determined the pattern of both goals determination and institutional development of the European Union. And it was this that made such model justifiable in light of a functional form of legitimacy linked to agreements between State and efficiency oriented decisions. However, the development of European integration has strained this relation between the model and degree of integration and its ideals. The degree of integration, the expansion of the scope of action of the European Union and its institutional changes are producing redistributive effects which can no longer be either traced back to an original agreement of the States or be predictable as part of an ad hoc political bargaining that may legitimise them through appropriate forms of compensation among States. Instead, the degree of majoritarian decision-making, the scope of European policies and the open and underdetermined character of political action therein, require an overall criterion of distributive justice which may legitimise those different policies and their redistributive effects or, in alternative, an agreement on constitutional forms of deliberation to develop that criterion.

At the same time, the increased direct relation established between European citizens and the Union requires the development of criteria of distributive justice capable of justifying before them the differentiated impact of EU policies. Citizenship of a State which agreed into a certain policy may no longer be sufficient to justify before a citizen the differentiated impact of a certain EU policy. In popular terms, the question will increasingly be why, for example, should poor citizens of State A pay for both poor and rich citizens of State B or why should some citizens of State A get less than citizens in a similar situation in State B just because State A agreed to that by being compensated with regard to a different group of its citizens. Can redistribution (both in the form of directly redistributive policies and redistributive impacts) in the Union be simply a function of national borders and not of the individual status of the European citizens?

e) The Challenge of Political and Constitutional Authority

There is final major constitutional challenge facing the Union. The challenge of constitutional authority and how it impacts and is impacted by the definition of the borders of EU and national polities. In other words, if one is capable of legitimating a new European polity and this acquires both normative authority (supremacy and direct effect) and political authority (the autonomous determination of its scope of action), a new question emerges on the potential conflicts of ultimate authority between national polities and the European polity. This question is reflected in the increased fears of a constitutional conflict between national legal orders (mainly national Constitutions) and the EU legal order. 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, EU 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. Therefore, it has the power to determine the constitutional borders of the EU legal order with those of the Member States. And such constitutional borders are, in turn, increasingly undetermined in the light of the process of Europeanisation highlighted above and the political authority it ascribes to the Union. However, a different perspective is taken by national legal orders and national constitutions. Here, EU 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. One may agree as to the validity of the different legitimacy claims of national and European jurisdictions. Still, we are left with the question: who decides who decides? Or, as we came to know it in the European context, the *kompetenz/kompetenz* question. In reality this is a problem both about the authority of the European Union and how such authority is to be coordinated and arbitrated with the authority of national polities.

It would appear that the clarification of the question of the nature of the authority of the European Union would required either a strict separation of competences with the States (therefore limiting the political authority of the Union) or a clear definition of the constitutional authority of the European Union with regard to the Member States. For the

second view, the Union should assume a form of *pouvoir constituant*. Only this would clarify the extent of its constitutional authority and solve the problems raised by the normative and political authority it already holds.

In my view, however, it is in the nature of European constitutionalism itself that the question of final authority should remain open.⁴³ One of the conclusions to be drawn of the previous analysis is how difficult it is to establish the polity legitimacy of the European Union but also how strongly that is required to answer to many of the current challenges faced by the Union. At the same time, it is also clear that such a European polity cannot and ought not to replace national polities. This requires the project of European integration to be able to secure a delicate balance between the authority of national and European polities. It is in this context that the concept of constitutional pluralism appears particularly appropriate to describe this emerging relationship between a plurality of constitutional forums.⁴⁴ But this constitutional pluralism must not simply be about regulating the question of ultimate authority between national and EU constitutions. It must be grounded on a particular understanding of the normative value to be derived from this plurality of constitutional sources and of the relationship between EU and national political communities.

Gradually some visions have been put forward that attempt to find on the constitutional relationship between EU and national political communities the source of legitimacy for the emerging European polity. Weiler's principle of constitutional tolerance is a good example. The EU would be legitimated by the openness to the other and the tolerance it would impose on States, limiting the communitarian dangers inherent in the Nation State.⁴⁵ Christian Joerges work also pays great attention to the legitimating power of the inclusion

⁴³ See Contrapunctual Law, op. cit..

⁴⁴ See Walker, N., The Idea of Constitutional Pluralism, *Modern Law Review*, 2002, vol. 65, iss. 3, pp. 317-359.

⁴⁵ J.H.H. Weiler, Federalism and Constitutionalism: Europe's Sonderweg, Jean Monnet Chair Working Papers, N° 10/00, available at www.jeanmonnetprogram.org/papers/index.html.

of the other in national political processes promoted by EU law.⁴⁶ Another trend, includes multi-governance scholars such as Jo Shaw and republican scholars such as Bellamy and Castiglione that stress the role of the EU in promoting the permanent contestability of democratic deliberations which in turn feeds the legitimacy of political communities.⁴⁷

In previous works, I have argued for a legitimacy of the European Union grounded on its constitutional and democratic added value in reforming national political processes (with regard to external and internal democratic deficits) and in allowing for a choice among polities.⁴⁸ There are three at least three forms of national democratic deficit with regard to which European constitutionalism may bring added value to European citizens. Firstly, national political processes no longer control many decision-making processes which impact on the national polity but take place outside its borders. In many cases, these are transnational processes (such as those of regulatory competition) that escape national democracies. Secondly, it has always been true that national democracy exclude from participation and representation in the national political process many interests which are affected by its decisions. Elsewhere I presented this as the paradox of the polity: a polity is both a condition for democracy and limit on democracy (by limiting those that participate in the democratic process).⁴⁹ This is difficultly compatible with the claims of the modern citizen to have a voice in any polity that affects him or her and even to have a choice

⁴⁶ *European challenges to private law: on false dichotomies, true conflicts and the need for a constitutional perspective*, (Annual Conference of the Society of Public Teachers of Law on 17-20 September 1997 at Warwick) 18 (1998) *Legal Studies* 146-166; 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', 2 (1996) *European Law Journal* 105-135.

⁴⁷ J. Shaw, 'Process and Constitutional Discourse in the European Union', in *Voices, Spaces, and Processes in Constitutionalism*, Oxford: Blackwell, 2000, pp.4-37; R. Bellamy and D. Castiglione, *op. cit.*

⁴⁸ M. Poiares Maduro, *We The Court, The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998 and 'Europe and the Constitution: what if this is as good as it gets?' in: J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State*, Cambridge: Cambridge University Press, 2003.

⁴⁹ *Ibid.*

between different polities.⁵⁰ In this respect, national democracy cannot cope with our desire to be involved in different polities and does not legitimise the different decision-making processes that affect our lives. Thirdly, even from an internal perspective there is a growing perception on institutional malfunctions on national democracies. The recognition that the political process may be captured by small concentrated interests is one of the examples of the challenges facing traditional democratic models through parliamentary representation. But that is also the case with the recognition that collective decision-making often takes place outside the political process or that representation and participation depends on a set of variables much more complex than simply political participation through elections. In some cases, national political processes have become embedded with certain values and assumptions that are no longer subject to deliberation. However, these values and assumptions are frequently the expression of particular interests.⁵¹ Economic protectionism and the frequent “hijacking” of the powerful concept of national interest are typical examples of these limits on the truly deliberative character of national democracies. European constitutionalism can be of added value to the citizen with regard to these different democratic deficits of national political communities. But he can also provide a new dimension of citizenship. Not only because it provides a new sphere of deliberation for problems we can no longer fully address at the national level but also because it provides us with a kind of meta-democracy: the possibility to choose among different political communities.

⁵⁰ See Lucas Pires, *Introdução ao Direito Constitucional Europeu*, Coimbra: Almedina, 1997, at 67, that argued that national democracy is no longer able to satisfy the needs of the new ‘multiple and supranational individual’ which corresponds to the “modern citizen”.

⁵¹ These democratic problems can perhaps also be related to what Habermas described as the relation between life world and system (*Theory of Communicative Action*, vol. 2, 1989). Systems are “genetically” embodied with certain values and assumptions that are excluded from communicative action (that is, discourse, which is, according to Habermas, the most way to legitimise moral statements and acts). What happens is that systems have been taken control over life world (where communicative action and rationality now predominate albeit based on a set of common understandings and culture) in this way reducing the area of life and normative action subject to discourse. In other words, reducing the scope of democracy.

This path for providing legitimacy to a European polity is however also linked the regime developments undertaken by the European Union. In this respect, if there is something that arises clearly from the previous analysis of the constitutional challenges faced by the Union is how intertwined are regime and polity questions. The institutional regime depends on the polity legitimacy attributed to the Union and its relation with national polities. The definition of the competences of the Union also depends on its perception as a polity and the same could be said of the discussion on the goals of European integration. The reverse is also true however. Some regime developments may require given to the Union a certain form of polity legitimacy. Certain majoritarian developments, for example, presuppose a form of democracy that requires a particular form of polity. The redistributive consequences of certain policies may also only be fully legitimated by a criteria of distributive justice agreed within a polity.

The extent and difficulty of the constitutionalism challenge face by the Union derives from the fact that while European constitutionalism must have polity building capacity it must, at same time, preserve polity diversity. In the first place, the ideal of political pluralism inherent in European constitutionalism extends itself to the question of the polity itself. In the second place, the maintenance of polity diversity in the context of an emerging polity creates a tension between the constitutionalism required by the latter and the intergovernmentalism imposed by the former. So far, this tension has been solved by keeping constitutionalism outside the deliberative process. The policies of the European Union are limited and constrained by constitutionalism but they are still largely decided under the logic of intergovernmentalism. The extent to which this limited constitutionalism is compatible with the polity and regime developments of the Union is unclear.

The Constitutional Moment

Many perceived the tensions created by the challenges highlighted as requiring a clearer definition of the *ethos* and *telos* of European integration to be expressed in the form of a

new and fully assumed political contract.⁵² In stark contrast, European constitutionalism has evolved as a simple functional consequence of the process market integration without a discussion of the values it necessarily embodies. In other words, it was presented as a logical constitutional conclusion without a constitutional debate. In this respect, the current debate on the future of Europe was presented as a departure from the traditional way “of doing constitutional business” in Europe. It was, first of all, presented as a constitutional moment.⁵³ To use the words of Laeken declaration: “the Union stands at a crossroads. A defining moment in its existence.”

To legitimate the constitutional exercise necessary to answer to this moment, a different procedure was set up, one that comes closer to the idea of constitutional deliberation. The basis for this constitutional procedure was the Convention model, already adopted in what we could qualify as the pre-constitutional moment of the Charter of Fundamental Rights. Such model appears closer to a traditional process of constitution-making than to the classic inter-governmental model that has so far dominated the revision of the Treaties.

But what makes such process more “constitutional”? And how does it impact on the constitutional outcome? Usually, the stress is placed on the broader scope of representation and direct legitimation entailed in such a method. The Convention is composed of representatives of the EU institutions, national parliaments and national governments. In particular, the role played by national parliaments and the European Parliament was aimed at expressing a more direct link with the European citizens. These institutions (notably, national parliaments) are seen as expressing a form of direct representation that national governments lack. In this sense, the Convention method, by comparison with the inter-governmental method, appears closer to a Constitutional convention with direct representatives of the people reflecting the different social interests. But also the representatives of the national governments reflected a pattern of representation different from the classical inter-governmental process. In some cases, though not in all, they were

⁵² See N. Walker, ‘After the Constitutional moment’, Online Paper 32/03, The Federal Trust for Education and Research, 2003, available at: http://www.fedtrust.co.uk/eu_constitution.

⁵³ Whether or not it can, in fact, be described as a constitutional moment is much more doubtful.

independent personalities selected in view of their technical and/or political experience and not as representatives of the State. It is curious to note, however, that the number of independent personalities called in to represent the States decreased considerably from the Convention on the Charter of Fundamental Rights to the Convention on the Future of Europe. Regarding the former, national governments probably did not fully grasp the potential impact of the Convention. Once it became obvious, after the example of the Charter, that the Convention results would become, in practice, highly binding for the Inter-Governmental Conference (due to its perceived reinforced legitimacy), many national governments decided to send their ministers of foreign or European affairs as their representatives at the Convention. The Convention was, in this respect, partly inter-governmentalised.

The Convention is also presented as promoting a broader participation from the “so-called” civil society (though the extent to which it did so successfully is a cause of dispute).⁵⁴ At least theoretically, civil society participation was furthered and a high stress was placed in making the debates more transparent for public opinion. This mirrors an idea of constitutional deliberation for Europe: constitutional moments are identified with a much broader mobilisation of society and a higher degree of direct participation from citizens.⁵⁵ The deliberative process on the Constitutional Treaty would enhance Europe’s constitutionalisation by promoting such broad involvement which, at the same time, would help to legitimate its final outcomes.

The constitutional character of the Convention method must, however, be discussed not only in light of its scope of representation but also by taking into account the character of its deliberative process. The second major difference brought in by the Convention method regards, precisely, the way deliberation is expected to take place and the nature of the contract arising thereof. Inter-governmental conferences have as their purpose the production of an agreement between States. A forum of inter-governmental bargaining is

⁵⁴ Regarding the Charter of Fundamental Rights see J. B. Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law’ 38 CMLRev. (2001), 1171, namely at 1182.

⁵⁵ For an in depth analysis, see Bruce Ackerman, *op. cit.*

expected to reduce information and transaction costs between States facilitating the adoption of cooperative decisions. Each State departs from a pre-definition of the national interest that it attempts to promote and harmonise with the interests of the other States. This inter-governmental bargaining is quite different from the nature of the deliberative process usually identified with the framing of Constitutions. In the latter, the vision of a social contract appears with its universal ambitions. Deliberation is seen as an agreement among individuals on the basis of universally constructed rules under a hypothetical veil of ignorance. The framers of a Constitution are seen as rational actors in search of universal rules that can best satisfy everyone's future interests.

This form of constitutional deliberation is substantially different from intergovernmental bargaining even when we realise that every constitutional deliberation is shaped and influenced by the specific interests of the participants and the context they are on. The difference arises from four elements that the Convention method imperfectly expressed. First, the expectation is that an overall political contract will be produced and not simply a particular negotiation on certain opposing interests; this helps to detach participants from their contextual stand points and to take a overall long term perspective that is more conducive to the universal rules typical of a Constitution. Second, the creation of a forum of stable medium term deliberation, instead of the short-term highly concentrated (though previously prepared) intergovernmental conferences, shifts the attitude of participants towards the process of deliberation itself and promotes higher mutual trust, stronger involvement and a more rational engagement between the participants. Thirdly, the participants in the Convention are expected to consist of more independent individuals, more committed to certain rational conceptions of the common good than to pre-established assertions of the national interest. Even when that is not the case, because, for example, national governments appoint public officials as their representatives in the Convention, the Convention method still promotes a more open deliberation on the part of the participants. This is due to the circumstance that the "national interest" is not represented by a particular single representative at the process of negotiation. The variety of national participants both releases them from being the individual guardians of a pre-defined national interest and challenges their respective notions of that national interest. There is no single representation of the national interest. There are, instead, different conceptions of the

national interest. This also promotes transnational interests to emerge through strategic coalitions between different sub-national groups. The fourth and final element conducive to a more constitutional characterisation of the Convention deliberative method regards its potential higher transparency. The subjection of the deliberative process to higher transparency requires arguments to be put forward in terms of universal rules of a social contract and not as a defence of the national interest. This change in the character of the arguments that participants can use will end up reflecting itself in the agreements that they will reach.

It is wrong, however, to adopt an idealist perspective of the Convention method. On the one hand, this process entrusts a great degree of authority to those that shape the agenda and provide the technical expertise and legal drafting required for. The “independence” and lack of in depth expertise of many of the participants make them much more dependent on the EU technocracy. At the same time, in such a large scale and comprehensive project the Praesidium and Secretariat assume a key role in setting the agenda, processing the different amendment proposals, drafting final versions and "establishing" the consensus. In the case of the Convention on the Future of Europe one of the more frequent critiques has been, precisely, that the entire scope of views expressed in the Convention has not, in reality, been reflected in the final document. This was also visible, in part and in a different way, in the process of drafting the Charter and namely on the tremendous impact that the EU technocracy and the Praesidium had on the final versions of the more contentious provisions, particularly when compared with the degree of incorporation of the amendments proposed by other participants at the Convention and civil society.⁵⁶

The third change in the nature of Europe’s "constitution making" introduced by the Convention method regards a reinstatement of the political control over the constitutional development of European integration. As said above, it often remarked that the constitutionalisation of EU law has been, to a considerable extent, a judicially driven process. This has open the constitutional growth of the Union to legitimacy challenges and the Court itself has appeared, at times, to expect for the political process to take a more

⁵⁶ See Liisberg, *op. cit.*, at 1178.

clear direction the constitutional development of the Union. The Charter of Fundamental Rights and its legal status can be seen as an example of this. The Court is, in fact, often placed in the difficult position of being asked to intervene in filling up the constitutional vacuum left by the EU political process in not reaching a clear agreement such as it has been the case with the legal status of the Charter.

The Convention and the larger constitutional process initiated with the Declaration on the Future of Europe can be seen as signalling a move away from the judicial process towards the political process in the development of European constitutionalism. There are important consequences that can be expected in the outcomes arising from these two different processes once both representation and the form of deliberation differ between them. It also impacts on the sources of law and its process of discovery that have dominated the European Constitution. In the absence of a written Constitution, the Court of Justice has constitutionalised the European Communities (now the EU) by reference to the constitutional principles of its Member States. The European Constitution becomes, in this light, mainly a product of both the EU Treaties and national constitutions and it is upon these sources that the constitutional values of the emerging polity are to be found by the Court. Once the EU political process takes over, EU constitutional values become a product of a trans-national deliberative process that takes place at the EU level. The dynamics of this new constitutional political arena are bound to determine a different set of constitutional values.

This formalisation and politicisation of the Constitution do not necessarily determine a lower importance of the role to be played by the European Court of Justice in the context of European Constitutionalism. It is not so much a difference in relevance as it is mainly a change in the nature and character of the role to be played by the Court. The emphasis will no longer be in establishing the normative authority of EU law and creating a legal dogmatic constitutional architecture to control that authority. Greater emphasis will have to be given, instead, to secure and clarify the constitutional conditions inherent in the political community necessary to support the constitutional architecture set up by the Constitutional Treaty. A major challenge will also be that of guaranteeing the constitutional coherence of a document where constitutional ambitions are mixed with classical inter-governmental bargaining. These two logics (that of universal rules associated to a political contract

among individuals and that of ad hoc agreements resulting from bargaining between States) do not necessarily fit well together and will raise increased legal conflicts between, on the one hand, constitutional principles and fundamental rights and, on the other, inter-governmental agreements.

What has been said highlights that the Convention and the IGC were, in fact, a very peculiar form of constitutional moment: They did not fully adopted a form of constitutional deliberation. Nevertheless, that did not prevent on the use of constitutional language to mould the new founding document of the European Union. It is wrong, however, to assume that the agreement on the use of constitutional language also entails an agreement on what constitutionalism means for the Union. In reality there are two very different conceptions of constitutionalism underlying the apparent agreement on the use of the word Constitution and its associated concepts. One is the conception of constitutionalism as a limit to power. This grows upon the previous limited constitutionalisation of the Union and uses constitutionalism as much to protect the normative authority of the Union as to guarantee that such authority would not threaten the constitutional values of the States. The other is the conception of constitutionalism as polity expression. This reflected the more ambitious views aiming at using constitutionalism as the instrument for building a political community in the EU. At the extreme, the expectation was even that such a process could be endowed with *pouvoir constituant* and serve to fully establish the constitutional authority of the Union.

A review of the four main constitutional issues of the new Constitutional Treaty will help me highlight those two different conceptions. As it will be discussed latter, however, the notion of constitutionalism as a form of political deliberation remained absent from the debate. This, together with the conflicting influences exercised by those two notions of European constitutionalism, means that the tension between intergovernmentalism and constitutionalism will be reinforced.

The New Constitutional Treaty: Four Uneasy Pieces

Several strategies have been presented to face the challenge of legitimacy in Europe. Many of them were actually reflected in the agenda for the “Constitutional” Convention and have

spill-over into the Constitutional text. Next, I will assess what are in my view the four core issues addressed by the Constitutional Treaty and their connected strategies of legitimacy for Europe. I will try to show that the legitimating power of these strategies depends both on different conceptions of constitutionalism and its relation with intergovernmentalism. In my view both those different conceptions and the tension between constitutionalism and intergovernmentalism is reflected in the constitutional text. I will also highlight that albeit the focus of the Constitutional Treaty appears to be in improving regime legitimacy this may not be possible without facing the question of polity legitimacy.

The Importance of Being Called a Constitution

The Constitutional form assumed by the Constitutional Treaty appears, in the first place, as the essential element of a strategy that appeals to the legitimating power of constitutionalism. There are several possible advantages entrusted into this formal constitutionalisation. A less ambitious thesis foresees the process of formal constitutionalisation as an opportunity to codify and clarify Europe's constitutional principles, fundamental rights and political organisation. But this is not seen simply as an exercise in tidying up. It is expected to have important consequences due to the mobilisation of political and legal discourses that will be promoted by a clearer exposition of the European Constitution. The Constitution might not change much but it would no longer be implicit. It will be there for citizens to discuss and engage with and this, apart from its immediate legitimating value, could have important future political and legal spill-overs in the constitutional development of the Union.

A more aggressive version of the codification strategy argued for such opportunity to be used to introduce a new set of constitutional foundations for the Union: a catalogue of fundamental rights, a clear allocation of competences, a "truly" democratic institutional system for the Union. The formal constitution was presented as the instrument to bring

forward these changes. But there are other arguments that have been put forward in favour of a formal constitution.⁵⁷

First, the Constitution was expected to clarify the present constitutional system and its relationship with national constitutions and, in this process, confirm the normative authority of the European Constitution vis a vis those national constitutions. Second, the process of drafting a formal constitution was expected to constitute a polity building process. It would finally grant to the European citizens the control over constitution-making in Europe. The mobilisation promoted by the constitutional process would, itself, help to generate a European demos. In this light, it would be the exercise of *pouvoir constituant* at the European level that would lead to a European demos and not the reverse. For this view, constitutional authority, in line with the traditional conceptions of *pouvoir constituant*, is inseparable from the adoption of a Constitution. The adoption of a European Constitution would, as a consequence, be both the instrument to grant to the Union constitutional authority and evidence that the Union has it. But this link between the European Constitution and its assumption of *pouvoir constituant* can be criticized in both normative and descriptive terms. It has been questioned, in the first place, whether the Union should and can assume a form of constitutional authority tantamount to a *pouvoir constituant*, mainly because that would entail replacing the national polities for the European polity and it could destroy the present plural relationship between the European and national constitutions. As mentioned above, such plural constitutionalism is a particular trademark of European constitutionalism and there are strong normative reasons to protect it. It reflects the nature of European constitutionalism as found on the competing claims of the European and national political communities.

The argument opposing a formal constitution argues, instead, that such constitution reflects a particular model of constitutionalism, that of national constitutionalism, that is associated

⁵⁷ For a critical summary of the arguments in favour of a European formal constitution, see also J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, Jean Monnet Chair Working Papers, N° 10/00, available at www.jeanmonnetprogram.org/papers/index.html.

with a State and an ultimate sovereign authority. It reflects a form of constitutionalism that is not and ought not to be that of European constitutionalism.

I agree with the concerns regarding any move that could allocate final constitutional authority to the EU. This does not mean, however, that the European Union ought not to have a constitutional future. The value of European constitutionalism lays precisely in its pluralistic form and the permanent dialogue it establishes with national constitutionalism. In this light, I nevertheless believe that the Union should adopt some form of constitutional document. The Union should have a Constitution. Not as an expression of a constitutional authority supreme over the constitutional authority of the States but as expression of the adoption of constitutionalism as the form of power in the EU and of the polity building character of the project of European integration.

The fact that the Union does not hold a *pouvoir constituant* should not be confused with a lack of normative authority. Union norms can and must have normative authority (supremacy and direct effect) over national constitutional norms (that is an existential requirement for a single and coherent EU legal order) but that does not entail that the Union's normative authority amounts to the authority to create a Constitution independently from national political communities and to be imposed on these. Constitutional authority (in the sense of a *pouvoir constituant*) is still, ultimately, in the hands of the national political communities⁵⁸ (and) but once it is jointly exercised at the European level it becomes autonomous from the national polities to embody a European polity that is granted both normative and political authority.

The importance of a formal Constitution is two-fold: first, the process of drafting a constitutional document and, now, of debating it will, itself, help to develop a European political identity; second, that constitutional document will be the basis for a permanent European wide discourse that would sustain a European public sphere and its polity building dynamics. These are, in my view, essential elements for the polity legitimacy that the European Union currently requires. A political community needs a permanent public and reflective discourse on its political values. Constitutional texts normally provide the

⁵⁸ That is why the new Constitutional Treaty allows for the possibility of a State redrawing from the Union.

basis for that discourse. They provide a common platform of agreement 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 conflicts without mutually accepted (albeit not agreed) solutions. Text does matter in this context. But what is not required is for such text to take the nature of a formal constitution adopted in the way national constitutions normally are and expressing the ultimate authority of a European demos.

What has been said can be related to two different constitutional dimensions on the basis of which we can assess the true constitutional nature of the Treaty instituting a European Constitution. One as to do with the constitutional authority of the document and the other with the degree to which it adopts constitutionalism as the form of government.

If the current process would have abandoned the requirement of unanimous ratification by the States, it will be recognising an independent constitutional authority to the Union. In other words, the Union would not simply have normative authority over national legal orders but that authority would be the result of a constitutional authority independent from the States or the peoples of Europe. Its future would be decided by a single European polity and not by an agreement between all national polities. Whether or not to have a European Constitution would then be a decision to be taken by the European people and no longer by the peoples of Europe. For some, this exercise of *pouvoir constituant* at the European level was what was needed to legitimate the European Union. In this light, what Europe lacks is not a people but simply a true exercise of constitutional power by that people. For others, any such European constitutional exercise is illegitimate precisely because it implies a European *demos* that does not exist.

The new constitutional treaty did not assume a true *pouvoir constituant*. Instead, the constitutional authority of the Union will continue to be a mix product of the formal constitutional authority of national polities complemented by an incremental or reflexive constitutionalism⁵⁹ that flows from the deliberative mechanisms set up by the Constitution and upon which the polity itself is in the process of being built. In this respect, the

⁵⁹ The expression belongs to Neil Walker (in an unpublished text).

Constitutional Treaty appears to respect the canons of the constitutional pluralism upon which the Union as evolved.

This is not to say that the adoption of a formal constitutional text will have no effect. On the contrary, it will have two types of profound effects. First, its will generalise the use of constitutionalism as the language of political and legal claims in the European Union and, as stressed above, will provide the basis for the rationalisation and arbitration of political conflicts that characterises successful political communities. This impact will not be, simply, a consequence of the symbolic and codification value of a European Constitution. It will arise from the role of a constitutional text in reconciling political pluralism (different visions of Europe) with the viability of a European project deliberated around a shared constitutional platform. Second, the Constitutional Treaty will confirm the adoption of constitutionalism as the form of power. In this respect, the question becomes that of determining the extent to which the formal adoption of constitutionalism is reflected in the deliberative logic of the entire polity and its regime. The limited conception of constitutionalism, that I have identified as dominating until now European constitutionalism, is challenged by this broader constitutional ambition.

Fundamental Rights: A Tool or a Limit to European Integration

The different conceptions of constitutionalism underlying the European constitutional debate were already particularly relevant in the Charter of Fundamental Rights which now integrates the Constitutional Treaty. From the outset, the instrumental role of the Charter in providing legitimacy of the project of European integration was conceived in two very different ways. One discourse places the Charter at the centre of the political building of Europe and foresees it as a dynamic element for further constitutionalisation. Another presents it as a limit to the political growth of Europe and conceives it as a tool for the protection of national constitutional values.⁶⁰

⁶⁰ I develop this analysis in ‘The Double Constitutional Life of the Charter of Fundamental Rights’ in: *The Chartering of Europe: the European Charter of fundamental Rights and its constitutional Implications*, Baden-Baden: Nomos, 2003.

The original aim entrusted to the Charter appeared to fit better with the second perspective. The goal ascribed to the Convention entrusted with the drafting of the Charter was not to alter the substance of fundamental rights protection in the Union but to make that protection clearer for European citizens. That was expected to promote a more effective application of those rights and, at the same time, reinforce the legitimacy of the integration process. It is this that also explains why the attribution of legal binding effect was not considered to be a priority. However, the final product is much more complex. The duplicity of constitutional discourses on the Charter comes to light in its catalogue of rights that is broader than what would simply result from the consolidation of previous Community legislation, Treaty provisions and the Court's case law. In fact, the Charter constitutes the most comprehensive catalogue of rights adopted in many years.⁶¹ At the same time, some of the rights may not create new competencies but may nevertheless give rise to new claims both under the existing competences and with regard to future constitutional developments. This dimension is reflected in the higher expectations that some deposit on the Charter as the basis for a strategy of legitimacy based on an understanding of the Charter as a centre for continuous discourse and deliberation that would lead to both a constant affirmation and redefinition of European political identity.⁶² This identity could even be affirmed in the internal sphere of the States. In this respect the Charter could provide a yardstick to be applied to Member States in defining a common set of European political values that all have to respect.⁶³

On the other hand, the scope of application of the Charter is substantially limited in its horizontal provisions and limits this polity building ambitions. First, the Constitutional Treaty even reinforces the limits on the use of the Charter's rights to expand the

⁶¹ G. Sacerdoti, 'The European Charter of Fundamental Rights: From a Nation State Europe to a Citizens Europe', (2002) *Columbia Journal of European Law* 37, at 43.

⁶² *Ibid* .

⁶³ There are increased political claims, even in the domestic spheres of the States, that appeal to such values. Academically there are also numerous projects that promote such dimension by comparing the status of the different fundamental rights incorporated in the Charter in different Member States.

competencies of the Union. At the same time, the provision limiting the application of the Charter to the classical scope of EU law limits the potential for incorporation of European political values in the Member States domestic orders. In that regard, it is well known that the general catalogue of EU fundamental rights does not, in general, applies to acts of the States, and the Charter remains cautious in that regard.

There is another dimension that a European Charter of Fundamental Rights could assume: that of a Charter of European citizenship focused on a new set rights granted to individuals vis a vis all national political communities (including their own and others) and transnational processes. In other words, the rights linked to a new form a citizenship relevant in the context of a plurality of political communities and a growing deterritorialisation and atomisation of power.⁶⁴ That could be a privileged path for legitimacy in the European Union but, to argue it, one must first discuss the telos of European integration and the nature of the European political community. The difficulty with this endeavour explains why both the Charter and the Treaty Constitutional have not paid much attention to European citizenship and the set of rights and duties that could be attributed to it.

The primary goal of the Charter appeared limited to the more classical dimension of constitutionalism in the European Union: to guarantee that the assumption of European powers will not challenge the standards of fundamental rights protection granted to European citizens in their States. But the logic of a Charter of fundamental rights and its placing at the core of a comprehensive constitutional project for the Union immediately adds a polity perspective to that more limited role: the exercise in defining the common political values justifying the recognition of those rights and the debate that will be generated in the interpretation and application of them will both legitimate and promote polity building dimensions. It is thus difficult to clearly establish the nature of the relationship between the Charter and European constitutionalism. It shares the same ambiguous constitutional character of the other pillars of the Constitutional Treaty,

⁶⁴ Gustavo Zagrebelsky talks about a pluralist revolution of power in *Il diritto mite*, Torino: Einaudi, 1992, notably pp. 4-11 and 45-50.

reflecting an agreement inherent on the use of the language of constitutionalism in European integration without agreeing on the conception of constitutionalism underlying such language. For some, the Charter is the foundation upon which to build a true constitutional project for the European Union. It will promote the construction of a European political identity and mobilise European citizens around it. For others, the Charter is simply a constitutional guarantee that the European Union will not threaten the constitutional values of the States. It is a constitutional limit to the process of European integration.

Competences: Constitutional Limits to Integration or Promotion of a European Public Sphere?

Another dominant topic of the constitutional debate regards the setting up of clearer limits on EU competences. It was natural therefore for it to be object of particular attention by the Convention. The issue of competencies normally focuses on a clearer delimitation of the competencies given and/or exercised by the EU. In this respect, the Constitutional Treaty both addressed that concerned (though a new classification of the different EU competencies and a clear affirmation of the principle of conferred competences) and recognised the limits to establish a clear separation of competencies between the Union and the States (by maintaining a flexibility clause and not adopting a strict catalogue of competences). There are both normative and pragmatic reasons that explain the difficulties involved in attempting to make a clear-cut division of competences.

From a normative stand point it is, first of all, quite contestable that there can be, in abstract, an ideal allocation of competences between the States and the Union. The allocation of competences is often better made by taking into account the real world contexts of participation in the different institutional alternatives available to exercise those competences. For example, it is often proclaimed that competences should be exercised as close as possible to the affected interests. However, it is, in fact, misleading to assume that the institutions closer to the affected interests are always more apt to exercise the competences affecting those interests. It may be the case that those same circumstances facilitate the capture of those institutions by concentrated interests against the interests of a dispersed majority. In the real world, more distant institutions may perform better in

regulating local interests where the local institutions are particularly susceptible to be captured by regulated interests. That may not always be the case but this simply serves to prove the point that an abstract allocation of competences ignores these institutional dynamics and therefore presents serious normative problems.

A strict delimitation of competences would also work against the normative goal of democratic deliberation inherent in the role played by the Union in providing an alternative deliberative and political setting for national actors which find little voice in domestic politics. As mentioned above, one of the democratic values provided by the Union is linked to the idea of democracy as being founded in permanent contestation and deliberation. The European Union is, in this case, a source of contestation and redeliberation of national policies, keeping national democracies "alive" and providing alternative viewpoints in their political debates.

It is also quite debatable that there is, or even that it should exist, an agreement on what competences should belong to the Union and what competences should be left to the States. Though the question of competences is often presented as an issue of simply determining who is more efficient or effective in exercising certain competences, in reality, it often hides profound different conceptions of the polity and the common good it should pursue. Our stance on the allocation of redistributive policies exclusively to the States depends on whether we believe or not that a polity such as the European Union should pursue objectives of solidarity and distributive justice between its citizens. Underlying the discussions on competences are, therefore, different conceptions of the European political community and the nature of the political and civic links between its citizens. In the light of this, it is in normative terms more appropriate for the Union to maintain an organisation of its competences that leaves room for pluralism in the discussion of alternative visions of the common good associated with the European polity and its policies.

From a pragmatic perspective, it is also quite difficult to devise a workable general and abstract criterion that can provide a clear allocation of competences between the States and the Union. The history of federal systems tell us how ineffective it is to trust to either a catalogue of competences or an abstract criterion the role of clearly allocate competences between different levels of government. The same can be said about the practice of

European integration and the limited effect of the principle of subsidiarity. Once the threshold of simple inter-governmental cooperation and limited competences is passed the idea of a clear allocation of competences is surpassed by the dynamics of political action and institutional interpretation. Once we have a new level of independent political power, this level is bound to be used by any social actor that is not satisfied with the national or local resolution of a certain policy issue. The substantive policy discussion rapidly overcomes the debate on what level is more appropriate to pursue that policy.

In this context the question of allocation of competences really comes down to be a question on who should allocate those competences⁶⁵ and how its exercised should be politically controlled by the citizens (accountability)? Who should decide on who can better exercise a certain competence? And to what kind of institutional constraints should the exercise of that competence be subject? These are questions that depend largely on the practice of political action and judicial interpretation.

In the context of a multi-level system of governance, competences cannot be a priori rigidly divided and codified in the Constitution. The Constitutional Treaty appears to have recognised this complexity. Some of the most positive reforms introduced by the project of Constitutional Treaty with regard to EU competences are, in reality, measures addressing the accountability and transparency in the exercise of those competences. The mechanism of control by national parliaments, on the application of the principle of subsidiarity, introduced in the new Constitutional Treaty is a good example. Its merit and effect does not lay so much on a possible blocking right of national parliaments in the adoption of EU legislation. It lays instead on the higher scrutiny by national parliaments over the role played by their respective national governments in the adoption of such legislation. At the same time, the increased discussion of EU legislative acts in national parliaments might subject EU legislation to a higher public scrutiny through the different national public spheres. Increased accountability will be the consequence. Not only with regard to

⁶⁵ The control over competences is normally transferred in this case to the institutional mechanisms of participation in the definition and exercise of those competences. That was expressly recognized by the American Supreme Court in *Garcia v San Antonio* [469 U.S. 528].

European institutions but also with regard to the role of national governments.⁶⁶ National parliaments become, in the light of this, catalysts for an emerging European public sphere. This is also improved by further elements of transparency in the legislative process. The openness of the Council deliberations when adopting legislation is a good, albeit limited, step forward).

The treatment of the question of competences as a question of transparency and accountability also shifts its constitutional role from that of a limit to European integration into an instrument for the development of more European deliberation with enhanced citizenship participation. It becomes a question of democratic accountability in a context of constitutional pluralism that reinforces democratic deliberation.

Institutional Reform: Intergovernmental Majoritarianism?

The core of the constitutional debate was, however, institutional reform. In this respect, there were four main goals enshrined in the agenda of the Convention: first, higher transparency and simplification; second, stronger democratic legitimacy; third, effectiveness and operationality; fourth, the promotion of political leadership. In part, these goals reflected old normative problems of the Union. In other part, they were made more visible and acute by the enlargement of the Union. But addressing these goals entailed a reorganisation of the balance of power with the Union. One of the problems was that the move towards a more effective, operational and stronger European Union would not be compatible with the continuation of the traditional institutional balance. This balance satisfied different national States and EU institutions, by diffusing power to such an extent that it affected the operationality and effectiveness of the Union or the degree of political leadership we could expect from it. In this way, for example, the aim of providing stronger political leadership enters into conflict with the goal of maintaining the current institutional balance as it will require empowering one of the institutional pillars. The same occurs with the claims for higher democratic control or effective decision-making in an enlarged EU.

⁶⁶ This decreases the risk of the EU being "used" to pass unpopular legislation at the national level transferring, therefore, the political costs of such measures to the European level.

The pursuit of these goals requires abandoning an institutional system whose legitimacy basis, as referred above, is deeply dependent, on the one hand, on the degree of voice given to the States in its decision-making processes and, on the other hand, in a partial delegation of power into a technocratic institution, independent from the States (the Commission) and which is conceived as functionally legitimated and pursuing efficiency goals. A stronger and "more democratic" executive would require politicizing the Commission but this goes against its perceived technocratic and independent legitimacy.

There is nothing scandalous about a Constitutional Convention being dominated by concerns over the distribution of power. On the contrary, that is a key concern of Constitutions. The problem with the Constitutional Convention was the lack of a constitutional theory of power (or a debate between competing constitutional theories of power) to frame its intended reorganisation of power within the Union. Instead of the discussion being framed by a previous clarification of the political characterisation of the Union and a debate on the principles of representation and separation of powers to be taken into account in its institutional and political reform, the path followed was that of a piecemeal inter-governmental bargain whose impact on the constitutional principles legitimating and organising power will largely be a product of unintended consequences.

The consequence, in my view, is an aggravation of the tension between constitutionalism and intergovernmentalism in the European Union. The Constitutional Treaty reinforces certain majoritarian elements of the institutional system without having fully addressed the requirements necessary to legitimise such a system in both normative and social terms, particularly because it ignores the relationship between majoritarianism and constitutionalism. By a majoritarian political I mean, in this context, a system where decisions in a particular jurisdiction are taken, in an open and undetermined sphere of competences, in accordance with the majority view of its citizens and can be effectively pursued by the legitimated authority of that jurisdiction. Such a system implies an effective executive, a system of decision-making dominated by majority vote, increased proportional representation and an open and undetermined field of competences. The Union already fulfilled some of these requisites and they are being enhanced by the forthcoming institutional changes. One of the aims of the current reform is the emergence of a true executive power through a variety of means: a President of the European Council,

reinforcing the authority of the Council and the accountability of the Commission to the Parliament. Majority decision-making is also being extended, albeit not as much as some would like. Proportional representation too has been a key feature underlying many of the current debates and was quite visible in the stress placed by the president of the Convention on legitimacy having to be assessed by the support of the majority of the European population and not the majority of the States. Proportional representation to the population has been reinforced in the Council with the Nice Treaty and it is developed with the new Constitutional Treaty. It will also increase via the extension of the co-decision procedure (since the Parliament is thought to be closer to such a principle of representation). A paradox emerging from this development is that majoritarianism is developed while at the same time intergovernmentalism is reinforced. However, while majoritarianism is normally legitimated by reference to a single polity (we are bound by that to decisions taken by a majority to which we disagree) intergovernmentalism is based upon the competing interests of different but equal polities.

The move towards a majoritarian system may be unavoidable in a Union entrusted with a broad scope of undetermined and flexible competences and including an increased number of participants in its decision-making processes. Even if we would depart from the assumption that the acquiescence of all participants (unanimity) will be, in normative terms, the normative ideal for collective action in the context of the EU, we would have to recognise, as Buchanan and Tullock have taught us,⁶⁷ that with 25 Member States the costs of deciding will be so high that they justify the adoption of majority decision making as a second best. Once we do that, the question becomes the criteria to be adopted in determining the relative power of the different participants and this requires elements of proportional representation in balancing between equality between States versus equality between citizens. We will then also have to define appropriate mechanisms of separation of powers and political accountability what requires a stronger distinction between the executive and the legislative, allowing stronger political leadership but subject to a more intense democratic scrutiny. The development of a majoritarian system is inextricably

⁶⁷ J.M. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1965).

linked to the scope of the political ambitions that the European Union has assumed and the costs of decision-making increased by the enlargement process.

In these circumstances, it becomes crucial to discuss what kind of requirements a majoritarian system must fulfil and how are they to be guaranteed in the European Union. The move towards a majoritarian system, in the context of a polity of increased open and undetermined goals, entails first of all a move from what, adopting the categories of Hirschman⁶⁸ we could define as a system of allegiance based on voice (secured by the high degree of relative power of all States in the decision making process and the issue linkage between different policy decisions of the Union compensating different States) to a system based on loyalty (where citizens will feel bound even by decisions of the majority to which they don't belong). One of the first priorities of the current constitutional reform should therefore be that of establishing the conditions for political loyalty of the all European citizens towards the majoritarian decisions of the Union. This requires polity and not simply regime legitimacy.

Second, any majoritarian system must establish a framework guaranteeing the universality of its policies and mechanisms of deliberation. These are the conditions of constitutionalism as a form of deliberation (opposed to the nature of intergovernmental bargaining). This requires, in the first place, the protection of minorities and, above all, the prevention of permanent and insulated minorities (*net losers*). Instrumental to this goal is the promotion of mobility between majority and minorities (guaranteeing that those one day in the minority may be part of the majority in the other) and a deliberative system that tends to disseminate the patterns of vote and not to promote the aggregation of rigid majorities or the creation pivotal players. This guarantees, at the same time, the prevention of zero-sum decisions (since those which compose a majority know that they can, in another instance, be part of the minority and have, therefore, an incentive to create mechanisms of compensation for the losing minority). Constitutionalism as a form of deliberation also requires for the majority decisions to always comply with a principle of universalizability in their translation into policy making and rules. Policies are framed under criteria of

⁶⁸ Applied by Weiler to the previous stages of European integration,

universal application, that determines that they are applicable to all citizens fulfilling the same requirements. In this way, it becomes more difficult for a particular group to concentrate the benefits or costs of a certain policy. This is also why rules are subject to requirements of generality and abstraction. In this way, they have to be drafted in light of conditions that can be potentially applicable to anyone and it is more difficult to draft them along the lines of particular interests. They provide a kind of ex-post consequence that obliges decision-makers to internalize a certain form of a veil of ignorance. It is easy to see how the logic of constitutionalism tends to conflict, in this case, with the EU patterns of intergovernmental deliberation.

Unfortunately, not much attention appears to have been paid to the requirements of both political loyalty and constitutionalism as a form of deliberation in the Constitutional Convention. Some of these can, however, be deduced from the general principles of the Constitution but that, in effect, involves assessing the extent of constitutionalism envisioned by the Constitutional Treaty. To which extent does it entail a move from intergovernmental deliberation to universal deliberation (where interests are to be aggregated between individuals and not simply between States) and from inter-governmental policies to universal policies (where policies are drafted along universal conditions referred to all European citizens and not dependent on the borders of the States). EU policies would have to move into a framework of universalisability, satisfying substantive, and not simply formal, conditions of generality and abstraction and where their redistributive impact is determined by the individual conditions of EU citizens. This requires constitutionalism to become to a substantial extent the form of political deliberation in the Union and no longer simply an instrument to solve conflicts of normative authority and establish the limits to such authority. In other words, constitutionalism would also have to frame the form of political deliberation in the Union. The extent to which the Constitutional Treaty really embodies such a choice is open to debate.

The creation of political loyalty would also require a much stronger emphasis on enhancing European citizenship and mechanisms of distributive justice than, indeed, it was the case at the Convention and the IGC. It would require further discussion on the link between the polity legitimacy of the Union and the rights of its citizens and how it can further the

debates of competing visions of the common good without, at the same time, endangering the project of integration itself.

A majoritarian political system needs a political community that guarantees the legitimacy of such system and secures the necessary safeguards to prevent its risks. Securing political loyalty, changing the character of political deliberation and universalising its policies, ought to be the priorities of any constitutional reform of the European Union that takes seriously its democratic rhetoric and the need for social legitimacy. But this requires European constitutionalism to fully embrace a discussion of its polity legitimacy and adopt a truly constitutional form of deliberation for the EU political process.

Conclusion: What Does Constitutionalism Means for the European Union?

At the moment, the future of the Constitutional Treaty remains at peril: we do not really now what will be the results of the lengthy process of ratifications of the Treaty. The current constitutional process may still tilt in two opposing directions: it may promote a genuine deliberative debate on Europe's political identity but it may also reinforce the constitutionalism by default that has marked much of Europe's development. Whether it will be one or the other does not depend on the idealist conceptions of broad public involvement in direct constitution-making that the current rhetoric of openness and civil society appears to assume.⁶⁹ It depends much more on tackling the issues that may mobilise the peoples of Europe to engage in the creation of that political identity. It is not that such political identity is a necessary pre-condition for a constitutional project: a Constitution both assumes and promotes a political community (it is both an arrival point and a point of departure in the construction of a political identity). Instead, that constitutional project must fulfil two polity building conditions: first, it must generate the right incentives for European citizens to embark in such a constitutional project; second, it must provide an adequate

⁶⁹ J.H.H. Weiler, 'A constitution for Europe? Some hard choices', 40 (2002) *Journal of Common Market Studies* 563.

framework for European citizens to engage in the construction of a common political identity. In other words, it must secure the political loyalty necessary to the subsistence of a political community, particularly of a majoritarian type. And it must guarantee to all members of that political community that they are treated as equal citizens and not as members of insulated and discrete groups. This is what I have described as the need for polity legitimacy and deliberative constitutionalism.

Until we fully address the need to legitimate the polity and not simply the regime we will not get satisfactory answers to the constitutional challenges faced by the Union. It is not necessary, however, that we fully agree on what makes a European polity legitimate. We only have to agree on having that debate and how we are going to have it. In other words, we must agree to discuss different conceptions of the common good relevant at the European level and we must accept a common framework for that discussion. It is here that deliberative constitutionalism becomes relevant. Once the polity is becoming increasingly majoritarian in its regime, it becomes quite difficult to conciliate those developments with the continuing intergovernmental character of deliberation. A majoritarian and increasingly redistributive polity is difficultly compatible with the low intensity form of constitutionalism that has helped to legitimate the Union so far. It needs to add to the dimension of constitutionalism as a limit to power, its polity expression and deliberative dimensions.

Until we know what we mean by constitutionalism in the European Union we will not really know what a new European Constitution will mean.