Where to Look For Legitimacy?[1]

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Draft prepared for presentation at:

IEEI/IEE-UCP

Com o Alto Patrocínio de S. E. o Presidente da República

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[1] This paper was presented early this year at the ARENA on Governance and Democracy in Europe.

First draft

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A friend of mine (also lawyer…) told me the following anecdote: A man is on his knees on a sidewalk looking for a watch that he lost on the opposite sidewalk. Someone asks him:

- What are you doing?
- I am looking for the watch I lost on that sidewalk.
- If you lost it on that sidewalk why are you looking for it in this sidewalk?
- There is more light on this side… replies the man.

When I reviewed the current strategies of legitimacy for the European Union this anecdote kept coming to my mind. In many respects, I will argue in this paper that we have been looking for legitimacy in the wrong place in the European Union. The starting point is an analysis of the constitutional challenges that give raise to the legitimacy debate and the current constitutional discussions. I will start by arguing that the origin of the legitimacy question lies in a claim by Europe to independent political authority associated to a community of open and undetermined political goals. This is the outcome of a political transformation of Europe embedded in the processes of constitutionalisation and Europeanisation. My argument is that such claim has never been fully legitimised. Instead we have moved directly into discussing how to legitimate the processes and institutional system through each the power derived from that claim is exercised. I will argue that the current dominant strategies for legitimacy of the EU miss this point. As a consequence they face two main shortcomings: first, they will always be a subsidiary or second order form of legitimacy; second, they take as their proxy for legitimacy the national form of democracy and constitutionalism and, in doing so, they are unable to reinvent the concepts of constitutionalism in order to apply them to a new form of political community. The final result is that any solutions brought forward by the current strategies of legitimacy will be deeply contested and insufficient. A viable strategy of legitimacy for the European Union must depart both from rethinking constitutionalism and, in the process, identify what legitimises the claim for a European political community.

The Political Transformation of Europe

Constitutionalisation

The first element of this political transformation of Europe consists of the process that the classical literature on European integration has labelled as constitutionalisation of Community law[2]. This describes 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). 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".[3]

This constitutional construction was legitimised by the Court on the basis of what I would call an epistemological shift operated by the ECJ in the understanding of EC law and the source of its normative authority. When the Court, 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.[4] It was this that granted to the European Communities (later the EU) and its legal order a claim of independent political authority. It would have been possible to base the supremacy and direct effect of Community law on some form of interpretation of international law.[5] But that was not the path chosen by the Court. By establishing the legitimacy and autonomy of European law on its direct relation with the peoples of Europe, the European Court, in effect, asserted a claim to independent political authority for European law.[6] At the same time, it was that direct relationship with the peoples of Europe that required a constitutional form for the organisation of power in the Communities and explained the adoption of a constitutional interpretative framework of the Treaties.

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[2] I am sure there will be no shortage of references to these works in this book 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 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.

[3] 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.

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

[5] See de Witte, Direct Effect, Supremacy and the Nature of the Legal Order, in Craid and de Burca (eds.), The Evolution of EU Law, Oxford, Oxford University Press, 1999, p. 177.

[6] In this light, it becomes understandable for Santiago Muñoz Machado to argue that it is the power of constitution-making (*el poder constituyente*) itself that is being transferred to the supra-national level. See La Unión Europea y Law Mutaciones del Elstado, Madrid: Alianza Editorial, 1993, at 59.

Europeanisation

However, the process of constitutionalisation would not have raised important constitutional challenges if the use of that "constitutional power" would have remained restricted to previously agreed, clear and limited competences or if all the new exercises of European powers would be subject to the agreement of all States (corresponding to what Joseph Weiler famously described as the relation between supranational normativity and intergovernmental decision-making).[7] What raised the current constitutional challenges was the association between constitutionalisation (an independent claim of political and legal authority) and what could be described as Europeanisation (the creation of a community of open and undetermined political goals). This process of Europeanisation is related to different legal and political developments in European integration.

The first element of Europeanisation relates to the growth of Community and EU competences. In parallel to the process of constitutionalisation, Community law has also seen its scope of action and Community competencies extend well beyond the initial limits of the Treaties. This means that the Community law has taken over many national functions and supervises over national law in an increased, and almost unlimited, number of areas. 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,[8] 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).[9] These developments led to a progressive conception of the European Union as a new space for political action and policy framing of open and undetermined political goals. In other words, a conception of the European Union as a political community of universal aims 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.

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 and European policies are decided 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 Treaty revisions but also from the Commission and Court of Justice interpretation of the appropriate legal bases for Community action. Such interpretation appears to have favoured the exercise of Community competencies under the legal bases which provide for majoritarian decision-making against unanimity.[10] This means that, not only were Community competencies extended but also the way they are exercised has changed from inter-governmental to supranational decision-making. The degree

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[7] J. H. H. Weiler, "The Community System: The Dual Character of Supranationalism", (1981) Yearbook of European Law 261.

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

[9] Articles 95 and 96..

[10] Compare for example, Article 100A and Article 235.

of each State control over the content of Community policies has substantively decreased and they have become the product of a European majority.

There is a final element of this process of Europeanisation that is not related to the growth and transformation of EU competencies. It relates, instead, to the degree of EU control and impact on policies that continue to be pursued by the States. A key role in the europeanisation of Nation States has been played by the market integration rules of the Treaty, notably the free movement rules. The Court has extended the scope of application of these rules much further than the scope normally attributed to trade rules. The interpretation given to internal market rules has promoted EC law review of any area of national legislation that impacts on the market. The extensive interpretation of the free movement rules led to a spill-over of Community law and its rationale of market integration into political and social spheres. National legislation intervening in the market become subject to review under Community law, independently of any protectionism intent or effects. This led to a process to which Burley and Mattli refer to as substantial penetration of EC law,[11] and Sabino Casesse as "'*comunitarizazione*' *di funzione nazionali*".[12] At the same time, the mechanism of regulatory competition among States generated by the internal market and European mobility further challenge the autonomy of States in the pursuit of traditional functions of governance such as those inherent in regulatory and redistributive policies.

Much of the legal writing has, for long, limited itself to describe the process of constitutionalisation and uncritically accept its results.[13] However, the constitutionalisation of the Treaties created a constitutional body without discussing its soul. The European Constitution appears as a 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. At the same time, these 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. The diversity of the constitutional challenges raised by these processes composes what we could describe as the existential crisis of European integration.

The Existential Crisis of European Integration

The present status quo has given rise to a kind of existential crisis in the process of European integration. 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. Many perceive the tensions

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[11] "Europe Before the Court: A Political Theory of Legal Integration", (1993) 47 International Organization, 41, at 43.

[12] "La Costituzione Europea", (1991) *Quaderni Costituzionali*, 487, at 487.

[13] 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.

created by such challenges 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.

The first constitutional problem normally highlighted in the current European is the issue of the democratic deficit. In reality, the existence of different discourses on the democratic deficit, highlights not one but several democratic deficits.

The most common presentation of the democratic deficit of the European Union stresses 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.[14] The focus is then on democratic representation through parliaments.[15] These 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. But, there is a second a fear: 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.

The problems of non-majoritarian decision-making have been exposed in the well known thesis of the joint-decision trap developed by Scharpf: Briefly, the "joint decision trap" occurs when the agreement of all national governments is required (unanimity): since all national

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[14] 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.

[15] See, for example, 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 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 thorugh national parliaments for example. See mainly at 178.

interests are satisfied and costs are shared (or transferred to EU level), "joint decisions have politically more attractive cost-benefit ratios"[16]. However this leads to an increase in expenditure on these programs at the expense of potentially more efficient programs[17]. States compete for funds independently of real needs, and their different positions are not taken into account. Furthermore, changes to the status quo are strongly limited by the requirement of unanimity, with negative consequences for the efficiency of public policies: "when circumstances change, existing policies are likely to become sub-optimal even by their own original criteria. Under the unanimity rule however, they cannot be abolished or changed as long as they are still preferred by even a single member"[18]. This can also be presented, as Weiler has stated, 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".[19] But this non-majoritarian character is increasingly being linked to a third democratic deficit discourse, that of lack of proportional representation.

Nice was emblematic on the growth of a democratic rhetoric that stresses 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.[20] 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 correspond to fears of the few or minoritarian bias.[21] But the few feared vary. In the first case, indirect representation means low accountability and higher risks of capture of the political process by concentrated interests. But these concentrated interests can be trans-national. In the second case, the fear of the few expresses the risk that a single State or a minority of States can block the will of a majority of States. In the third case, the few correspond to a minority of Europeans that can be aggregated in a small State or a group of small States and block the will of a majority of European citizens.

A final facet of the democratic deficit which is less discussed regards the weakening of judicial control over the political process which arises from European integration and Community law. This is only the case in regard to countries which traditionally have judicial review of legislation. It is thought that Community 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 was normally

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[16] Fritz Scharpf, 'The Joint-Decision Trap - Lessons From German Federalism and European Integration', 66 Public Administration 1988, 239, at 255.

[17] Ibid., specially at 247-249 and 255-256.

[18] Ibid., at 257.

[19] Weiler, Joseph, 'The Transformation of Europe', 100 Yale Law Journal 1990, 2403, at 2467.

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

[21] The expression originally belongs to Neil Komesar. See Imperfect Alternatives - Choosing Institutions in Law, Economics and Public Policy, Chicago and London: Chicago University Press, 1994.

subject to.[22] This can be seen in much of the rhetoric on the need of better system of fundamental rights protection in the Union.

But Europe's constitutional problems do not limit themselves to the rhetoric of the democratic deficit. A second major constitutional challenge brought by European integration regards the underlying conditions for the performance of certain functions of governance. 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 affected national redistributive policies. These limits on the pursuit of these functions of governance at the national level are not compensated by the degree EU intervention to secure those functions. The Union as yet does not fulfil the conditions or 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). The consequence is that the process of European integration is seen not simply has 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 required for the subsistence of political communities and civic solidarity.[23] In this case what would be required from the current constitutional process is the adoption of a social contract clarifying the forms of civic solidarity on which the European polity ought to be based.

This debate on a European social contract is also promoted by an additional constitutional challenged faced by European integration. It regards the increased redistributive consequences of its policies. The assumption of economic integration was increased growth without interference in the distribution 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.[24] 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 unduly burden to any of the members. Mainly, as in most economic integration agreements, States make their cost/benefit analysis at the time of

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[22] See Weiler, Haltern and Mayer, op. cit., at 8-9.

[23] See *The Postnational Constellation*, London, Polity Press, 2001.

[24] See Mestre and Petit, "La cohesion économique et sociale après le Traité sur l'Union européenne", RTD eur. 31(2), 1995, 207, at p. 241.

signing in and, if necessary, obtain specific compensations in agreeing with 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 welfare or could subject their agreement to receive some form of compensation in other areas of European policies (something referred to as issue linkage).[25] It is this that determined the pattern of both goals determination and institutional development of the European Communities. In the absence of a common believe in some kind of European ideal or political concept of European integration, integration could only proceed if it pragmatically satisfied as many people or groups as possible. This could be achieved either by guaranteeing that all would have to agree to a specific decision (institutional rule promoting Pareto efficiency) or by agreeing on mechanisms of compensating to those which would be worst off by virtue of a certain decision (subordinating institutional and substantive developments into a form of Kaldor-Hicks efficiency). The leading idea justifying free trade is a mainly a kind of Pareto efficiency. Free trade and economic integration will maximize total net benefits without putting any one worse off. However, the development of European integration has strained this form of 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. Instead, the degree of majoritarian decision-making, the scope of European policies and the open and underdetermined character of political action therein, require a overall criterion of distributive justice which may legitimise those different policies and their redistributive effects. The institutional shift into majoritarian decision-making (both through the extension of majority voting and Parliament intervention) and the grown of EU competences tend to make the EU have a redistributive impact larger than what could be functionally legitimised.

There is final major constitutional challenge facing the Union. There are 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, Community primary law will be the "higher law" of the Union, the criterion of validity of secondary rules and decisions as well as that of all national legal rules and decisions within its scope. Moreover, the Court of Justice is the higher court of this legal system. However, a different perspective is taken by national legal orders and national constitutions. Here, Community Law owes its supremacy to its reception by a higher national law (normally constitutions). The higher law remains, in the national legal orders, the national constitution and the ultimate power of legal adjudication belongs to national constitutional courts. One may agree as to the validity of the different legitimacy claims of national and European jurisdictions. Still, we are left with the

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[25] According to Shlomo Weber and Hans Wiesmeth, "nn 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.

question: who decides who decides? Or, as we came to know it in the European context, the *kompetenz/kompetenz* question. As mentioned above, following the claim of independent political and legal authority made by the ECJ in its foundational decisions, the EU assumes itself as sovereign in determining its own competences. Therefore, it has the power to determine its constitutional borders with Member States. However, the States also maintain that claim of sovereignty on the basis of their respective constitutions. These competing claims can give raise to specific constitutional conflicts and, at the same time, require us to look at the alternative legitimacy bases of the political communities on which those claims are based.

Playing Catching Up Legitimacy: Legitimating the European Regime[26]

Several strategies have been devised to face the challenge of legitimacy in Europe. Most of them are reflected in the current agenda for the 2004 IGC and the "Constitutional" Convention. Next, I will assess these different legitimating strategies. I will try to show that the legitimating power of these strategies requires a previous discussion on certain core constitutional concepts and that, in fact, these strategies are not capable of satisfactorily legitimating the European Union. A true legitimating strategy has to be found by looking somewhere else. All the current strategies either assume the need to organise the European polity in a democratic manner (to make the genius behave in a European democratic manner) or to reinstate national control over the European project and legitimating it through the States (to put the genius back into the bottle). None of them really address the foundational question: what legitimates a European political community and what should that political community make? In other words, what wishes do we want to see realised by the genius? Without answering such questions all other legitimating steps will be deeply contested and European democracy will always be a second best by comparison with national democracy. It will be playing catching up with national constitutionalism and democracy.

The Majoritarian Strategy

The most common answer presented to the constitutional challenges brought by European integration argues for the assumption of "traditional" democracy at the European level. I will call this the majoritarian strategy but, in reality, this strategy argues for more than simply more majoritarian decision-making. In its different versions, it is a strategy that focus on institutional reform oriented towards mirroring traditional forms of federal organisation. The argument is

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[26] 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 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.

that the European Union needs an institutional reform of the Union that makes it correspond to the same democratic standards of the Nation State. This, it is argued, requires a shift towards majoritarian decision-making and stronger parliamentary control over the legislative and executive functions. This constitutional alternative has often been linked to the arguments in favour of a stronger European Parliament and an extended application of the principle of majority decision-making. It therefore answers to two of the democratic deficit versions that where highlighted above. But entailed in this vision of the European Parliament as the more democratic institution is also a preference towards a more proportional representation of European citizens. The European Parliament is perceived to be not only directly representative and more majoritarian oriented but also to fit closer to a principle of democratic representation based on the idea of one person one vote (closer to the demographics of the different Member States than the Council voting distribution). In this way, it can also be seen as answering to the third form of democratic deficit mentioned above related to proportional representation. The discussions surrounding the Treaty of Nice have expressed an increase in the democratic rhetoric that stresses the relation between the democratic deficit and the lack of proportional representation. The focus is on the idea of one person one vote and it was, in great part, on this basis that larger States argued to see their voting position reinforced (particularly in the Council).

Both the Nice and Laeken Declarations on the Future of Europe attach great importance to a democratic institutional reform of the Union. This idea is to make its institutional model fit closer to the democratic model in place at the level of the Member States. Many current proposals follow that perspective. They include a stronger executive but more accountable to the Parliament; reinforcing the legislative powers of the latter; more majoritarian decision-making; greater proportionality in representation etc. The aim is to reproduce the institutional mechanisms of separation of powers and democratic accountability that legitimise the powers and deliberation of national political communities. These are the institutional models associated with the traditional conception of democratic constitutionalism. It is thought that only by adopting such model can the European Union become legitimate and be opposed to the democratic legitimacy of Nation States.

There are serious problems in what appears to be the preferred strategy of legitimation through institutional reform. The first problem is that such strategy overstates the legitimating power of its proposals for institutional reform. Some examples can be given in this regard. One of them relates to the generalised but largely wrong perception that the Union does not fit the democratic criteria of proportional representation. In reality, if compared with a Federal system, such as the United States, the European Union is perhaps already closer to proportional representation than to equal representation among States. In the United States, one of the legislative chambers still reflects a principle of equality among States (the Senate). In the European Union we currently have a system where the two main bodies with final legislative authority (the Council and, albeit still with lower powers, the Parliament) are increasingly closer to proportional representation. The Council is still often presented as being closer to a principle of equal representation among States but that is largely a wrong assumption. In fact, where it decides under qualified majority (nowadays, most of the time it legislates) the distribution of votes among States is quite close to perfect proportional representation as the table below shows. In this regard, where votes are allocated as blocks (as in the case of the Council) the most consensual models to express proportional representation

have been developed by Lionel Penrose[27] and John Banzhaf [28] and both establish that votes should be proportional to the square root of the population (because the smaller the communities the stronger the swing voting power of their members). If we apply that criterion to the European Union and compare it with the distribution of votes in the Council after Nice one can conclude that it already mirrors quite closely to a principle of perfect proportional representation.

Table 1: voting weight attributed by the Treaty of Nice compared with what should be the voting weight in terms of proportional representation:

	%V after-Nice	"% v in "ideal proportionality"
Germany	12.24[29]	15.12
U.K.	12.24	12.06
France	12.24	12.05
Italy	12.24	11.99
Spain	11.39	9.34
Netherlands	5.49	5.98
Greece	5.06	4.64
Belgium	5.06	4.61
Portugal	5.06	4.58
Sweden	4.22	4.47
Austria	4.22	4.41
Denmark	2.95	3.22
Finland	2.95	3.20
Ireland	2.95	3.03
Luxemburg	1.69	1.29
Total	100	100

Source: Adapted from D. Leech, Fair Reweighthing of the Votes in the EU Council and the Choice of Majority Requirement For Qualified Majority Voting During Successive Enlargements, London, CPNSS, London School of Economics, available at http://www.lse.ac.uk/Depts/cpnss/projects/vp.html.

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[27] "The Elementary Statistics of Majority Voting", Journal of the Royal Statistical Society, 1946, 109, p.53.

[28] "Weighted Voting Doesn't Work: A Mathematical Analysis", Rutgers Law Review, vol. 19, 1965, p. 317.

[29] Germany representation is in fact stronger than 12.24 due to the third voting criterion introduced in Nice that is not taken into account in here.

In reality, even with the current distribution of votes that this is actually already the case to a great extent.[30]

Since the European Parliament has always been an institution more based on the idea of proportional representation the paradox is that the European Union has moved, in a substantial area of its legislation, towards a bi-cameral system (Council and Parliament in co-decision and co-operation procedures) where both institutions are now closer to express a principle of proportional representation. In those areas of legislative powers, the EU is probably more majoritarian than the United States (in the sense that the bi-cameral system of the latter also reflects in a stronger manner an idea of equality among States). Small and medium size European States have less voice than their American counterparts. As a consequence, a simple institutional reform favouring majoritarianism and proportional representation in the Union may aggravate instead of solving Europe's democratic questions.

Another problem with a majoritarian strategy is that it assumes a democratic superiority of majoritarian decision-making that is not necessarily true. In the first place, it has been powerfully argued by Buchanan and Tulluck that, once we assume an anthropocentric perspective of social decision-making, there is no a priori superiority of the majority rule.[31] This is based on a democratic notion that stresses the idea of individual autonomy to pursue happiness and therefore highlights the notion that any interference with that autonomy must be legitimised by something more than a majoritarian will (why should the majority tell me what to do?) and traced back to an individual commitment to the application of the majority rule in that case. Even if this individual-centered conception can be contested the reality is that constitutionalism requires a notion of democracy beyond majority decision-making and often limits the latter. In fact, constitutionalism is about balancing between the democratic will of the majority and the rights of the minority, between the common values of the polity and the individual preferences of its members. All major constitutional arguments and doctrines gravitate around this complex system of countervailing forces set up by constitutional law: the empowerment of the majority for the democratic exercise of power and the limits to that power so that it is not abused against a minority. There are two basic fears underlying constitutional discourse and organisation: the fear of the many and fear of the few.[32] The core of constitutional law is the balance between the fear of the many and the fear of the few. Constitutional law sets up the mechanisms through which the many can rule but, at the same time, creates rights and processes to the protection of the few. One can say that the function of constitutional law is to assure that the few do not rule over the many but, at the same time, to guarantee that the many will not abuse of their power over the few.

Any institutional reform of the European Union must address both the fear of the few (the risk of minoritarian bias) and the fear of the many (the risk of majoritarian bias) and their different variants.[33] Authors arguing for a more majoritarian system and a transfer of powers to Parliament, for example, underlie the risks of certain forms of minoritarian bias in the present *status quo* but forget to assess the risks underlying the alternative that would follow from their

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[30] See Reime, Hannu, Changing EU voting rules would be undemocratic, Newsletter of the Finnish Institute in London, nº 13, 1999 (available in www.polarities.net/articles/EU/EU%20%20voting.htm).

[31] The Calculus of Consent, The University of Michigan Press, 1965.

[32] See Komesar, op. cit.

[33] The expressions are borrowed from Neil Komesar. CITE

proposals. Moving decision-making from an inter-governmental body to a European Parliament may not reduce the risks of minoritarian bias (that is, the over-representation of the few at the cost of the many). It may simply change the character of that minoritarian bias. The higher the number of represented people the more difficult will be to organise dispersed interests due to the low stakes of individual members and the information and organisation costs involved. Moreover, the absence of a European public sphere means that for the majority of European citizens there are still high transaction costs involved in European wide political action. That being the case, national levels of representation may perform better in organising and mobilising even a European majority. The information and transaction costs of participating in the European political process at the level of the European Parliament may be higher than participating in the European political process through national governments. As a consequence, in issues were the European majority interests are quite dispersed it may be easier for a minority of concentrated and organised interests (even a national minority) to capture the European Parliament political process than the inter-governmental political process, where different national governments may act as catalytic elements of the cross-national majority. Thus, depending on the issues and the interests at stake, the European Parliament may actually be subject to a higher risk of minoritarian bias than the inter-governmental process. At the same time, the transfer of powers for the European Parliament and the increase in majority decision-making to "prevent" minoritarian bias may raise an opposite fear: that of an inordinate power of the many over the few. There is nothing that guarantees us that the interests benefited by a majority decision are higher than the costs it imposes on the minority.

This is not to say that certain institutional reforms are not desirable. It simply serves to prove that they must be based on a much more sophisticated analysis than the one that frequently supports the current calls for more majoritarianism, proportional representation and parliamentary control. But there is a final problem faced by the strategy of legitimation through institutional majoritarian reform. What from an European perspective can appear as an increase in democracy, from a national perspective may well constitute a decrease in democracy (once nationals that previously controlled their national policies are now subject to the European majority)[34]. It all depends on the polity taken into consideration in measuring democracy and applying the majority principle.[35] This is the fundamental problem affecting the viability of the institutional strategy. As stated above, this strategy answers to the erosion of national powers and representative democracy by reintroducing them at the European level. It is a constitutional model that answers to the challenges on national democracy by developing European democracy. But, in doing so, replaces the national polity for the European polity. However, it is precisely the existence of such polity that needs to be ascertained and legitimised.

To talk about a European democracy assumes that the relevant jurisdiction to measure democracy is the European polity and no longer the Nation State. Without first explaining the need for such a European polity and clarifying the nature of its relation with national polities, any institutional reform is bound to raise new versions of the democratic deficit and the Union will always look as a second order democracy vis a vis the Nation States.

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[34] Weiler, Transf 2470ff

[35] Weiler, Transf 2471

The Fundamental Rights Strategy

The second strategy for legitimation, reflected in the Declarations on the future of Europe, focus on the role of the Charter of Fundamental Rights adopted in Nice. The Charter does not yet have formal legal binding value, an issue that is precisely to be addressed by the Convention on the future of Europe and the 2004 IGC. However, the Charter is already acquiring importance in the case law of the European Court of Justice as an essential element of interpretation in determining the fundamental rights that form part of the constitutional traditions of the Member States.[36] As it is well known, the Court of Justice has considered such fundamental rights as constituting part of the fundamental legal principles that the Community legal order must respect.[37] In any case, the Charter was not supposed to be more than an exercise in codification and consolidation of the rights that where already recognised in the Court's of Justice case law and Community legislation.[38] Some of the provisions of the Charter even appear to restrict the scope of fundamental rights protection in the European Union. Notably, Article 51 only refers to the application of these fundamental rights to Member States when they are implementing Union law contrary to the more extensive scope of application recognised in the case law of the European Court of Justice. In the latter, EU fundamental rights may also be applied to State acts that derogate from EU norms. If interpreted literally, Article 51 could lead to a more restrictive application of EU fundamental rights.[39] The same restrictive concerns appear to underlie other general provisions. Article 51, nº 2, establishes that the rights ascertained in the Charter cannot constitute the basis for new EU competences. Article 52, nº 2 makes clear that the fundamental rights declared in the Charter that correspond to Treaty rights are subject to the limits and the conditions established therein. This, for example, subjects the general right to free movement of persons proclaimed in the Charter to the conditions and limits to which it is subject in the EC Treaty. Curiously, or may be not, there appears to be a paradox in the way the Charter is drafted: its catalogue of rights is, perhaps, broader than what would simply result from the consolidation of previous Community legislation, Treaty norms and the Court's case law;[40] but the scope of application of these rights is substantially limited in its general provisions. This may express a kind of dualistic approach to the Charter: some saw it as a constitutional moment in the process of European integration; others saw it as a simple codification of pre-existing law.

As it stands, the legitimating power of the Charter, even if made legally binding, will be quite limited. Its function will be substantially similar to that already provided by the Court of Justice standards of fundamental rights protection. If made legally binding, the major consequence will be a greater control over a judicially developed fundamental rights catalogue and a higher degree of transparency for European citizens. However, the European discourse on fundamental rights would not be substantially broadened and therefore its polity building power (envisioned by the convenors of this Conference)[41] will be limited. In fact, the

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[36] Cite cases

[37] CITE literally

[38] CITE

[39] One could argue, however, that such Article must be interpreted in light of other provisions of the Charter (mainly, Article 53),

[40] Cite examples

[41] CITE introduction paper

European fundamental rights discourse would continue to be restricted to the original concern of guaranteeing that EU acts would not threaten the fundamental rights traditionally protected by the Member States. In this respect, EU fundamental rights protection will again be a form of "catching up" legitimacy. It would serve to present the EU as a political community closer to the constitutional standards of national political communities without really justifying the need and role of a European political community. At the same time, there are no substantial risks of fundamental rights violation by EU institutions and it can hardly be said this risk constitutes a current legitimating problem for the Union.[42] The function of the Charter in this regard would be predominantly symbolic but with that limited scope it cannot really assume the polity building function that some hope for.

The polity building power of a European fundamental rights discourse would require such discourse to be linked to much more ambitious and contested dimensions of fundamental rights protection in the European Union. The first possible dimension is to understand a European Charter of fundamental rights as affirming a set of European common values that constitute the basis for a common European political identity. 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.[43] This conception can also be related to the rhetoric that legitimated the interference with the Austrian national political process when Mr Haider extreme right-wing party was "co-opted" to power. The other Member States considered themselves entitled to act against Austria because they affirmed the need to protect a set of European political values even in the internal sphere of Austria. However, this incorporation of European political values in Member States domestic orders is still not expressly assumed in EU law. 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 does not change this approach. Fundamental rights protection at the level of the States is left to either or both national constitutions and the European Convention of Human Rights and Fundamental Freedoms. However, this leads to a permanent tension in the European Union between the need to affirm common political values and the lack of adequate instruments to realise them. This was clear in the paradox embedded in the reaction of Member States to the situation in Austria: their intervention was legitimised on the basis of a need to protect common political values related to democracy and human rights; however, the intervention took the form of traditional international law sanctions without any form of constitutional safeguards in light of those same values.[44] The use of a Charter of fundamental rights to develop common European political values may be a powerful polity building tool but it will all depend on a previous decision on the extent to which those political values should also apply to the States.

There is a third 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

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[42] Weiler…

[43] Cite introductory paper.

[44] Article 7 of the TEU, even after the Nice Treaty, does not alter the analysis made in here.

of a plurality of political communities and a growing deterritorialisation and atomasition of power.[45] It will be argued below that this should be one of the preferred paths for legitimacy in the European Union but, to argue it, one must again first discuss the telos of European integration and the nature of the European political community.

To define what other roles should a EU fundamental rights strategy assume beyond guaranteeing EU compliance with traditional national fundamental rights standards we must first agree on the political goals of the project of European integration. We need to provide for polity legitimation to determine the scope that fundamental rights discourse can assume in the EU. This requirement explains why any of these further dimensions is absent from the current Charter. The current Charter and the strategy of legitimation linked to it appear to be limited to the first dimension highlighted: to guarantee that the use of European powers will not challenge the standards of fundamental rights protection granted to European citizens in their States. But this, as stated, will again be a form of catching up and second order legitimacy that would not be capable of answering to the real challenge of legitimacy faced by the European Union: how to legitimise the claim of independent political power assumed by an emerging European polity and to do it without eliminating the equal claims to independent political power of national political communities

The Competences Strategy

Another topic in the driving seat of the current constitutional debate regards the setting up of clearer limits on EU competences.[46] Again, it will not work. There are both pragmatic and normative reasons that explain why a strategy based on a better delimitation of competences should not be a priority in the search for legitimacy in the European Union.

In the first place, it will be quite difficult to devise a workable general and abstract criterion that can make 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 allocated competences between different levels of government.[47] 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-governamental 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 you 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. In this context the question of allocation of competences really comes down to be a question on who should allocate those competences?[48] 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? Therefore, the usefulness of a discourse on competences is strongly

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

[46] Cite Declarations.

[47] CITE Ingolf Pernice et al.

[48] 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 vs Santo António…CITE

limited by the constraints highlighted and it would be better if concentrated on the question of who should decide the competences and how those competences should be exercised. For example, one should focus on increasing transparency and accountability in the exercise of competences, making clearer to the citizens who has decided on what and who participates in the different levels of decision-making. But once more this will only provide a limited form of legitimacy to the European Union. It would not be able to legitimate why the European Union has assumed the character of a political community of open and undetermined political goals on which the imposition of clear limits of competences does not work. Of course, one can challenge that claim of the European Union to be a political community but that would require a return to a pure inter-governamental character of the process of European integration. This implies a different strategy to face the problems of legitimacy of the process of European integration that will be discussed below.

There are also strong normative problems faced by a strategy of legitimation based on the trust in a clearer allocation of competences. First, many competences cannot be adequately distributed in abstract and are better allocated on the basis of a comparative institutional analysis that takes into account the real world contexts of participation in the different institutional alternatives 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 misleading to assume that the institutions closer to the affected interests are always the more apt to exercise the competences affecting those interests. In fact, it may often be the case that that circumstance leads to the capture of those institutions by the concentrated interests against 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 capture by regulated interests. That will not always be the case but this serves simply to prove the point that an abstract allocation of competences ignores these institutional dynamics and therefore presents serious normative problems. The second type of normative questions raised by the strategy of competences is related to the underlying conception of the European political community that must support any such strategy. Often, the question of competences is presented as an issue of simply determining who is more efficient or effective in performing some competences. In reality, this often hides profound different conceptions of the European polity community. Le us the take the example of the German proposals for the renationalisation of the limited redistributive policies of the EU. Such proposal is based on the argument that redistributive functions are better exercised by the States. However, this type of choices cannot be presented has based on a neutral criteria of efficiency or effectiveness on who is more apt to exercise those competences. Instead, these are choices closely linked to previous choices on the nature of the European political community. The renationalisation of redistributive policies only makes sense if one takes as the basis for a duty of solidarity and distributive justice between citizens the Nation States but not Europe. Underlying such proposal is a particular conception of the European political community and the nature of the political and civic links between its citizens. Without discussing the latter any debate on competences is seriously flawed. Again it requires a previous discussion on EU polity legitimacy[49].

[49] The expression polity legitimacy belongs to Bellamy and Castiglione and has also recently been used by Neil Walker. CITE all

The Constitutional Strategy

One of the most frequently heard thesis, usually supported by the European Parliament, is the claim for a formal European Constitution. The Declaration of Laeken appears to finally adopt such goal as an essential element of a strategy for legitimating the European Union. The idea is to replace or complement the Treaties by a formal constitution establishing Europe's constitutional principles, fundamental rights and political organisation. Several arguments are put forward in defence of such a thesis. Some are linked to the other strategies highlighted (a catalogue of fundamental rights, a clear allocation of competences, a "truly" democratic institutional system for the Union). The formal constitution is presented as the instrument to bring forward these changes. In this respect, the project of a formal constitution is bound by the limits already highlighted on the legitimating power of those strategies. It is also not a necessary element to bring them forward. The same reforms can be introduced by legal instruments not having the character of a formal constitution.

But there are other more powerful arguments put forward in favour of a formal constitution.[50] First, this Constitution is expected to clarify the present constitutional system and its relationship with national constitutions and, in this process, confirm the independent authority of the European Constitution vis a vis those national constitutions. Second, the process of drafting a formal constitution will be itself a polity building process and would finally grant to the European citizens the final control over constitution-making in Europe. It will make the European demos through the exercise of its *pouvoir constituant* at the European level. With regard to the first argument, it is debatable whether we should in fact clarify the present relationship between the European and national constitutions. Isn't it a particular trademark of European constitutionalism that it is built in co-operation with national constitutions?[51] Doesn't that reflect the nature of the relationship between the European and national constitutions as non-hierarchical and based on discourse and mutual adaptation to each other?[52] And, finally, doesn't this, in turn, reflect the nature of European constitutionalism as found on the competing claims of the European and national political communities?

As we have seen above, both national and European constitutional law assume in the internal logic of their respective legal systems the role of higher law. In this way, the question of who decides who decides has different answers in the European and the national legal orders[53] and

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[50] For a critical summary of the arguments in favour of a European formal constitution, see also Joseph Weiler, Federalism and Constitutionalism: Europe's Sonderweg, Jean Monnet Chair Working Papers, Nº 10/00, available at www.jeanmonnetprogram.org/papers/index.html

[51] See: Damian Chalmers, "Judicial Preferences and the Community Legal Order", 60 MLR 1997, 164, particularly at 180; Kamiel Mortelmans, 'Community Law: More than a Functional Area of Law, Less than a Legal System', Legal Issues of European Integration, 1996/1, 23, at 42-43; and mine CITE

[52] See, for example: Neil MacCormick, , "Beyond the Sovereign State", 56 MLR 1993, 1 (the foundation article in this respect); Chaterine Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law', 16 Law and Philosophy, 377; M. Kumm, Who Is the Final Arbiter of Constitutionality in Europe?, Harvard Jean Monnet Chair Working Papers 10/98, www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-10-.html; and mines The Heteronims of European Law… and Europe and the Constitution

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

when viewed from a perspective outside both national and Community legal orders requires a conception of the law which is no longer dependent upon a hierarchical construction. 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. A formal constitution is expected to solve this question by granting ultimate supremacy to EU law as a higher constitutional authority derived from the exercise at the European level of a *pouvoir constitutant*. But this answer may, in effect, not be compatible with the type of European constitutionalism that we prefer based on competing European and national political communities without a clear allocation of authority between them. In this case, what is needed is to rethink constitutionalism itself.

In a sense, the question of "who decides who decides" has long been around in constitutionalism even in non-federal (or, if you prefer, non-multi-level) systems. It is a normal consequence of the divided powers system inherent in constitutionalism. In fact, it can be considered as an expected result of the Madisonian view of separation of powers as creating a mechanism of checks and balances. In the European Union, we would be extending this notion of divided powers to the *grundnorm* itself. Or, if you prefer, there is no longer an ultimate sovereign authority but competing claims of sovereignty that have to be managed in a non-hierarchical manner. A hierarchical alternative imposing a monist authority of European law and its judicial institutions over national law would be difficult to impose in practical terms and could undermine the legitimacy basis on which European law has developed.[54] In Law we too have to learn how to manage the non-hierarchical relationship between different legal orders and institutions and to discover how to gain from the diversity and choices that offer us without generating conflicts that ultimately will destroy those legal orders and the values they sustain There is much to be gained from a pluralist conception of the EU legal order. In a world were problems and interests have no boundaries, it is a mistake to concentrate the ultimate authority and normative monopoly in a single source. Legal pluralism constitutes a form of checks and balances in the organisation of power in the European and national polities and, in this sense, it is an expression of constitutionalism and its paradoxes. But, to take full advantage of this legal pluralism we need to conceive forms of reducing or managing the potential conflicts between legal orders while promoting exchanges between them and requiring courts to conceive their decisions and the conflicts of interests at hand in the light of a broader European context. This will also highlight the trans-national character of much of these conflicts which is often ignored by national constitutional law.

The problem with a formal constitution is that it is reflection of a particular model of constitutionalism, that of national constitutionalism, that is associated 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.

The final argument in favour of a formal European constitution is the most powerful one: a formal constitution is necessary as a process of polity building and an instrument to involve all European citizens in the process of European integration and the establishment of its political identity. There are two elements in this: first, the process of making a formal constitution is expected to create a European constitutional moment; second, that formal constitution will be

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

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 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.

Europe needs a constitutional moment whereby European citizens are mobilised to promote a constitutional debate that would allow us to move beyond the current locked positions of States. Paradoxically, the current social dissatisfaction with the process of European integration may trigger a true mobilisation of European citizens in a constitutional process. The history of constitutionalism tell us that is often when the political and social status quo become strained that a constitutional moment arises.[55] This constitutional moment is characterised by a broad involvement of citizens on a truly deliberative process that manages to depart from social locked in positions and therefore puts the participants as close as possible to a societal original position under a veil of ignorance. But the possibility of a European constitutional moment should not necessarily lead to a formal European constitution. Another type of text may reflect better the peculiar type of constitutionalism on which Europe can be legitimated. And that text can serve as well to provide the basis for that rationalisation of political conflicts that characterises successful political communities.

An Alternative Strategy: Legitimating the European Polity

What do all these four strategies have in common? They all attempt to legitimise the claim to an open and independent political authority derived from the processes of constitutionalistion and Europeanisation at the European level by making sure that such political authority is exercised in a constitutional and democratic manner. But the yardstick selected is that of the particular model of Nation State constitutionalism. At the same time, the first legitimacy question remains unanswered: what legitimates such claim to being a polity with open and independent political authority in the first place? The existence of a new political community at the European level is, implicitly, accepted as given and the legitimating efforts turn into making such new form of political organisation and power conform to the traditional standards of national democracy. But this inevitably leads any European citizen to assess the legitimacy of European integration through a comparison between its marginal power of participation in the European and national political processes with regard to the competences that have been transferred from the States to the Union. In this light, the European Union always tends to loose. This relates to what has been called as regime legitimacy:[56] in here this means the legitimacy of the institutional and procedural mechanisms through which power is exercised in a polity. This is a necessary form of legitimacy for the Union but it is not to sufficient to legitimise the claim to the existence of that political community. Moreover, in this regard the European Union will always appear as second order legitimacy vis a vis the Nation

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[55] Cite Ackerman

[56] The expression belongs to Bellamy and Castiglione CITE and has also been used recently by Neil Walker CITE. In both cases the meaning does not totally coincide with that employed in here.

States. Finally, even such limited form of legitimacy is linked, as we have seen, to the application of core constitutional concepts such as the concept of a political community, the fears of the few and the many and the question of who decided who decides. These concepts are deeply contested in the European Union and without first rethinking them it is impossible to provide even a satisfactory solution to the limited form of regime legitimacy.[57]

Any process of legitimacy for the European Union must start by justifying the need for a new form of political community. To provide for polity legitimacy.[58] The initial legitimacy question must be why to have a European political community at all? There are some that simply deny this possibility. They argue that there is no basis for legitimating a European political community and therefore what is required is a return to a much less ambitious process of European integration. In this light what created the legitimacy deficit were the processes of constitutionalisation and Europeanisation. There is no basis for Europe to claim independent political authority linked to a community of open and undetermined political goals. A polity requires a community with a high degree of cultural, ethnic or historical cohesion, what is not the case of the European Union. Instead, this type of community is still identified with the nation state. Here, the problem of European Constitutionalism does not derive from the absence of regime legitimacy but from the absence of a demos capable of legitimising such constitutionalism in the first place. All the other legitimacy problems are simply reflections of this initial legitimacy gap. This view is at the origin of the arguments in favour of a return to limited express competences and inter-governamentalism with, where necessary, a role for national parliaments at the European level. It is an analysis which still sees national democracies as the highest source of constitutional legitimacy. As a consequence, the final authority between national and European "constitutionalism" belongs to national constitutions. Paradoxically, this view has a common starting point with the strategies of legitimacy highlighted above. It assumes the national constitutional representation of constitutionalism as the proxy of constitutionalism (its ideal model). But, in doing this, it ignores that national constitutionalism is simply a contextual representation of constitutionalism and does not constitute its ideal expression. There are also strong problems faced by national constitutionalism and a European political community and European constitutionalism may bring an important added value with regard to those problems. It is precisely in here that we can find the basis for the legitimacy of Europe's claim to independent political authority and to be a community of open and undetermined political goals.

National political communities also suffer from serious constitutional problems and democratic deficit. 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

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[57] I analyze this in much more detail in Europe and the Constitution, op. cit.

[58] This expression also belongs to Bellamy and Castiglione CITE and has also been used recently by Neil Walker CITE. Again, in both cases the meaning does not totally coincide with that employed in here.

the democratic process).[59] 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 between different polities.[60] It becomes increasingly obvious how artificial are the jurisdictions of democracy, and the lack of correspondence between the democratic polities in which one participates and the democratic polities that affect us.[61] 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.[62] 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 the different democratic deficits of national political communities. The first ground for legitimacy of the European Union can be found in the democratic improvement of national political processes with regard to nationals of other Member States. Much of the ethos of European integration can be linked to this idea of increased inclusiveness in national political communities. From guaranteeing peace to promoting in national policies the inclusion of out-of state interests, therein probably lies the most significant democratic added value of European integration.[63]As stated before, we are increasingly being affected by polities upon which we have no control or democratic participation. Those polities, which may internally be organised in a democratic manner, affect us both within the borders of our national polities or as "wish-to-be citizens" who would like to conduct our lives outside our original polities. European law can (and has done so, to a certain extent) increase democracy in national polities by requiring these polities to have some form of representation of the foreign interests affected by its decisions. This

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[59] See Europe and the Constitution: As Good As It Gets…CITE

[60] See Lucas Pires, CITE, 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". op. cit., at 67.

[61] CITE David Held

[62] These democratic problems can perhaps also be related to what Haberman's described as the relation betwween lifeworld and system (Theory of Communicative Action, vol. 2 CITE). System's are "genetically" embodied with certain values and assumptions that are excluded from communicative action (that is, discourse, which is, according to Habermans, the most way to legitimise moral statements and acts). What happens is that systems have been taken control over lifeworld (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.

[63] In We The Court…CITE I have applied such a conception to promote a particular reading of the EU economic law. A similar conception has also been argued, in different ways and to a different extent, Christian Joerges (CITE) and Joseph Weiler (CITE). Nicolaides?...

takes place in two ways: first, by creating mechanisms who impose the internalisation in national political processes of the interests of other national polities which are affected by that decision;[64] second, by granting to citizens of the European polity rights of participation in any national polity on which they choose to set up residence.

This second form of inclusion also provides a new dimension of citizenship. We could call it plural citizenship and link it to a form of meta-democracy: the possibility to choose among different political communities. National democracies tend to be mutually exclusive. Our participation in different democracies is usually limited or impossible. So is our freedom to choose the political community of which we would like to be members. What guarantees democracy (our acceptance of the decisions taken by the majority of the polity of which we are members) also limits it our enjoyment. This happens in two ways: first, by preventing our democratic participation in a polity from which we are not members; second, by traditionally restricting our citizenship to a particular polity defined in a strong historical and ethnic sense. We are not really free to choose the political community of which we want to be members simply on the basis of political adhesion to the values and processes of a particular political community. In this respect, European integration can give us a new form of democratic participation: the freedom to choose among different national democracies or, in other words, the right to choose between different political communities. First, it give us the right to choose the national democracy of which we would like to be members; second, the competition among the different national democracies generated by that freedom of choice will also improve the democratic operation of each national polity.

European integration can also improve the representation and participation of domestic interests in the national political process therefore improving national democracy even from its internal perspective. In other words, even if the national polity is the only jurisdiction taken into account in measuring democracy, there is a democratic added value arising from European integration. The inclusion of foreign interests in the national political processes will in many cases lead to the satisfaction of dispersed national interests that were previously under-represented in that national process. In other words, it may help to correct democratic malfunctions in the national political process arising from the capture of the political process by concentrated interests (minoritarian bias). Most instances of discrimination against (or under-representation of) foreign nationals in national political processes are, at the same time, instances of capture of the national political process by a national interest group against the interests of a dormant national majority.[65] In these cases, the inclusion promoted by EU law also provides a opportunity for further and more open deliberation at national level frequently exposing those instances of regulatory capture. In a broader sense, the existence of a European political community provides, even in cases of purely domestic disputes, an opportunity for correcting biases of the national political processes. In some cases, it may even make sense to have the European Union playing a role in purely national disputes if the national political

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[64] CITE book and Christian Joerges

[65] The typical example is trade protectionism: in most cases, we do not really have a homogeneous national interest opposed to the foreign national interests; instances of trade protectionism tend to occur where concentrated national interests try to conserve there economic privileges at the cost of foreign competitors and national consumers. Because of the concentrated interests and high stakes of the small minority they can easily dominate the national political process even against the interests of the dispersed majority of consumers whose low per capita stakes and high transaction and information costs prevent them from being aware of their interests and exercising pressure in the political process.

process is suspected of a serious form of majoritarian or minoritarian bias. The reverse also being true.

There is another process through which European integration can help improving national democracies even from a purely domestic perspective. The existence of a European political authority provides for rules on the system of inter-dependence and competition among States which is generated by European economic integration. This European regulation of regulatory competition should be used to prevent negative externalities (cross-national transfer of costs derived from national policy choices) that affect the accountability in national political processes. At the same time, competition among States, subject to regulation, can increase both the efficiency of national policies and national comparative information. The open method of coordination can also be seen as a new form of competition among States that can improve national deliberations on particular policies.

National democracies also feel increasingly threaten by the forces of globalisation and market competition. These processes are often perceived as imposing on those national political processes decisions which arise from the need to be competitive in the global market even if those decisions would not correspond to the majoritarian preferences of the members of that national polity. The European political process can be a form of regaining political control over the market. It is also possible to make a different reading of such transfer of power to the market and the role of the European Union therein. In effect, the market can also be seen as a democratic source. In this case, the voluntary agreements between individuals taking place in the market in the form of transactions are considered to be the best form of democratic decision making. In this light, some argue that the main function of European integration should instead be to devolve powers to the market by limiting any form of public (State or European) intervention therein. In this case, the legitimacy of European constitutionalism would be found on the limits it imposes on any form of public power. But this would also place strong limits on the role to be played by a European political community. Whatever the perspective taken on the democratic value of the market, there is an added value to be gain from European integration. It subjects many of the decision-making powers which have evaded the States through globalisation and market competition to a new form of democratic assessment. What happens is that the State's political process is no longer considered the exclusive owner of democracy. Has we have seen, this is both a natural consequence of the limits of the democratic jurisdictions of the States and of the democratic malfunctions in the State's political process. The European Union provides a forum in which to compare the different institutional alternatives arising from trade liberalisation (the State's political process; the European Union political process; and the market) under common democratic criteria. But the European Union can also be used to democratise each of those institutions.

It is in this democratic role that we can find the polity legitimacy of the European Union; the basis for its claim of independent political authority from the States. Only after satisfying this requirement can we move into a discussion on the forms of regime legitimacy. The current constitutional agenda should, therefore, focus primarily on building the Union's polity legitimacy by looking at enhancing its role in the reform of national political processes, the construction of a plural form of citizenship and the democratisation of trans-national decision-making processes.