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## **Abstract**

European studies have rarely dealt with the question of the European common good (or public interest). This is due, probably, to the hybrid nature of the EU. Its multilayered institutional nature makes the problem of how to track the European public interest much more challenging when compared to the national level. Constitutional pluralism seems to be one of the most inspiring theories of European constitutionalism. It offers an appealing account of the stratified institutional framework of the Union. Therefore, it is a natural candidate for explaining how to track the European public interest. Pluralism may serve as the best methodology for keeping into account and respecting the multiple perspectives on the common good represented by every institutional layer of the Union. After having explored the theories of two of the most influential authors of constitutional pluralism, this paper tries to show how pluralism might improve its highly potential explanatory and normative force, that is, by including in the institutional picture not only courts, but also political institutions. In this way, every European and national voice might have a fair say in the interactions between institutions.

## **Key-words**

European Constitutionalism – Constitutional Pluralism – Common Good – Mattias Kumm – Miguel Maduro

# Constitutional Pluralism and the Politics of the European Common Good

Marco Goldoni

## 1. Tracking European Common Goods

The common good has never been a popular concept in liberal thought<sup>1</sup>. It has always conjured up images of despotism and heavy metaphysics assumptions. An endemic conflict between the politics of the common good and the politics of individual and group interests is always looming, once a discourse on the public good is introduced in the debate. This is one of the reasons why, in the liberal tradition, reflections on the common good are frequently replaced by arguments based on principles of justice. Rawls' distinction between the right and the good represents the most influential example of this strategy. In other versions, individual rights are often thought as a bulwark against the illegitimate and sometimes violent demands of the common good<sup>2</sup>. If the common good is conceived in a communitarian fashion, then the the right holder is at risk of being ignored or sacrificed to the common good. In the framework of the national state, this conflict can take the form of the opposition between state (public) and individual interests where nationalism plays a negative role in shaping in an organic or unitary way the understanding of what one intends with the word common. Of course, if the common good is admitted as a legitimate concept, then it is portrayed as inherently free from conflict<sup>3</sup>. If the object of the common good were essentially contested, so goes the argument, it would not be an authentic common good<sup>4</sup>. In this version, the common good is usually understood as generality as distinguished from the will of all or the sum of individual interests.

Transposed to the level of the European Union, the idea of the common good, once linked to

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<sup>1</sup> This is not the same for republican theory. See, among others, P. Pettit, *Republicanism*, Oxford, Oxford University Press, 2000, pp. 121-122; see, also, I. Honohan, *Civic Republicanism*, London, Routledge, 2002, pp. 150-158. In this paper, a republican conception of the common good as an object whose content is always open to political contestation and redefinition is adopted. Unfortunately, it is not possible to develop this aspect for reasons of space.

<sup>2</sup> See the classic statement by R. Dworkin, *Taking Rights Seriously*, London, Duckworth, 1977. For Dworkin's evolution on the topic see P. Yawell, "A Critical Examination of Dworkin's Theory of Rights", *American Journal of Jurisprudence*, 52 (2007), pp. 93-122. For an exception, within the liberal field, see J. Raz, *Ethics in the Public Domain*, Oxford, Oxford University Press, 1994, pp. 52-55.

<sup>3</sup> According to Raz, «the politics of the common good, questions regarding what is and what is not in the public interest are as controversial as other political issues. But they are relatively free from conflict»: *Ibid.*, pp. 55-56.

<sup>4</sup> On this conception of the idea of the common good see J. Finnis, *Natural Law and Natural Rights* (1980), Oxford, Oxford University Press, 2010 (second edition), ch. 6.

clearly defined political units such as the nation state, becomes inevitably more controversial. What is fundamentally different about the EU is that there are – at least – two levels of legitimate law-makers which have overlapping competences and sometimes conflicting policies and interests<sup>5</sup>. Of course, the usual justification for European political decisions, being based on an output-oriented attitude<sup>6</sup>, has always revolved around the idea that the European Union should basically guarantee to his citizens good and effective governance, which means that European citizens not only have the right to participate, but they also have a right to be properly governed. But this strategy still eludes the question of what is the European common good and how to track it, not to say that it does not clarify whether there are one or several (multilevel) common goods. Indeed, the main problem is that it is difficult to enucleate with any certainty to which political space the idea of common good should be referred to when we speak of Europe. In other words, given that the Gordian knot of the nature of the EU has not yet been cut, the meaning of the adjective European, when applied to the idea of the common good, remains largely unattainable and elusive.

From an intergovernmental perspective, the idea of the common good of a multilayered polity should be located in the aggregation of the interests of its single units. From a federalist perspective, a European common good should be established through the realisation of a perfect integration<sup>7</sup>. However, as remarked by Jiri Priban,

the constitutional structure of the EU is determined by the “non-state” character of the Union, the absence of its sovereign legal authority, and the subsequent impossibility to clearly establish the normative supremacy and hierarchy of EU and national laws<sup>8</sup>.

And this is why the idea of constitutional pluralism has attracted so much interest and has become one of the most challenging European constitutional narratives<sup>9</sup>. Given the unresolved or unstable hierarchy between (at least certain) national constitutions and EU law, federalist or intergovernmentalist approaches to EU constitutionalism cannot claim to be exhaustive. Since each

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<sup>5</sup> N. Bernard, *Multilevel Governance in the European Union*, The Hague, Kluwer, 2002.

<sup>6</sup> Characteristically, Romano Prodi, presenting his Commission Agenda in July 1999, remarked that “at the end of the day, what interests them [Europeans] is not who solves these problems, but that they are being solved”: quoted in P. Magnette, “European Governance and Civic Participation: Beyond Elitist Citizenship?”, *Political Studies*, 51 (200), p. 142.

<sup>7</sup> This is a highly simplified account. For a useful overview of the theories of European integration see A. Wiener, *Theories of European Integration*, Oxford, Oxford University Press, 2009 (2<sup>nd</sup> ed.).

<sup>8</sup> J. Priban, “Multiple Sovereignty: On Europe’s Self-Constitutionalization and Legal Self-Reference”, *Ratio Juris*, 23 (2010), p. 47.

<sup>9</sup> For an introduction see M. Avbelj, J. Komárek, “Four Visions of Constitutional Pluralism”, *EJLS*, 1 (2009); M. Avbely, “Questioning Eu Constitutionalisms”, *German Law Journal*, 1 (2008), available at <[www.germanlawjournal.com](http://www.germanlawjournal.com)>; M. Avbelj, J. Komárek (eds), *Constitutional Pluralism in Europe and Beyond*, Oxford, Hart, 2011 (*forthcoming*).

level is seen as sovereign in its own terms, a description of the overall state of affairs in terms of pluralism seems more appealing than one which concedes too much to the claims of one side or the other. In other words, constitutional pluralism is a theory that accounts for the fact that in Europe no single institution, national or supranational, can claim to have the ultimate authority. In a recent paper, Gareth Davies has starkly rejected constitutional pluralism by defining it as an “empty idea”, because “where there are multiple sources of apparently constitutional law one always takes precedence and the other is then no longer constitutional”<sup>10</sup>. This reaction is based on a classic (and modern sovereignty-based) stance on constitutionalism as higher law, where the highness nature of the law implies a legal hierarchy. However, Davies also concedes that despite “the investment in constitutional pluralism by scholars has not brought satisfactory returns, yet pluralism is too attractive an idea to be abandoned in haste”<sup>11</sup>.

In this paper, I intend to investigate and assess the theoretical resources offered by two versions of constitutional pluralism for the tracking of the European common good. This has to be done cautiously because it would be unfair to ask to a theory that has been put forward for other reasons to solve problems for which it was not conceived in the first place. However, after having enucleated the main tenets of constitutional pluralism, this paper intends to focus on some of the structural limits which make pluralism not always suitable as a theory for tracking the European common good. In particular, the focus on judicial dialogue and conflict, partly due to the contingent structure of the European constitution, i.e., the fact that one of the most relevant legal channels of communication between the European and the national levels is the preliminary reference<sup>12</sup>, and the record of judicial relations since the time of the *Maastricht Urteil* impedes the formation of a larger view on the dynamic and formation of a (or many) European common good(s).

Constitutional pluralism remains a challenging theory because it invites us to maintain a sense of legal meaning despite the recognition that the usual standard of legal modern sovereignty does not apply anymore. However, this is not a radical pluralist theory for at least two reasons. It aims at rationalizing the *status quo* (*rectius*, to provide the most accurate framework for understanding legal reality), not at transforming it. Moreover, pluralism is portrayed as an instrumental value and not a normative one<sup>13</sup>, which means that pluralism serves the aim of integration and not *viceversa*. But it

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<sup>10</sup> G. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, in J. Komárek, M. Avbelj (eds.), *Constitutional Pluralism in Europe and Beyond*, cit.

<sup>11</sup> *Ibid.*

<sup>12</sup> As known, the preliminary reference procedure is not followed uniformly among Member States: A. Tomkins, D. Chalmers, *European Union Public Law*, Cambridge, Cambridge University Press, 2007, pp. 291-302; S. Nykos, “The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistments”, *European Union Politics*, 4 (2003), pp. 397-419.

<sup>13</sup> Here lies the main difference between constitutional and legal pluralism: the latter recognizes pluralism as an intrinsic value. For a recent and excellent overview of pluralist theories see E. Melissaris, *Ubiquitous Law*, London, Ashgate,

should not pass unnoticed that it also purports to explain pluralism as the best institutional mechanism to protect fundamental rights. Given this scenario, this theory might be improved by adding other elements into the framework. On a descriptive level, it should take into account actors other than courts. Otherwise, it would lose, at least partially, its explanatory force.

Also, while seemingly workable, it should, on a normative level, answer the question of whence its principles draw their legally binding force from. The pluralists view seems to take for granted that the principle of proportionality and an agreement on general principles are sufficient to ground the protection of fundamental rights. At this stage, one of the problems, as we shall see, lies in resorting to the idea of judicial dialogue as an alternative way of tracking public interests. Furthermore, constitutionalism is grounded on the very idea of proportionality and balancing becomes the best solution to deal with conflict of rights. But if one admits, as the pluralists do, that the legal meanings in the European legal space cannot be always imposed *ex alto*, then it is also necessary to recognize that European law is shaped through multiple interactions of many and different institutions.

In order to show these weak spots of the pluralists' discourse, I will proceed as follows. In the second and third paragraphs, two of the most influential theories offered by constitutional pluralists (Mattias Kumm and Miguel Maduro) will be examined and evaluated against the background of a republican conception of the common good. The main difference between these two versions is to be found at the level of principles: both advocate the necessity of certain constitutional (meta)principles, but they do not share the same list of principles. In any case, this principled aspect seems to challenge the idea that pluralism, as some authors fear, won't cease «to pose demands on the world»<sup>14</sup>, leaving the societal forces free to determine the outcome of any kind of institutional conflict. Among the things that are worth being outlined, an inquiry into these two proposals will show that, despite they claim to be pluralists, they are not ready to take into full account the consequences of epistemic pluralism. Indeed, in this shape, constitutional pluralism betrays a bias in favor of judicial power and the risk, always inherent to these kinds of theories, of favoring a strong centripetal drive. As already remarked, there are technical and practical reasons behind this idea: first, the formal channel of communication between the Luxembourg Court and the national States is constituted by the preliminary reference procedure; second, the historical role played by the European Court of Justice in the process of constitutionalizing the European polity<sup>15</sup>. But this

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2009. For a strong pluralist case against constitutionalism see N. Krisch, *Beyond Constitutionalism*, Oxford, Oxford University Press, 2010.

<sup>14</sup> M. Koskeniemi, "The Fate of Public International Law: Between Technique and Politics", *Modern Law Review*, 70 (2007), p. 23.

<sup>15</sup> See the classic account of E. Stein, *Lawyers*, "Judges and the Making of a Transnational Constitution", *American*

mono-institutional approach may prove to be in contradiction with the premises which constitute the pluralists' agenda. It strikes as contradictory to support epistemic pluralism and at the same times take for granted that constitutional courts have the monopoly of national constitutional meanings. Interestingly, once taken in a less judicial fashion, pluralism may provide some useful insights on how complex is the relationship between courts and political institutions in the European legal realm. At this level, the normative and the explanatory properties of constitutional pluralism may prove appropriate for understanding the implications of a wider and, indeed, more pluralistic perspective on the relation between national and supranational authorities. In the last paragraph, since the pluralists are still concerned mainly with the judicial process and they rely on an exclusively output-related approach to legitimacy, they are not able to put forward an autonomous and sufficient proposal for tracking and defining European common goods. In fact, they do not take into account the so-called circumstances of politics<sup>16</sup> and the relevance of input reasons in the tracking of common goods. Indeed, if this is the context in which pluralism has developed, then the task for the European constitutional theorist consists in providing constitutional criteria and/or principles which may keep together, on the one hand, the idea of multiple sites of authority and, on the other hand, the meaningfulness of the constitutional discourse for the EU.

## 2. The Primacy of Proportionality: Mattias Kumm's Conflict Rules

Mattias Kumm is certainly one of the most sophisticated supporters of the idea of constitutional pluralism and, at the same time, a proponent of the legitimacy of strong judicial review. His reflection on the topic, as is true for other constitutional pluralists, has been triggered by the *Maastricht* judgment<sup>17</sup>. The core of Kumm's pluralism can indeed be individuated in a jurisprudence of constitutional conflict which should contribute to the maintenance of coherence within the European legal order<sup>18</sup>.

In a series of articles, Kumm has developed a theory for explaining and justifying the current state of affairs of the European Union, a state which may be described with a paraphrase of the words of *The Federalist*: neither federal nor national, but a composition of both<sup>19</sup>. As already said,

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*Journal of International Law*, (1981), pp. 1-27; see, also, J. Weiler, *The Constitution of Europe*, Cambridge, Cambridge University Press, 1999.

<sup>16</sup> J. Waldron, *Law and Disagreement*, Oxford, Oxford University Press, 1999, p. 102; A. Weale, *Democracy*, London, Basingstoke, 1997, pp. 8-13.

<sup>17</sup> 89 BverGE 155.

<sup>18</sup> M. Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty", *European Law Journal*, 11 (2005), pp. 262-307.

<sup>19</sup> A. Hamilton, J. Madison, J. Jay (eds), *The Federalist Papers*, Oxford, Oxford University Press, 2008, p. 192 (paper n. 39, J. Madison).

in such a context a collision between constitutional orders becomes a concrete and often not desirable possibility. And Kumm's pluralism intends to deal precisely with these exceptional circumstances. In his theory, pluralism is instrumental to the managing of constitutional conflicts.

Kumm identifies three tenets of modern constitutionalism which should orient the resolution of constitutional disputes. The first one is "*the idea of legality*"<sup>20</sup>, that is the rule of law. National courts should start with the presumption that they have to enforce EU law, but this presumption "can be rebutted, however, if, and to the extent that, countervailing principles have greater weight"<sup>21</sup>. To sum up, the respect of the European rule of law should be the rule, but exceptions are allowed. The second principle is jurisdictional, in the sense that it establishes boundaries for protecting national self-governments against illegitimate intrusions of the European Union. This principle has currently taken the form of subsidiarity. The third and last principle is democratic legitimacy. Kumm introduces this principle in light of the persistence of the democratic deficit at the European level: "national courts continue to have good reasons to set aside EU law when it violates clear and specific constitutional norms that reflect essential commitments of the national community"<sup>22</sup>. On top of these three principles of constitutionalism lies an interpretive approach according to which

the task of national courts is to construct an adequate relationship between the national and the European legal order on the basis of the best interpretation of the principles underlying them both. The right conflict rule or set of conflict rules for a national judge to adopt is the one that is best calculated to produce the best solutions to realise the ideals underlying legal practice in the European Union and its Member States<sup>23</sup>.

This is the Dworkinian principle of "best fit"<sup>24</sup> and it assumes that both national and European constitutional orders are built on the same normative ideals, that is, the three principles

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<sup>20</sup> M. Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty", cit., p. 299.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ivi*, p. 286.

<sup>24</sup> Kumm specifies that even though the "best fit" principle is clearly inspired by Dworkin's legal and constitutional theory (see *The Moral Reading and the Majoritarian Premise*, in *Freedom's Law: The Moral Reading of the Constitution*, Cambridge Mass., Harvard University Press, 1996, pp. 1-34), it does not depend on the idea of integrity or on a thick conception of interpretation. It is not clear how is it possible to have a best fit approach to the question of adjudication in matters of constitutional authority without resorting to the idea of integrity. Probably, Kumm wants to avoid the fact that integrity is linked to a conception of the liberal community, which he seems to treat as potentially authoritarian and dangerous for European integration. Indeed, one of the main concerns for Kumm is to avoid any reference to the idea of nation or people, deemed by him irremediably tainted by their romantic and irrationalistic conception.



previously enucleated. It also presupposes the ability of a national court to disregard EU Law when its provisions find no reflection in national constitutional norms and, in case of explicit contrast, no interpretive effort can possibly save the conflict. This is an interpretive device that allows the developing of a coherent European Legal order as long as inviolable national constitutional principles are in danger or violated. The role of pluralism becomes apparent: it helps EU constitutional law to flourish by posing some constraints. It also capitalizes on a practice of some constitutional courts to remain loyal to the founding principles of their own national constitution.

Some questions might be posed at this stage. Where these constitutional principles come from? And what makes them legitimate? The answer may be found, according to Kumm, in history and in human rationality. The first prong of this answer recalls the historical events that have led European nations to adopt national constitutions in several waves (first, Italy and Germany after the end of the World, then Spain and Portugal after the end of the dictatorships, and the embracing of liberal constitutionalism by the States of the former Soviet-block). A core of liberal principles can be detected in these documents and in the constitutional tradition of each country. Part of the force of the principles evoked by Kumm lies, therefore, in the legal and political practices which take inspiration from them.

The second prong that supports this two-tier approach to legitimacy of these principles is represented by the rational nature of these same principles. First of all, principles are not rules (at least, according to Kumm, who follows Alexy) and they are not subject to the same pedigree requirements<sup>25</sup>. They do not need to be enacted in order to be valid. In a classic liberal fashion, reason is supposed to justify the adoption and implementation of certain constitutional principles<sup>26</sup>. The recognition of this feature of constitutional principles, typical of a certain rights-based constitutionalism<sup>27</sup>, seems to accept the idea that the validity of the same principles is somehow pre-political. This approach has certainly an impact on the reasoning of the courts and fosters a discursive relation between them. In this respect, as Kumm puts it, courts engaged in principled reasoning may have a positive spill-over effect. Judicial opinions using principled analysis are absorbed by the media and permeate the public debate, thereby encouraging meaningful public deliberation<sup>28</sup>.

Taken together, the historical and rational prongs form the basis of Kumm's constitutional

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<sup>25</sup> R. Alexy, *A Theory of Constitutional Rights*, Oxford, Oxford University Press, 2010 (revised edition), p. 44.

<sup>26</sup> On the limits of rationality as understood by modern liberalism see P. Kahn, *Putting Liberalism in Its Place*, Princeton, Princeton University Press, 2005. On the limits of this approach applied to Europe, see U. Haltern, *Europa Recht und das Politische*, Tübingen, Mohr Siebeck, 2005.

<sup>27</sup> On the distinction between democratic and rights-based constitutionalism see J. Rubinfeld, "Unilateralism and Constitutionalism", *New York University Law Review*, 79 (2004), pp. 1971-2028.

<sup>28</sup> M. Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice", *International Journal of Constitutional Law*, 2 (2004), p. 595.

perspective, from which conflicts should be assessed and managed. It is a unitary and universal perspective because it takes into account all the layers involved in the integration process and treats them as a common whole. From this point of view, a European legal practice is envisaged and imbued with substantial and homogenous values coming from a specific conception of constitutional rationality.

From these assumptions follows that, if correctly interpreted, constitutional rationality should underline the central role of proportionality analysis. The idea of proportionality deserves to be dissected because it represents, according to Kumm, what is peculiar of the European legal order and what makes it, at least partially, legitimate. Proportionality analysis ensures that the laws of a polity can be justified in terms of reasonableness. *Lato sensu*, proportionality review is comprised of four steps<sup>29</sup>. The first one should discern whether the law has a legitimate aim. If the law's aim were simply to discriminate against a politically or socially disfavoured group of people, then the law would fail this test and should be struck down. The second step concerns the suitability of the means envisaged by the law in order to achieve its aim. If the means are clearly unrelated to the aim, then again, the law cannot pass the test. The third step implies an inquiry into possible alternative ways for achieving the same end that are less restrictive of the rights of those negatively affected by the law and that is, at the same time, equally effective and equally cost-effective for the State. Finally, step four is to be considered as proportionality *stricto sensu*. This step is indeed the so-called "balancing test", which reads: "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other"<sup>30</sup>. In other words, the restrictions on the rights of those who are negatively affected must not be disproportionate with respect to the value of the legitimate aim that would justify the law. Going further, this balancing should be performed in three phases: first, establishing the degree of non-satisfaction, or of detriment to a first principle (intensity of the infringement); second, establishing the importance of satisfying the competing principle; third, establishing whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former (evaluation)<sup>31</sup>.

According to Kumm, if properly understood, balancing is performed paying great attention to the judgments of the legislature whose law is under examination<sup>32</sup>. A law will be found

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<sup>29</sup> I follow Kumm's reconstruction, except where otherwise indicated.

<sup>30</sup> R. Alexy, *A Theory of Constitutional Rights*, cit., p. 102. As known, Alexy is the most influential supporter of the balancing test. On Alexy's legal philosophy see G. Pavlakos (ed.), *Law, Rights, and Discourse: The Legal Philosophy of Robert Alexy*, Oxford, Hart, 2007. Cf., also, D. Beatty, *The Ultimate Rule of Law*, Oxford, Oxford University Press, 2004.

<sup>31</sup> R. Alexy, "Balancing, Constitutional Review, and Representation", *International Journal of Constitutional Law*, 3 (2005), p. 572.

<sup>32</sup> Kumm brings considerations of normative jurisprudence to bear on the practice of proportionality analysis in M. Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality*

unconstitutional only if the best attempt to provide a legitimate aim for the law yields the aim no reasonable person would think sufficient to justify the negative costs involved<sup>33</sup>. To wrap up these insights into a political-philosophy jargon, judicial review, thought in this way, that is, as a site of proportionality analysis, comes to be equated to public reason, or as famously argued by Rawls, constitutional courts are intended as the institutional embodiment of the idea of public reason<sup>34</sup>. They are the seats where the principles of liberal constitutionalism can be publicly articulated in a universalistic (that is, acceptable to all the people involved in the discussion) manner. Courts are the most appropriate institution for performing this task. They are not constrained by elections and they are not representative of the interests of the electorate. This distance from citizens' interests and desires bestow on them the possibility of becoming the seat of reflexivity<sup>35</sup>. The privileged status of courts is deemed to be valid both for national and European courts.

Proportionality analysis offers the most rational way to solve constitutional conflicts in Europe. It requires, according to Kumm, both national and European courts to engage in balancing in order to find the solution that fits best all things considered within the overall practice of European law. Of course, this activity is guided mainly by one value, i.e. integration, and this fact gives on the balance a major weight to EU law against national claims. This means, in other words, that there is a structural bias toward European relative supremacy over national interests, with the exception of those constitutional principles which cannot be overcome<sup>36</sup>.

In theory, this relative supremacy works as a form of protection of the fundamental rights of European citizens. Indeed, it should work only as far as it does not violate some constitutional principles of Member States. But this primacy and its potentially distorting effects on proportionality analysis become evident when one considers, among other examples, the much debated *Laval* and *Viking* cases<sup>37</sup>, where some of the four freedoms were to be balanced against certain social rights linked to national labour law. In the latter case, the ECJ held that corporations could rely on their free movement rights against trade unions when industrial action threatened employers' exercise of those rights. In *Laval*, the ECJ, interpreting Article 56 TFEU (previously Article 49 EC) on freedom of providing services held that free movement rights precluded a trade union from using a blockade of sites to force an employer from another Member State to sign a

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*Requirement*, in G. Pavlakos (ed.), *Law, Rights, and Discourse: The Legal Philosophy of Robert Alexy*, cit., pp. 131 ff.

<sup>33</sup> Cf. M. Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, cit.

<sup>34</sup> See J. Rawls, *Political Liberalism*, New York, Columbia University Press, 1993, ch. VI.

<sup>35</sup> For a recent attempt at justifying judicial review in these terms see P. Rosanvallon, *La légitimité démocratique*, Paris, Seuil, 2008.

<sup>36</sup> It should be noted, however, that the focus on constitutional conflicts allows Kumm to preserve a space for national autonomy.

<sup>37</sup> Case C-341/05, C-438/05.

collective agreement containing terms that were more favourable than those laid down in the relevant legislation. In these cases the starting point of the Court's argument has been that the right to strike is conditional on the satisfaction of the proportionality test. This directs courts to consider whether there was any other form of action open to the unions which would have been less restrictive of the employer's free movement rights. But the point of the practice of industrial action is to cause harm to the employer because otherwise it won't be really effective in persuading it to make concessions<sup>38</sup>. For this reason, it does not look promising to assess the right to strike with the tools of proportionality analysis. As it has been noted, usually

the proportionality test is commonly used as a way of assessing the state's limitations on the right to strike [...] However, in *Viking and Laval*, the right to strike is not the starting point for the analysis. Instead, the ECJ's reasoning begins with the employer's assertion of its free movement rights [...] Thus, it is the union's industrial action which must pursue a legitimate aim and which must not go beyond what is necessary to achieve that aim<sup>39</sup>.

Therefore, in *Laval* the Court considered that industrial action as blockading of sites constitutes a restriction on the freedom to provide services which is disproportionate with regard to the *public interest*. The suspicion is that we are not witnessing an ordinary balancing but rather a structural imbalance<sup>40</sup>, other than a re-interpretation of Treaty provisions that is "marking a substantial hierarchy between economic and social rights"<sup>41</sup>.

It is clear that the preponderant focus on the work of courts cannot put into question some of the unchallenged assumptions on which is based a case like *Laval*<sup>42</sup>. The principle of proportionality very much assumes that the boundary of rights have been established before any political process, so that it is possible to think that a statute or a collective action should infringe a right as little as reasonably possible. But if one considers the idea of common good as something whose content has not been settled once and for all because of an agreement on certain outputs between the relevant actors<sup>43</sup>, then one is left wondering what is the common measure or yardstick

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<sup>38</sup> A. Davis, "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ", *Industrial Law Journal*, 37 (2008), pp. 140-144.

<sup>39</sup> Ivi, p. 141.

<sup>40</sup> On the difficulties of proportionality analysis applied to the balancing between fundamental freedoms and other rights, in particular with the right to implement collective action, see the comments, made before the decisions were taken, by E. Bercusson, "The Trade Union Movement and the European Union: Judgment Day", *European Law Journal*, 13 (2007), pp. 279-308.

<sup>41</sup> A. Davesne, "The Laval Case and the Future of Labour Relations in Sweden", *Cahiers européens*, 1 (2009), p. 9.

<sup>42</sup> Not to mention the fact that if it is the court that identifies the relevant interests, then why should the interests of the parties before the court be privileged over the interests of others equally affected by the outcome of the decision?

<sup>43</sup> On the general difficulty even for democratic theory to set normative criteria for the definition of common goods see

against which evaluating the weight of the interests involved<sup>44</sup>. Things become even more complicated when proportionality analysis is performed outside the framework of the constitutional State. In the latter case, to the question on the standard according to which one is supposed to measure the optimization of rights or principles, one may respond, as Alexy puts it, somehow elusively, “the constitutional point of view”<sup>45</sup>. The point is that the meaning of this constitutional point of view, at least in Europe, is far from being clear.

Another controversial aspect of the proportionality analysis should be mentioned. In the case of *Laval*, the ECJ did not take properly into account the peculiar structure of the Scandinavian social model and therefore questioned the state’s failure to regulate the collective bargaining process on which it was relying for full implementation of the Posted Workers Directive<sup>46</sup>. Clearly, it would have been unrealistic to ask to the Court to assess and take into consideration all the aspects linked to the peculiar Scandinavian social model involved in the litigation. And this is due to the fact that, the principle of proportionality, as it stands today, does not give a voice to all the parties involved<sup>47</sup>. To put it more accurately, proportionality and the law of balancing appear to be conceived within a pre-constituted framework which sets the content of fundamental rights without taking into account the disagreement on the same rights. For this reason, once left to the jurisdiction of courts, rights are claimed by the applicant and that state of affairs may create a presumption of priority<sup>48</sup>. Despite what might appear as obvious, the European contextual root of Kumm’s proposal is hardly the only reason that can explain his “single institutional” approach. Indeed, when he has to evaluate judicial review, Kumm clearly sides with what has been defined as legal constitutionalism<sup>49</sup>. Recently, he has clarified his position on this issue, qualifying it as part and parcel of a rationalist paradigm<sup>50</sup>. The point of judicial review is to allow what he defines as “Socratic contestation” for those excluded by the political process. Kumm is right when he affirms that

it is utterly implausible to claim that through ordinary legislative procedures ‘the people

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T. Christiano, “The Authority of Democracy”, *Journal of Political Philosophy*, 12 (2004), pp. 266-290.

<sup>44</sup> G. Webber, “Proportionality, Balancing, and the Cult of Constitutional Rights”, *Canadian Journal of Law and Jurisprudence*, (2010), p. 193.

<sup>45</sup> R. Alexy, “On Balancing and Subsumption. A Structural Comparison”, *Ratio Juris*, 16 (2003), p. 442.

<sup>46</sup> This shows a superficial understanding of the industrial relations context. And the test of proportionality was decided on such a reductive understanding.

<sup>47</sup> G. Davies, “Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time”, *Common Market Law Review*, 43 (2006), pp. 63-84.

<sup>48</sup> E. Brems (ed.), *Conflict Between Fundamental Rights*, Antwerpen, Intersentia, 2008, p. 3.

<sup>49</sup> Cfr. R. Bellamy, *Political Constitutionalism*, Cambridge, Cambridge University Press, 2007.

<sup>50</sup> It seems that for Kumm constitutionalism is mainly rationality. This is why its principles may be recognized by a competent organ even in the case they had not been enacted.

themselves' decide political questions, whereas decisions of duly appointed judges are cast as platonic guardians imposing their will on the people<sup>51</sup>.

It is possible to think of multiple sites where to articulate the will of the people and this is usually the task of the principles of representation and separation of powers. However, in this passage one can detect also a serious misunderstanding of modern democratic politics. Kumm is reacting against political constitutionalists of the British and American kind<sup>52</sup>, and in particular he wants to undermine their institutional preference for the role of parliaments. He believes that by weakening the link between the people and parliament he can reject political constitutionalism. If one admits that representative democracy is a second best solution because it precludes the people from directly deciding, so goes the argument, then it becomes also legitimate the role of an institution like a constitutional court which is equally distant from the people. But this move proves to be too quick. In fact, there is no strict connection between the claim that the people cannot be properly represented by any single institution and the claim that what is normatively relevant for contemporary constitutionalism should not be determined by the will of the people. Kumm thinks that "the rhetoric of 'the people themselves' sabotages clear thinking"<sup>53</sup>, but if one concedes that representative democracy is the best version of democratic legitimacy<sup>54</sup>, then this argument loses much of its theoretical grip. Here lies the *ratio* of pluralism in Kumm's version:

on the conceptual level, constitutional pluralism allows basic commitments of liberal democracy to be articulated in a way that divorces them from the Hobbesian statist conceptual framework in which they originally had to fit. It allows us to reconceive legitimate authority and institutional practices in a way that makes without the ideas of the state, of sovereignty, of ultimate authority, and of 'we the people' as basic foundations of law and the reconstruction of legal practice<sup>55</sup>.

The reference to a concrete collective sovereign would shift the *locus* of legitimacy from reason to collective will, a move highly dangerous for Kumm since, as noted earlier, it would reintroduce particularity in the constitutional system and this would taint the judges' ability to

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<sup>51</sup> M Kumm, "Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review", *European Journal of Legal Studies*, 1 (2007), p. 26.

<sup>52</sup> In this quotation, it is quite evident that the reference goes to L. Kramer, *The People Themselves*, New York, Oxford University Press, 2004.

<sup>53</sup> M. Kumm, "Institutionalising Socratic Contestation", cit., p. 27.

<sup>54</sup> See, e.g., N. Urbinati, *Representative Democracy*, Chicago, University of Chicago Press, 2006.

<sup>55</sup> *Four Visions of Pluralism*, cit., p. 366.

perform proportionality analysis.

According to Kumm, the authentic institutionalisation of the practice of contestation has been realized by the contemporary European system of courts. This has been possible because of a series of propitious conditions, not available before World War II (and probably not even before the fall of the Wall). The point of this practice is aptly described by the author in these terms: “The most likely way that a citizen is ever going to change the outcomes of a national political process, is by going to court and claiming that his rights have been violated by public authorities”<sup>56</sup>. This is the gist of Kumm’s argument: courts constitute a more effective and viable channel for representing disagreement than the political process. In this way, contemporary European constitutionalism, after having learned its lessons from the disasters of the “short Century”, protects itself from the return of nationalism, one of the worst evils generated by European history and by its modern metaphysics<sup>57</sup>.

Kumm’s approach is highly representative of a typical *forma mentis* of the European scholar, which understands constitutionalism in atomistic terms, leading to a legal environment which envisages as the only appropriate spaces of contestation and of claiming those represented by national and international courts. Coherently, rights are conceived as individual safeguards against the State and the focus of the constitutional theorist remains on the relationship between the individual and the State, or to put it in a more theoretical shape, between the individual fundamental rights and the policy promoted by a majority of citizens or politicians.

Once again, things are portrayed in this way because it is believed that the reasonableness of the arguments put forward by the legal authority and by the dissenters can be checked only by judicial reasoning through balancing. To put it shortly, this is a restatement of the idea that courts are forums of principles and political institutions forums of policies<sup>58</sup>. If one conceives rights as optimisation (and not maximization) requirements – as Kumm seems to do – then courts become the most effective locus for balancing between rights. Yet, it is telling that some of the test-cases to whom Kumm refers in developing a theory created in order to solve constitutional conflicts through judicial bodies, were finally resolved by the political process. In Ireland, the prohibition of abortion was saved at the Community level by adopting a special protocol exempting Ireland from certain Community rules. In Germany, the *Kreil* case triggered a change in the Basic Law<sup>59</sup>.

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<sup>56</sup> M. Kumm, *Institutionalising Socratic Contestation*, cit., p. 25.

<sup>57</sup> Kumm individuates in Hobbes the main responsible for the creation of this «monster» and refers to Kant and Rousseau as the main theorists of this nationalist republican constitutionalism. This is quite a superficial reading of these two authors. For a different reading, among many available works, see N. Urbinati, *Representative Democracy*, cit.

<sup>58</sup> R. Dworkin, *A Matter of Principle*, Cambridge Mass., Harvard University Press, 1985, ch. 2.

<sup>59</sup> M. Kumm, *The Jurisprudence of Constitutional Conflict*, cit., p. 270.

### 3. The Institutional Version of Pluralism: Maduro's Contrapunctual Principles

Another body of work highly influential for constitutional pluralism has set the contribution of the ECJ in terms of “necessary cunningness” in the process of juridification of the EU. The so-called dual nature of supranationalism, that is, the idea that the integration process has been marked mainly by legal means and only marginally by political processes<sup>60</sup>, has now been challenged by different perspectives. Miguel Maduro, in order to avoid the risks federalists have outlined, has introduced meta-principles in order to regulate the relation between supranational and national courts. These principles are defined as “contrapunctual” and they aim at avoiding chaos and conflict in a polity where there are multiple sites of constitutional authority. They are, clearly, normative principles and should constitute the core of constitutional pluralism, that is, pluralism viewed from the internal perspective of every institutional actor. As already remarked, if pluralism were circumscribed to a descriptive level, it would simply amount to the recognition of a state of affairs that one may approve of or not. The move to a normative level implies that all the actors involved in pluralism should start acting guided by reasons given by the idea of constitutional pluralism. For example, they should recognize the fact that there are other constitutional sites representative of competing equal claims. The point is that collisions between different constitutional perspectives in a pluralist environment are almost unavoidable. A framework to pre-empt (or at least to contain) possible conflicts needs to be introduced within this perspective. As it should be clear, this move is very close, in substance, to Kumm's appeal to fundamental and common constitutional values. Pluralism cannot be taken to its extreme consequences, otherwise it will collapse into something completely different, giving way to anarchy and to the manipulation of the legal order by the most powerful. For this reason, by introducing contrapunctual principles, Maduro certainly wants to limit pluralism in a significant way. In this sense, he presents his theory not as a radical, but a more modest version of pluralism<sup>61</sup>. Interestingly enough, the principles he puts forward are addressed first of all to courts (national and European).

The first principle to which courts should subscribe is *pluralism* itself:

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<sup>60</sup> It is interesting to note that the idea of the ECJ's necessary cunningness has been adapted outside a pluralist framework by Julio Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, Oxford, Hart, 2002. Cruz resorts to John Ely's theory of judicial review as protecting democracy from its weaknesses for explaining how the Court sought to correct for national representational deficiencies or to relieve supranational decisions amidst the complexly overlapping layers of governance. In that respect, Cruz is clearly moving beyond pluralism, advocating a strong form of European constitutionalism.

<sup>61</sup> Maduro makes it clear in *Four Visions of Constitutional Pluralism*, cit., p. 344. On the idea that Maduro's theory is not truly pluralist see the remarks made by M. Avbelj, *Questioning EU Constitutionalisms*, cit., p. 19.



any legal order (national or European) must respect the identity of the other legal orders; its identity must not be affirmed in a manner that either challenges the identity of the other legal orders or the pluralist conception of the European legal order itself<sup>62</sup>.

In other words, no court should affirm the supremacy of its legal order. This principle is intended to foster two values. First of all, it should protect national identity and the related idea that self-determination is fundamental in the formation of this identity. In the European context, the respect of national identity poses the problem of co-existence between different identities. The recognition of the value of self-determination<sup>63</sup> entails an attitude of respect between the European and the national level. This mutual recognition implies the acceptance of the existence of EU law on the one side, the respect for the claims of national constitutions on the other. The second value fostered by the idea of pluralism is *participation*. For Maduro, pluralism should be constructed in such a way as to promote the broadest participation possible. Leaving the construction of a pluralist legal order to courts means promoting the participation of certain subjects (those who can afford the transaction costs involved in EU law litigation). Litigants in EU case law “often coincide with multi-national companies and are supported by cross-national legal strategies while, for example, national court involvement in this litigation does not benefit from the same cross-national perspective or coordination”<sup>64</sup>. Also, the dialogue between national courts and the ECJ tends to develop along separate national lines, raising the question of the uneven impact of different constitutional courts on the European dialogue. Maduro seems to admit that pluralism goes hand in hand with a certain conception of institutional (or more accurately, judicial) equality. Otherwise, pluralism in itself would never be able to yield a true European legal discourse. The third principle states that courts should seek consistency and vertical and horizontal coherence in the whole of the European legal order. Maduro notes that “(w)hen national courts apply EU law they must do so in a manner as to make those decisions fit the decisions taken by the ECJ but also by other national courts”<sup>65</sup>. Evidently, the same rule applies to the ECJ, which should take other courts’ decisions seriously. According to the third principle, “any judicial body (national or European) should be obliged to reason and justify its decisions in the context of a coherent and integrated European legal

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<sup>62</sup> M. Maduro, *Contrapunctual Law*, cit., p. 526.

<sup>63</sup> On this topic see the classic article of J. Raz, A. Margalit, “National Self-Determination”, *Journal of Philosophy*, (1990), pp. 12-34.

<sup>64</sup> M. Maduro, *Contrapunctual Law*, cit., p. 527.

<sup>65</sup> *Idem*, p. 528, Samantha Besson proposes a principle of coherence even more ambitious, that is, a principle to be respected by every constitutional actor: S. Besson, “From European Integration to European Integrity: Should European Law Speak with Just One Voice?”, *European Law Journal*, 10 (2004), pp. 257-281.

order”<sup>66</sup>. This means that courts should use reasons, which may later be adopted by other courts within the EU. Consequently, under this principle courts are not allowed to rely on specific provisions of their constitutions as justification because this could lead to “evasion and free-riding”<sup>67</sup>. In other words, it is better to prevent courts using the autonomy of their legal systems in their legal reasoning. This should be done in order to promote a virtuous cycle in the application and construction of EU law. According to Maduro, the avoidance of giving reasons based on its own constitution will make courts aware of the effects of their decisions on other national legal orders. In this way, Maduro believes, courts will internalise in their decisions the consequences for future cases in other national courts and in the system as a whole. This third requirement is probably the most demanding. Given the genetic link between most of the national constitutional courts and their constitutions, it is quite hard to provide reasons, for those courts, that are completely detached from the source of their legitimacy. One should not forget that most (if not all) of the national constitutional courts are thought to be the guardian of their national constitution<sup>68</sup>. Paradoxically, the universalisability requirement may force courts to solve most conflicts by themselves and this leaves no space for other institutions to step in. In the European Arrest Warrant saga, for example, the Polish Constitutional Tribunal left the decision of a conflict between a clearly formulated constitutional prohibition to extradite Polish nationals on the one hand and the requirement to do so imposed by a framework decision on the other to the constitutional legislator<sup>69</sup>. Following Maduro’s principle of universalisability, the Polish Tribunal should not have left the decision to the legislator, because the reference to the condition of Polish citizenship cannot be universalized.

The fourth and last principle is probably the most original among those advanced by Maduro: the idea of *institutional choice*<sup>70</sup>. According to this principle, “each legal order and its respective

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<sup>66</sup> M. Maduro, *Contrapunctual Principles*, cit., pp. 529-530.

<sup>67</sup> *Ibid.*, p. 530.

<sup>68</sup> This does not mean, however, that they have a monopoly on constitutional meaning.

<sup>69</sup> This point has been made by J. Komárek, “European Constitutionalism and the European Arrest Warrant: In Search of the Limits of Contrapunctual Principles”, *Common Market Law Review*», 44 (2007), pp. 30-39.

<sup>70</sup> Maduro builds his proposal on the theoretical background provided by the neo-institutionalist theory of N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy*, Chicago, Chicago University Press, 1994. Komesar pleads for an increase of the awareness of institutional choice in constitutional law and constitutional theory. The “institutional choice” approach avoids two common mistakes. The first one has to be found in the exclusive focus, typical of law and public policy analyses, on “goal choice”. Of course, goal choice is important. Komesar expresses this importance in this way: «Goal choice and institutional choice are both essential for law and public policy. On the one hand, institutional performance and, therefore, institutional choice can not be assessed except against the bench mark of some social goal or set of goals. On the other hand, because in the abstract any goal can be accommodated with a wide range of public policies, the decision as to who decides determines how a goal shapes public policy. It is institutional choice that connects goals with their legal or public policy results» (p. 5). In other words, out of any institutional context, any set of goals is not really meaningful. According to Komesar, pure normative theory can not guide public policy because it can not determine *who* decides and *why*, a capital question for constitutional law. The other common mistake can be found in those works which show a certain awareness of the importance of the institutional setting. However, works like those of Richard Posner (see, e.g., *Economic Analysis of Law*, New York, Aspen, 2007, 7<sup>th</sup> ed. ) and John Ely (*Democracy and Distrust*,

institutions must be fully aware of the institutional choices involved in any request for action in a pluralist legal community” and “the importance of institutional choices in a context of legal pluralism only serves to reinforce the need to do adequate comparative institutional analysis to guide courts and other actors in making those choices”<sup>71</sup>. The introduction of institutional choice in a European context devises pluralism as a doctrine not only for the exceptional situation of constitutional conflict (as it is, to a certain extent, in Weiler and Kumm), but to guide the ordinary state of affairs. However, as we shall see below, Maduro’s pluralism does not seem to avoid the defects of “single institutionalism”. When he makes reference to the dialogic nature of the European legal order, he indeed reflects almost exclusively on the role played by courts and provides guidelines only for judicial behaviour.

The aim of these contrapunctual principles is to make “harmony” possible within a context of different “melodies”. A viable form of constitutional pluralism requires that every actor involved be ready to recognise the competing claims of each other and to mutually defer. In order to obtain this, conditions for mutual deference must be established. The idea is that all the actors involved must acknowledge the values of pluralism and acting consequentially. Maduro believes that pluralism is in itself an external theory: institutions should operate adopting the perspective of the legal system to which they belong<sup>72</sup>. At the same time, institutions should be aware of the possible interactions with other actors and other jurisdictions in the context of pluralism. One may see a danger for the coherence of European law in the fact that ordinary actors in the pluralist arena are not always playing fairly when it comes to the task of adjudicating in a context where heterarchy, rather than hierarchy, should be the rule. In this context, contrapunctual principles may easily degenerate into dissonance or cacophony<sup>73</sup>. It is a danger that cannot be underestimated. At this stage, it is also possible to point out an equal risk, but opposite in substance, that is to introduce a European aspect in the relevant national institution which would require too much from it. This may bring national courts to act as if they were European courts, which means that there could be two possible

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Cambridge Mass., Harvard University Press, 1980) share a tendency toward what Komesar defines as “single institutionalism”, that is, the focus on only one institution – the market for Posner, the political process for Ely. According to Komesar, asking in the abstract which institution is best at is meaningless. What is needed, and what Komesar is advocating, is comparative institutional analysis in a given setting of institutions.

<sup>71</sup> M. Maduro, *Contrapunctual Principles*, cit., p. 530.

<sup>72</sup> *Four Visions*, cit., p. 364.

<sup>73</sup> This risk has been pointed out by G. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, cit. and by J. Baquero Cruz, “The Legacy of the Maastricht Urteil and the Pluralist Movement”, *European Law Journal*, 14 (2008), pp. 389-422. According to the latter, pluralism endangers the rule of law. These critiques point toward the same line of argument. If law is not a hierarchically authoritative structure then it cannot secure some of the most important goods it is supposed to deliver. In particular, legal certainty, rule of law and management of conflicts. Of course, these remarks do not take into account that on the balance of reasons, constitutional pluralism has already opted for the safeguard of certain principles of national constitutions as the best safeguard both for the process of integration and for the Member States.

outcomes. One is the idea championed by Franz Mayer, according to whom national constitutional courts should also interpret EU law from the point of view of national constitutions, “generating national constitutional law versions of EU law”, as alternative to that of the Luxembourg Court. This position does not seem very convincing, because it is affected by several problems: It not only supports an asymmetrical and unilateral constitutional review, but it also asks to the single national constitutional court to act in order to be the guardian of the other Member State constitutions<sup>74</sup>.

If, on the other hand, national constitutional courts were asked to act like European Courts by introjecting certain European principles as normative guidelines, then the meta-principles required by Maduro would be reduced to an almost monist conception of the relation between European and national law. The emphasis on commonality might suggest a form of institutional pluralism, as promoted by the late MacCormick<sup>75</sup>. However, as ably remarked by Nico Krisch, “the character of the coherence requirement can also be interpreted in a more radical fashion, as merely a moral requirement for the different actors to show respect to each other, to display an orientation towards cooperation rather than conflict”<sup>76</sup>. This is a charitable interpretation, probably the best one for Maduro’s proposal. It makes the European legal order a compound of 28 legal systems, each one willing to engage at the European level respectfully<sup>77</sup>. However, several questions remain open. As in the case of Kumm’s theory, it remains open the question of the *status* and legitimacy of these meta-principles. Maduro’s solution is to interpret the content of these principles as a form of Sunsteinian incompletely theorized agreements, which might allow the possibility of agreeing on particular legal outcomes without an agreement on the fundamental values that may justify those outcomes<sup>78</sup>. This suggested interpretation looks quite weak if the aim of constitutional pluralism is to encourage some form of constitutional dialogue. If for Kumm the resolution of constitutional conflict lies in the individuation of some principles which are removed from among the “appropriate subjects for political decision”<sup>79</sup>, for Maduro, contrapunctual principles constitute a really thin grammar of a pluralist discursive public reason.

Despite its institutionalist touch, Maduro’s pluralism is still, even though not necessarily, court-centred. This is so for at least three reasons. First, the language and the substance of Maduro’s theory are always directed at courts. Second, the idea that the EU constitution is a remedy of

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<sup>74</sup> F. Mayer, *The European Constitution and the Courts*, in A. Von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law*, Oxford, Hart, 2006, p. 306.

<sup>75</sup> N. McCormick, *Questioning Sovereignty*, Cambridge, Cambridge University Press, 1999.

<sup>76</sup> N. Krisch, “The Case for Pluralism in Postnational Law”, *LSE working papers*, 10 (2009), p. 17.

<sup>77</sup> See, also, J. Dickson, “How Many Legal Systems?”, *Problema*, (2008), pp. 9-50.

<sup>78</sup> See C. Sunstein, *Political Conflict and Legal Reasoning*, New York, Oxford University Press, 1996; see, also, C. Richmond, “Preserving the Identity Crises: Autonomy, System and Sovereignty in European Law”, *Law and Philosophy*, 16 (1998), p. 417.

<sup>79</sup> J. Rawls, *Political Liberalism*, New York, Columbia University Press, 1993, p. 151 n 16.

Member State constitutions' failures is dependent on a proper institutional analysis. However, take for example, his reading of the former Article 28 EC: if understood as a political right, it gives traders a tool to question regulatory policies of a State to which they import their goods, forcing that State to justify its regulatory choices. One must seriously ask whether the judicial process in the Union is open enough so as it does not systematically favour only some type of litigants<sup>80</sup>. Third, it is in relation to courts that he highlights what might be called "institutionalist awareness": courts

must increasingly be aware that they don't have a monopoly over rules and that they often conflict with other institutions in their interpretation. They have to accept that the protection of the fundamental values of their legal order may be better achieved by another institution or that the respect owed to the identity of another legal order should lead them to defer to that jurisdiction. This requires courts to both develop instruments for institutional comparison and to set limits for jurisdictional deference at the level of systemic identity<sup>81</sup>.

It is the courts' specific role that bestows on them the responsibility of being at the institutional crossroads of several legal interactions. But why this institutional awareness should be limited to courts? Is it possible to extend it also to other institutional actors? And if yes, shall those actors be guided by exactly the same principles?

Before putting under scrutiny this possibility, it is better to take stock of what has been outlined up to now. Kumm's and Maduro's theories do not have the resources for avoiding the fact that constitutional pluralism be reduced to mainly judicial dialogue. Or at least, they do not engage directly with the question of how define politically the European public interest. The confinement of pluralism to the realm of courts presuppose an objective (but thin) understanding of fundamental rights and the idea of European common good may end up being only a sophisticated formulation of the *status quo* with no real engagement with the values promoted by a more politicized conception of the public interest<sup>82</sup>.

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<sup>80</sup> M. Maduro, *We the Court. The European Court of Justice and the European Economic Constitution*, Oxford, Hart Publishing, 1998, pp. 156-159.

<sup>81</sup> M. Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism", *European Journal of Legal Studies*, 1 (2007) (available at [www.ejls.eu](http://www.ejls.eu)).

<sup>82</sup> On the political conception of constitutionalism see R. Bellamy, *op. cit.*; A. Tomkins, *Our Republican Constitution*, Oxford, Hart, 2005; G. Gee, G. Webber, *What Is a Political Constitution?*, in «Oxford Journal of Legal Studies», 30, 2010, pp. 273-299.

#### 4. Assessing Pluralism Against the Common Good: An Enlarged View

Constitutional pluralism is extolled for several merits. They are supposed to be, at least, 1) learning, 2) more space for voice and 3) limitation of constituted powers<sup>83</sup>. The first value is realized through a common disposition for exchanging information and experience among different institutions belonging to different orders. The absence of a hierarchical authority, far from representing simply a constitutional impasse, may provide room for greater adaptability and responsiveness to changes. The second value usually associated with pluralism is the opening of new channels for contestation. This aspect enhances the representative dimension of constitutionalism by bringing in voices from institutional and perhaps non-institutional sites often neglected. The proliferation of sites of contestation, while improving conflict, may also help in making more visible and evident to citizens the role and the essential values of institutions. The third value implies that the multiplication of authoritative institutions will render problematic any claim of being an ultimate authority<sup>84</sup>. Furthermore, the need to reach a compromise among different levels involved in a decision or in its implementation should encourage a more cautious attitude from the subjects and, to go back to the first value, a willingness to listen and if necessary even to learn from the reason of other institutional actors.

In light of these remarks, the doubt that a strong constitutional take on pluralism may hamper these valuable aspects is legitimate<sup>85</sup>. This essay limits itself to note that one of the weakest spots in the pluralists account lies, as already remarked, in the absence of a more sophisticated account of the interaction between institutions belonging to different levels. In tracking common goods, a perspective on how different institutions interact in a multi-layered polity proves to be essential. According to Raz,

the existence of common goods depends on wide-ranging consensus. The relative absence of conflict of interests and the background of a common tradition makes the courts a suitable forum for the conduct of this branch of politics<sup>86</sup>.

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<sup>83</sup> Here I follow N. Krisch, *The Case for Pluralism in Postnational Law*, cit., pp. 20-33.

<sup>84</sup> See M. Maduro, *Europe and the Constitution: What If This Is as Good as It Gets?*, in J. Weiler, M. Wind (eds.), *European Constitutionalism beyond the State*, Cambridge, Cambridge University Press, 2003, p. 66. It would be interesting to confront this pluralist claim with Kelsen's idea that an ultimate legal norm is an essential feature of every legal system: cfr. J. Raz, *The Authority of Law: Essays on Law and Morality* (1979), Oxford, Oxford University Press, 2009 (2<sup>nd</sup> ed.), pp. 122-145.

<sup>85</sup> J. Tully, "The Unfreedom of the Modern in Comparison To Their Ideals of Constitutional Democracy", *Modern Law Review*, 65 (2002), pp. 204-228; E. Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society", *European Law Journal*, 9 (2003), pp. 401-432.

<sup>86</sup> J. Raz, *Ethics in the Public Domain*, cit., p. 59. See, also, id., "Rights and Politics", *Indiana Law Journal*, 71 (1995),

The role of courts in the tracking of common goods is obtained by serving individual rights which by being served consolidate the value of common goods. But if one assumes that the content of common goods, despite the fact that it is the product of a wider consensus, is open to discussion and debatable, even after a decision on it has already been taken, then Raz's position seems to be partial. It reproduces certain stereotypes on the difference between democratic processes as concerned on short-term interests and judicial activity concerned mainly with the protection of fundamental rights<sup>87</sup>. The politics of the common good, in a pluralist environment, should be represented at several levels by different institutions, each one putting forward a conception of the common good from a specific (representative) point of view.

Therefore, the lack of a reflection on the role of political institutions in the tracking of common goods casts a shadow on the ability of constitutional pluralism to provide for the values previously mentioned. Indeed, this view strikes as inaccurate both at a descriptive and at a normative level. On the first level, this institutional blindness<sup>88</sup> is probably due to the fact that there is a tendency in Europe to conflate legal reasoning with judicial reasoning<sup>89</sup>. The European Arrest Warrant saga represents a good example of a practice understandable in pluralist terms, even though the lesson one might draw from it remains far from univocal<sup>90</sup>. But in order to explain the dynamics behind this saga, one should not limit its account to the dialogue between the courts involved in the case. *Mangold*<sup>91</sup>, a case concerning discrimination on the ground of age, constitutes another example which might prove the necessity for an enlarged institutional view. In this case, the ECJ, leaving aside its case law on horizontal effect and temporary effects of Directives, recognized a new general principle of non discrimination on the basis of age<sup>92</sup>. This led to declare the incompatibility of a German law allegedly intended to introduce fixed-term contracts for employers older than 52 in order to facilitate their integration in the job market. Unsurprisingly, this decision was received with harsh criticism from the German parliament and the German President, generating a lively debate

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pp. 27-44.

<sup>87</sup> This is the position held also by R. Dworkin, *Taking Rights Seriously*, cit.

<sup>88</sup> For the notion of institutional blindness see A. Vermeule, *Judging under Certainty*, Oxford, Oxford University Press, 2007, pp. 16-18.

<sup>89</sup> Alec Stone Sweet has demonstrated that there is a general tendency to reason as judges do: *Governing with Judges*, Oxford, Oxford University Press, 2000.

<sup>90</sup> Was the Belgian court, the only one asking for a preliminary reference, acting as a pluralist court? For an evaluation of the Belgian Constitutional Court as a pluralist institution see E. Cloots, "Germs of Pluralist Judicial Adjudication: Advocateen voor de Wereld and Other References from the Belgian Constitutional Court", *Common Market Law Review*, 47 (2010), 645-672. For a reconstruction of the European Arrest Warrant saga as a pluralist case see D. Sarmiento, "The European Arrest Warrant and the Quest for Constitutional Coherence", *International Journal of Constitutional Law*, 6, 2008, pp. 171-183.

<sup>91</sup> Case C-144/04, 2005 ECR I-9981.

<sup>92</sup> M. Schmidt, "The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment", *German Law Journal*, 7, 2005, p. 509.

which will soon come to an end with a decision of the *Bundesverfassungsgericht*. In the meantime, the ECJ seems to have overruled its own position as a reaction to the German political backlash. In *Palacios de las Casas* and in *Bartsch*<sup>93</sup>, the Court reduced substantially the message sent previously with *Mangold*. This conflict proves that is the case that communication (and conflict) between institutions can be a more sophisticated, delicate and sometimes dangerous (for the authority of the ECJ) operation when national political institutions have a say in the debate. However, all this happens in an informal way, that is, outside formal institutional channels, and it may give the impression that what counts is mostly the political force of the involved institution(s).

On a normative level, to account for an encompassing view on the possible institutional dialogues in Europe would have represented a first step toward a constitutional theory which allows for more voices to be heard, more perspectives from which to learn and more sites of possible constitutional resistance. The tracking of the European public interest, as complicated as it certainly is, might also benefit from a more, say, pluralist understanding of the separation of powers between different layers. This separation may also represent the first step in the setting of normative criteria for solving conflicts between different interests underpinning the relation between European and national layers.

All this happens, also, in an under-theorized legal context which hardly will change any time soon. As known, the Treaty of Lisbon has introduced new powers for national parliaments which were already contemplated in the Constitutional Treaty. This could be understood as a first step toward a more political dialogue between European and national institutions. National parliaments are given a new instrument (the “Early warning system”) to police the application of the principle of subsidiarity. The Treaty incorporates a Protocol that lays out a special procedure to enable national parliaments to play that role. The Protocol establishes that the Commission should forward all documents of legislative planning and all legislative proposals to national parliaments at the same time as it forwards them to the European Parliament and the Council. All European legislative acts have to be justified with regard to the principles of subsidiarity and proportionality. Art. 4 states that “the reasons for concluding that a Union objective can be better achieved on the Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators”<sup>94</sup>. If a national parliament holds that a proposed legislative act is incompatible with a commitment to subsidiarity it can send a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission stating why it considers the draft in question does not comply with the principle of subsidiarity. This opinion should be taken into account and if at least a number of parliaments to

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<sup>93</sup> C-411/05, [2007] ECR I-8531; Case C-427/06 [2008] ECR I-7245.

<sup>94</sup> Protocol n. 2 on the Application of Subsidiarity and Proportionality.



which a third of all votes have been allotted have sent such a reasoned opinion, then the draft must be reviewed. The draft can then be maintained, amended or withdrawn and reasons must be given for this decision. The parliaments' veto is not binding, and the scope of this tool is limited, one might be reminded, to subsidiarity arguments, not proportionality. However, the aim of this provision is to create a framework of cooperation between the Commission, the Council and national parliaments in order to produce a written record of reasons so that the ECJ can assess them if asked to do so in litigation. But what is most interesting from a pluralist perspective is that parliaments are not recognized legal standing and therefore cannot bring subsidiarity issues to the ECJ. Only the government of the Member State could bring action on parliament's behalf<sup>95</sup>. This means that there won't be any direct channel of communication between the ECJ and national parliaments. Of course, it is far from being clear that a political question needs to be taken to court<sup>96</sup> (but then, one wonders whether this argument can be valid for every subsidiarity issue) and it is questionable to refer to national parliaments as a collective entity while it is clear that there are huge differences among legislatures across Europe<sup>97</sup>. Moreover, in the absence of a lasting practice, it is difficult to assess the impact of these provisions on subsidiarity.

As it happens in other constitutional experiences, a dialogue, or sometimes, a conflict between institutions belonging to different constitutional layers of the polity may help both spark a debate on the meaning of certain constitutional features and on the application and interpretation of fundamental rights<sup>98</sup>. Obviously, the single-institutional approach advocated by some constitutional pluralists is constrained by certain legal rules (like the preliminary reference rule) which shape the institutional interactions between institutions at the European level. But the assumptions of the pluralists' approach do not rule out completely the possibility to enlarge the scope of these interactions in order to include other perspectives. Indeed, one can already find traces of this possible enlarged view<sup>99</sup>. The reason why this kind of enlarged dialogue/conflict may become normatively desirable lies in what every institution represents. As remarked by William Eskridge

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<sup>95</sup> This was criticized already in the aftermath of the Constitutional Treaty by B. Donnelly, L. Hoffmann, *The Role of National Parliaments in the European Union*, Federal Trust for Education and Research policy Brief, 3, 2004, and A.C. Cygan, *The Role of National Parliaments in the EU's New Constitutional Order*, in T. Tridimas, P. Nebbia (eds), *European Union Law for the Twenty-First Century*, Oxford, Hart, 2004.

<sup>96</sup> P. Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building*, Den Hague, Kluwer, 2006, p. 166.

<sup>97</sup> See L. Verhey, H. Broeksteeg, I. Van den Driessche (eds), *Political Accountability in Europe: Which Way Forward?*, Groningen, Europa Law Publishing, 2008.

<sup>98</sup> J. Waldron, "Some Models of Dialogues Between Judges and Legislators", *Supreme Court Law Review*, 23 (2004), pp. 7-21; J. Hiebert, "Parliamentary Bill of Rights: An Alternative Model?", *Modern Law Review*, 69 (2006), pp. 7-28; C. Bateup, "The Dialogic Promise. Assessing the Normative Potential of Theories of Constitutional Dialogue", *Brooklyn Law Review*, 71 (2006), pp. 1109-1180.

<sup>99</sup> See J. Komárek, *Institutional Dimension of Constitutional Pluralism*, in M. Avbelj and J. Komárek, *Constitutional Pluralism in Europe and Beyond*, cit. Komárek notes that an institutional perspective on pluralism should focus less on choice (because it lacks clear normative criteria) and more on involvement and communication.

and Philip Frickey in an essay on a different legal context, different institutions seek “to promote [their own] vision of the public interest”<sup>100</sup>. This view would probably vindicate Daniel Halberstam’s idea of constitutional heterarchy. After having outlined three constitutional values (democracy, expertise and fundamental rights), Halberstam makes a case for different claims based on the values of constitutionalism:

none of these values is exclusively or even reliably associated with one or another of the contending actors. At different times, different actors can lay claim to be vindicating any one or more of these values. If an actor can maximize all three values in any given case, that actor’s claim to authority within the system becomes paramount. If, as is more frequently the case, different actors can lay only partial claim to one or the other of these values, the stage is set for constitutional confrontation<sup>101</sup>.

In conclusion, one of the possible ways to track down European common goods lies, once again, in the interplay between representative institutions and the principle of separation of powers, even when this problem is tackled with in a multilayered polity as the Europe Union is supposed to be. Constitutional pluralism indicates an interesting route that might be followed to arrive at a better formulation for a European politics of the common good. However, it represents only a first step that needs to be supplemented, firstly, by more attention to input reasons as provided by political processes and, secondly, to a thicker pluralist interplay between different powers and institutions.

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<sup>100</sup> W. Eskridge, P. Frickey, “Law as Equilibrium”, *Harvard Law Review*, 108 (1994), p. 28.

<sup>101</sup> D. Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in J. Dunoff, J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law & Global Government*, Cambridge, Cambridge University Press, 2009, pp. 326-365.