Zuzenbidearen eta Gizartearen ikuspegitik Europako pluralismo kultural, legal eta konstituzionalen arteko harremanari buruz egindako azterketa. Europan kultura-aniztasuna, soziologikoki konplexuak diren gizarteei, aniztasun etikoari eta nazionalismoari lotuta, immigrazioaren eta erlijio-aniztasunaren ondorio da gero eta gehiago. Bizi-estilo, sinesmen, ohitura eta "legaltzat" jotako arau sozialen aniztasuna. Estatuko legea eta aniztasunarekiko erreakzio ofiziala funtsezkoak dira "pluralismo juridikoan". Dena den, nazioaz haraindiko fenomeno juridikoek eta fenomeno globalek pluralismo gehiago sorrarazten dituzte.

Giltza-Hitzak: Pluralismo kulturala. Kultura-aniztasuna. Pluralismo legala. Pluralismo konstituzionala. Europa kosmopolita. Herri subiranotasuna. Giza eskubideen estandarrak. Konstituzioen sarrerak.

Análisis realizado desde el punto de vista del Derecho y la Sociedad sobre la relación entre el pluralismo cultural, legal y constitucional en Europa. El multiculturalismo en Europa, vinculado a sociedades sociológicamente complejas, diversidad étnica y nacionalismos, es cada vez más una consecuencia de la inmigración y la diversidad religiosa. La diversidad de estilos de vida, creencias, costumbres... y de las normas sociales consideradas "legales". La ley de estado y la reacción oficial a la diversidad son esenciales en el "pluralismo jurídico", pero los fenómenos jurídicos transnacionales y globales generan nuevos pluralismos.

Palabras Clave: Pluralismo cultural. Multiculturalismo. Pluralismo legal. Pluralismo constitucional. Europa cosmopolita. Soberanía popular. Estándares de Derechos Humano. Preámbulos de las constituciones.

Analyse réalisée du point de vue du Droit et la Société sur la relation entre le pluralisme culturel, légal et constitutionnel en Europe. Le multiculturalisme en Europe, lié à des sociétés sociologiquement complexes, diversité ethnique et nationalismes, est de plus en plus une conséquence de l'immigration et la diversité religieuse. La diversité des styles de vie, croyances, coutumes... et des normes sociaux considérées "légales". La loi d'état et la réaction oficiel à la diversité sont essentiales dans le "pluralisme juridique", mais les phénomènes juridiques transnationaux et globaux génèrent de nouveaux pluralismes.

Mots Clés : Pluralisme culturel. Multiculturalisme. Pluralisme légal. Pluralisme constitutionnel. Europe cosmopolite. Souveraineté populaire. Droits Humains standards. Préambules des constitutions.

European pluralist takes on We the People

Bengoetxea, Joxerramon
Univ. of the Basque Country (UPV/EHU).
Fac. of Law. Dpt. of Administrative and Constitutional
Law and Philosophy of Law.
Pº Manuel de Lardizabal 2. 20018 Donostia
joxerramon.bengoetxea@ehu.es

BIBLID [0212-7016 (2013), 58: 2; 284-307]

Reccep.: 31.08.2012
Accep.: 11.12.2012

The aim of this paper is to discuss the relationship between three types or expressions of pluralism in Europe: (1) cultural pluralism, usually portrayed as multiculturalism, (2) legal pluralism or normative diversity and (3) constitutional pluralism. Multiculturalism in Europe, traditionally linked to sociologically complex societies with an increasing number of subcultures or to ethnic diversity, national minorities, regionalisms and nationalisms is now increasingly the result of immigration and religious diversity. This rich plurality brings along not only a diversity of lifestyles, beliefs, mores, languages, looks, fashion, attire, gastronomy, and the like, but also social (religious or moral) norms concerning aspects like family relations, marriage forms and rights and duties of spouses, divorce, and many other matters that can be considered as forms of legal norms or law. The result of this cultural diversity, in the normative domain, is something close to what legal sociologists, anthropologists and comparativists call 'legal pluralism', in debates where the State and its official reaction to such diversity occupies a prominent role. However, the transformations of the State in the European Union and the new transnational and global legal phenomena give rise to new forms of pluralism that need to be accounted for. It is worth analysing the way in which such diversity of social and legal norms is integrated into a new European system protecting fundamental rights and claiming to have a final say on the many, ever-growing, areas of European legal concern. States and their constitutional courts remain as key, but no longer sole and perhaps no longer ultimate, custodians and this new poly-archy gives rise to new pluralist discussions labelled under the term constitutional pluralism. This article thus seeks to connect these different social phenomena.

Here is a fine question for social scientists and methodologists interested in the law, but it also encompasses issues of normative and constitutional prognosis as to whether for example a European People, a constituent *demos*, will eventually conform giving rise to a new discussion of pluralism and monism which it might be interesting to compare to and contrast with the federal constitutional foundation of the USA. The current context of European crises where these different forms of pluralism are interacting makes it necessary for scholars and citizens to understand diversity within Europe, to analyse cultural plurality and the legal claims and challenges that it generates on the legal system and on institutions at all levels:

local, regional, state and supranational, and to see how the different responses at these levels themselves create a new pluralistic picture. Such has been the subject of my course at the Stanford Law School (2012 Spring) entitled: “Cultural, Legal and Constitutional Pluralism in Europe”.

1. Cultural, Legal and Constitutional Pluralism in Europe[1]

Rights and obligations in Europe are assigned to individuals. In a very important sense, as Stanford professor Lawrence Friedman argues, the *Human Rights Culture* is individualistic. But clearly, individuals are not *noumenal* or atomistic self-standing cultural or social units and many of their rights and obligations become meaningless without the social, community or group dimension[2]. The point is not that rights are vested in groups; “group rights” is a hotly debated issue. Clearly, rights have a social and collective dimension but the suggestion is rather that (some) individuals conceive of and lead more valuable lives through their membership of groups (“rights through a group”) rather than being left on their own to devise their vision of the good. We can be normatively individualist but cognitively social or communitarian.

European legal culture tends to be individualistic in a normative sense, but Europe is characterized by diversity, plurality, and complexity in a cultural and social sense. There are over thirty widely used languages in the EU, not all of them official; a handful of major World religions together with and a plethora of non-religious and anti-religious beliefs, together with a rich collection of traditions, histories of peoples and groups of ethnic and national minorities. Some of these territorial national minorities often, not always, happen to be majorities in their territories and other times they are territorially separated from the State of their national identity. This is the case, for instance, of Hungary and the Magyar in Romania, or of Serbian Kosovars and Muslim Serbians in Kosovo and Serbia, a thorny reminder of the complex linguistic, ethnic, national and religious mosaic in the Balkans. Others are non-territorial minorities (the Roma or gypsies), and, scattered mostly in the major metropolitan areas, there are communities of immigrants, and urban subcultures. Cultural diversity in Europe therefore springs from a diversity of sources (**the players**):

- National, cultural or linguistic minorities (e.g. Serbians in Kosovo after independence in 2008, Kosovars in Serbia before 2008, Catalans in Spain, Kanaks in France);

1. The course description runs: “The purpose is to examine cultural, legal and constitutional plurality in the European Union. A ‘comparative legal cultures’ approach will be combined with a jurisprudential focus on pluralism, following the concept of law as institutional normative order (MacCormick). We will analyse the challenges of plurality and inter-culturality to the European integration project, based on recognition and harmonisation. This topic receives attention from different circles, from academic research to court practice, from civil rights movements to state-national and regional legislatures, from the Council of Europe to the OSCE.”

2. Habermas, *op.cit.* p. 88: “*At a conceptual level*, rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another”.

- Immigrant groups with organised religious claims (e.g. Muslims in Europe);
- Non-territorial ethnic minorities with a special way of life (e.g. the Roma in Europe);
- Other heterogeneous groups: sub-urban minority groups and sub-cultures, rights-groups claiming accommodation and recognition of their difference (based on gender, sexual orientation, disabilities, lifestyles, ideologies, age);
- Other cases that are hard to classify (e.g. Gibraltarians in the UK resisting Spanish sovereignty claims and maintaining privileges under the Commonwealth and the Crown, or Russians in Latvia)

This is a pan-European classification. The classification may differ in each of the European Member States (e.g. it will be different in Portugal, in the UK, and within the UK, it will be different in Scotland, Wales or Northern Ireland, in Finland, in Slovakia, in Latvia, in Austria or in Greece, to name but a few). In other parts of the world, multicultural studies focus on other major sources. In the USA's melting pot indigenous peoples, immigrant communities and racial minorities get more attention than national minorities; but in Canada, national minorities are brought to the fore. In India, religious, cultural, and national minorities, along with the class stratification, are highlighted[3].

One of the key distinctions regarding the study of pluralism, cultural and legal, is that between the descriptive-interpretative aspect of pluralism and the normative or practical reason discourse about pluralism. In the former, pluralism, a social fact, is better referred to as plurality or diversity, and its counterpart would be uniformity. In the latter, the term pluralism or multiculturalism is apt to convey the idea that such diversity is to be accommodated for and advanced within a given social space, and its antonym would be monism, or simply, assimilation. Multiculturalism calls for political accommodation by the state and/or a dominant group of all minority cultures and coexistence between groups, by reference to race, ethnicity, religion, language, nationality or aboriginality. Studies of cultural diversity or plurality and normative proposals of multiculturalism draw from each of these different groups. Some methodological risks that follow from confusing the two dimensions when analysing the social space include (i) confusing the two types of discourse, descriptive and normative, (ii) prioritising one type of minority over the others, (iii) ignoring the presence of other minority groups or (iv) forgetting to bring other minorities into the light and into practical discourse when advancing claims of one particular group. Meer and Modood, two sophisticated and methodologically aware scholars, seem to prioritise immigration (and thus religion) over sub-state

3. Werner Menski, in his Osaka lecture (2002), makes an interesting comparison of the multicultural models: "In the USA, the image of the 'melting-pot' is still relevant, but has quietly been replaced by the 'salad bowl' model, in which cultural and ethnic identities do not just disappear through a process of blending the elements of the multicultural salad. The cucumber is still a cucumber, and the tomato still a tomato, but they have taken on a different flavour, too. In Canada, the 'mosaic' model has been applied to create an image of Canadian society as composed of all kinds of immigrants and their descendants. Australia has begun to recognize this pluralizing fact, too, and various European countries are experimenting with different models of respect for ethnic minority groups and their socio-cultural needs.

nations in the West: "[D]espite Kymlicka's attempt to conceptualize multiculturalism as multinationalism, the dominant meaning of multiculturalism in politics relates to the claims of post-immigration groups"[4].

On a practical reason dimension, these groups all make social, political and legal claims on rights and policies in various ways. They all claim (official) **recognition** of their difference, non-discrimination and resistance to assimilation; they all aim at participation in social and political life of the wider organised society and call for a nuanced understanding of the principle of equality as non-discrimination and awareness to difference – treating like cases alike and not treating unlike cases alike. Depending on their identities, and their perceived needs and interests, each of the identified categories of groups make specific claims (**demand side**):

- National minorities make territorial, cultural, linguistic claims, demands for devolution and self-government and for official recognition and constitutional accommodation;
- Religious groups claim respect, tolerance and freedom to pursue and practice their own, distinct view of the good;
- Ethnic minorities claim non-discrimination and equality and special measures of inclusion or positive discrimination (indigenous people have special claims related to their territories and local knowledge and way of life, whereas non territorial ethnic minorities have cultural and recognition claims);
- Other groups claim non-discrimination, respect and support for their special social, cultural needs

It is largely the role of a sociologically minded legal theory and political science to study and explain such claims or demands, and it is the role of the philosophy of practical reason to study and critically assess them. This is the most difficult but adequate approach to "pluralism": it tries to study and understand the types of claims and the responses – legal and political strategies, reasons and techniques – to those claims, and defers the evaluation of these debates to a latter stage.

These claims for access, power, empowerment, recognition, tolerance, respect, equality are made before different institutions: legislatures, policy-makers, jurisdictions and administrations, and also before non-public organizations (e.g. mass media, telecommunications, cultural industry, educational sector, labour environment, political parties, trade unions, NGOs). Public institutions, organizations, agencies and bodies with an authority to make general norms and determine public policies or to apply those general rules and generate individual norms responding to these claims in different ways (**supply-side**)[5]:

---

4. Nasar Meer and Tariq Modood, *art cit*, p. 181

5. The *Stanford Encyclopaedia of Philosophy*, entry "Multiculturalism" mentions the following supply-side examples of cultural accommodations or "group-differentiated rights": exemptions from generally applicable law (e.g. religious exemptions), assistance to do things that the majority can do unassisted (e.g. multilingual ballots, funding for minority language schools and ethnic associations, affirmative action),...

- Containing demands for difference, (majority is supported facing minority claims)
- Reinforcing equality as "uniformity" or assimilation, denying the relevance of difference,
- Reconstructing equality as non-discrimination, recognising a claimed difference;
- Granting special rights of representation for collectives (often seen as special privileges);
- Recognising, accommodating differences (from reasonable accommodation to full blown pluralism and programs for inclusion
- Mainstreaming the differences and encouraging a normative and communicative situation between majority and minority positions, either through legislative measures or judicial recourse to equity and exceptions.

These responses take place at different levels, and different institutions or legal strategies (e.g. adoption of general, universal norms or dispute resolution through litigation or alternative methods) and vary according to territorial-institutional perspectives. They have a lot to do with access to power and power sharing. Constitutional theory, administrative law and sociologically informed legal theory, amongst other academic disciplines, ought to analyse such responses and to do so in an inter-disciplinary and comparative way. Depending on the powers or competences assumed by each institutional arrangement, the types of demands and the types of norms and decisions adopted, the reactions vary greatly (**the institutional levels**):

- Local level, e.g. permits for the building, or opening of a new mosque, family counselling services, school boards / normally accommodation v rejection takes the form of administrative decision; but other forms like mediation can also solve individual conflicts;
- Regional level: housing and social benefits, provision of health, taxes, education policy, infrastructures, cultural promotion, social inclusion policy / accommodation or containment can take the form of legally recognised and enforceable rights, or promotion policies; also administrative decisions and judicial individual norms;
- Member State level: immigration, labour laws, justice, of course Human Rights constitutional control / legislative accommodation through universal norms, social and cultural policies, individual judicial decisions at highest courts;

... representation of minorities in government bodies (e.g. ethnic quotas for party lists or legislative seats, minority-majority Congressional districts), recognition of traditional legal codes by the dominant legal system (e.g. granting jurisdiction over family law to religious courts), or limited self-government rights (e.g. qualified recognition of tribal sovereignty and federal arrangements recognizing the political autonomy of Quebec).

- European level (very complex governance): harmonization of laws, free movement, internal market, non-discrimination directives[6], promotion measures and programs, but also judicial decisions.

Multiculturalism can be seen as a comprehensive normative theory guiding public policy and decision-making in many different domains[7]. These different responses are then also controlled, overseen or supervised by European supranational institutions by reference to commonly shared European values and standards as recognised by and interpreted from important Human Rights instruments (**the standards**):

- Council of Europe; European Convention of Human Rights, European Court, Venice Commission: depending on the existence of a European consensus there will be more or less margin of appreciation left to the states, e.g. special constitutional traditions like Turkish or French *laïcité* or radical secularism, or special Catholic culture in Italy,
- European Union institutions and the values of integration: the ever closer union of peoples Subsidiarity, margin of appreciations, harmonization, solidarity, loyalty and cooperation, mutual recognition, equal treatment,
- EU Charter of Fundamental Rights, and Social Charter: Fundamental Rights, HR Agency,
- (Peace and) Security and Cooperation OSCE: the whole rationale of the democratization of Central and Eastern Europe
- UN Legal Instruments, Conventions on Human Rights, individual and collectively understood, and UN soft law on Human Rights

Interesting tensions and dynamics obtain as to the descriptive-interpretative question as to who is actually setting the standards and highlighting the values and as to the normative question of who should be setting those standards: local versus European or global. As mentioned above to the extent that a “European” consensus may have emerged, the local – meaning national – margin of appreciation will decrease and to the extent that the challenges at stake need to be and actua-

6. The EU Antidiscrimination directives do not provide an equal level of protection: (Race) Directive 2000/43/EC prohibits discrimination on the ground of race in the areas of employment, education, social protection, social advantages and access to goods and services, but (Framework Employment) Directive 2000/78/EC forbids discrimination on the ground of religion only in the area of employment. The European Commission put forward a proposal for a new general anti-discrimination Directive on 2 July 2008, still blocked in the Council (Summer 2012) covering sexual orientation, age, disability and religion or belief in the areas of access to goods and services, education, social protection and social advantages.

7. Julie Ringelheim (ed) *Le Droit et la diversité culturelle*, Bruylant Bruxelles 2011, has carried out one of the most impressive research projects in Europe trying to see how this theory informs all areas of Belgian law ; see her excellent introduction: “Le Droit et la Diversité Culturelle: Cartographie d’un champ en construction” where she explains how “le multiculturalisme est conceptualisé comme une politique publique particulière qui peut se traduire par différentes mesures, comme le financement d’associations socio-culturelles regroupant des personnes d’une même origine ethnique, l’aménagement de certaines règles générales pour éviter d’entraver la pratique de religions minoritaires ou la modification des programmes scolaires pour mieux tenir compte de la pluralité de la population” p. 6.

lly are tackled effectively at a wider regional European scale the scope for subsidiarity and proximity of decision-making to the citizens will diminish. The focus on pluralism in Europe explores who is ultimately interpreting the standards in issues like:

- ECHR: headscarf prohibition in French and Swiss schools[8] or in Turkish universities (*Sahin*[9]), crucifix in Italian public schools (*Lautsi*[10]), gypsies in UK (Connors[11]), Spain (Muñoz Diaz[12]), national minority in Silesia (Gorzelik[13]), languages[14], banning of political parties[15], even the Human Rights review of UN Security Council resolutions reinforced by the Contracting States (*Al-Jedda*[16]),
- In the ECJ: language cases[17], same-sex marriage cases[18], fundamental rights in the single market[19], citizenship[20], regional social welfare v internal market[21], regional taxation v state aid control and anti-trust[22], even the Human Rights review of UN Security Council reinforced at EU and Member State level (*Kadi*[23]).

We engage in the evaluation of these normative questions from the standpoint of critical discourse theory, and of a new understanding of law and its legitimacy. The result of this complex situation of multiple *forums or fora* or public spaces of debate where multiple sovereign authorities are trying to find their way in this complex institutional patchwork is a diversity of normative claims; it is not only a question of who gets to interpret and decide on the extent of the competences (or powers), but the difficult question is, as Humpty Dumpty put it to Alice: “who is to

8. *Dogru* v. *France*, Eur. Ct. H.R. (2008) and *Dahlab* v. *Switzerland*, 2001-V Eur. Ct. H.R. 447

9. *Sahin* v. *Turkey*, 2005-XI Eur. Ct. H.R. 173.

10. *Lautsi and Others* v *Italy*, ECHR judgment of 18 March 2011.

11. (Application no. 66746/01), judgment of 27 May 2004.

12. (Application no. 49151/07), judgment of 8 Dec 2009.

13. *Gorzelik and Others* v *Poland*, (Application no. 44158/98) judgment of the ECHR 17 Feb 2004.

14. *Belgian linguistic case* (A/6), (1979–1980) 1 E.H.H.R. 252.

15. *Refah Partisi and Others* v *Turkey* (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98), judgment of 13 Feb 2003, and *EAE-ANV* c. *ESPAGNE* (Requêtes nos 51762/07 et 51882/07), arrêt du 7 déc 2010.

16. *Al-Jedda* v. *United Kingdom*, Application no. 27021/08, ECHR Judgment of July 7, 2011.

17. Criminal proceedings against Horst Otto Bickel and Ulrich Franz C-274/96 [1998] ECR I-07637.

18. T-58/08P *Commission* v *AP Roodhuijzen*, judgment of 5 Oct 2009 and W v Commission F-86/09 judgment of 14 Oct 2010 and.

19. *Omega Spielhallen* C-36/02, [2004] ECR I-09609.

20. Ruiz Zambrano, C-34/09 judgment of 8 March 2011

21. Viking case *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti* C-438/05 [2007] ECR I-10779 and *Laval* C-341/05 [2007] ECR I-11767.

22. Basque Historic Territories Taxation, joined cases C-428/06 to C-434/06 judgment of 11 Sep 2008.

23. C-402/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-06351.

be master", in other words, where lies sovereignty itself and whose normative standards are going to be followed: is it, as the state-nationalists claim, on the side of the Member States or is it, as the European federalists claim, on the side of the EU? Looking at the cases where European supranational courts have reviewed UN Security Council resolutions on the basis of Human Rights, or at the cases where the ECHR has controlled EU Member State's normative standards and practices or their wrongful implementation of EU policies[24] one might conclude that the question is rather who is to be the legitimate interpreter? According to Alec Stone Sweet, *Al-Jeddah* extends the reach of cosmopolitan constitutionalism into a realm beyond the ECHR[25].

Take issues like the banning of political parties, or the treatment of detainees and the recognition of certain fundamental rights to prisoners, or the imposition of certain penalties and the definition of certain crimes. These issues might be less controversial within a homogeneous society or a seemingly consensual society where divergent voices do not get much media attention – according to the principle that national authorities know better and thus need a margin of appreciation – but they might be much more controversial and closely examined form a wider European perspective where such consensus is regarded with more scepticism – according to the need for European-wide standards on the core of the rights recognised. And sometimes the local level, even well established democracies, might see this European control as offensive, like when important parts of public opinion in the UK push for a revision of the terms of their accession to the European Convention of Human Rights on the basis of their different local appreciation of the standards (UK Commission on a Bill of Rights)[26].

2. Who is to be (legitimate) Master?

The first, state-nationalist, solution relies on the fact that the Member States willingly confer, vest or invest some of their sovereignty onto the Union in order to exercise it in this new *forum*; in reality they only relinquish the exercise of that sovereignty but not the title itself, which they constitutionally retain. The federalists claim that Member States have relinquished or conferred state powers onto the Union with the result that they can only jointly exercise those powers in the context of the EU decision-making and can clearly be outvoted on the exercise of those powers; and if they wish to exercise those powers on their own they have to leave the Union.

Note that both positions ultimately embrace monism or shy away from dualism or pluralism. The difficulty in deciding one way or the other as regards who is ultimately sovereign and the inclination to see sovereignty as shared and divisible is

24. *Hirsi Jamaa* v *Italy*, (Application no. 27765/09) ECHR judgment of 23 Feb 2012.

25. Alec Stone Sweet, "A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe", *Global Constitutionalism* (2012), 1:1, 53– 90. See also Sabino Cassese, *When Legal Orders Collide: the Role of Courts*, Global Law Press, Sevilla, 2010.

26. See at http://www.justice.gov.uk/about/cbr.

what sparked off discourse on “constitutional pluralism” in Europe. This position, which could be referred to as constitutional “dualism” from the European point of view, was first theorised by my mentor, the late Neil MacCormick[27], who slightly moved towards a milder pluralism under international law, and was further elaborated by Julio Baquero (critically), Marco Goldoni, Jan Komarek, Nico Kirsch, Mattias Kumm, Miguel Poiares Maduro, Agustin Menendez, Daniel Sarmiento, Alec Stone Sweet, Kaarlo Tuori, Neil Walker to name but a few of the authors we discussed in the course. I would like to single out Aida Torres Perez for her impressive analysis of *Conflicts of Rights in the European Union*[28] incorporating the perspective of the ECHR.

The main idea of the “constitutional pluralists” is that there is no, nor should there be any final authority or sovereignty; there is no clear European *demos* that could self-proclaim its identity or constitute itself by an illocutionary act; on the other hand there are no longer sovereign nation-states of the old one-dimensional Westfalian Europe but rather European *Member-States*. Statehood in Europe has simply become member-statehood, and the different *demoi* of those Member States are at the same time the citizenry of the Union: pluralism and *heterarchy* prevail. Yet, as Avbelj and Komarek concede, “the world pervaded by plurality also requires a minimum degree of coherence and, more importantly, it calls for a meta-language through which the actors situated at different (epistemic) sites could reflexively engage with each other by recognising their differences with a simultaneous commitment to a certain shared framework of co-existence.”[29] In other words, although descriptively they are pluralists many of these scholars become normatively more nuanced.

In my view, there are good cognitive and normative reasons for giving up the nation-state claim to sovereignty. It being true that we find in the EU at least 27 ultimate authorities each claiming legitimacy and supremacy; it is nevertheless the case that each of them are part of a wider Union where they share their sovereignty and their constitutional values, and also part of the European Convention of Human Rights onto whom they are jointly and severally accountable: each of them abide to the supranational decisions of its Court, based in Strasbourg, and soon, following the Treaty of Lisbon (Article 6), so will the EU formally and legally abide, as it now does as a matter of general principle. Perhaps then, where the highest domestic jurisdictions see *heterarchical* relations and our non-conflictual, meta-constitutionalist scholars see bridled pluralism – and dead metaphors – the Euro-

27. N. MacCormick, ‘Beyond the Sovereign State’ (1993) 56(1) *Modern Law Review*, 1-18; ‘The Maastricht-Urteil: Sovereignty Now’ (1995) 1(3) *European Law Journal*, 259-266; ‘Risking Constitutional Collision in Europe?’ (1998) 18(3) *Oxford Journal of Legal Studies*, 517-532; collected and refined in *Questioning Sovereignty* (OUP: 1999).

28. Oxford, 2009. Torres favours a constitutional pluralist framework of interdependent legal orders not only as an explanatory but also as a normative model with no hierarchy between the foundational texts of national and supranational norms, although this requires some conceptual model of interaction –like diachronic judicial dialogue – for managing the conflicts, preventing collapse of the system and providing legitimacy to fundamental rights adjudication, p. 67, 69, 117. Interestingly, there is need for system here as well, a shared ‘codex’ or European legal culture, an epistemic site (Avbelj and Komarek).

29. Matej Avbelj and Jan Komarek (eds) *Constitutional Pluralism in the European Union and Beyond*, see their “Introduction”, Hart, Oxford 2012

pean courts, especially the ECJ[30], see an understandable national reluctance to digest the "systemic necessity" of supranational primacy, a foot-dragging to be cured with patience, modesty and well-grounded pedagogic judgments. In my opinion this constitutional pluralism devised by public lawyers can also be seen as a new 'ideology' in the sense of the term given by Clifford Geertz, provoked by the difficulty in providing an adequate image of the political process according to traditional models, like that of the sovereign nation-state[31].

If we add to this picture the gradual development of a *forum* or *agora* which becomes the instance where the decisions required to face the economic and financial crisis can become effective and where the social solidarity necessary for inclusive strategies to manage cultural diversity inspires harmonising measures, then gradually we will see the waning of the nation-state as the only, perhaps even the main *forum* of sovereignty, deliberation and decision-making on these issues of practical reason; and this issue takes me to the comparison with the USA.

3. We the People

"We the People" as in the preamble of the US Constitution has become a standard in the symbolic representation of popular sovereignty and the constituent power in a federal system. Important works have interpreted this expression and historians, constitutional lawyers and political theorists have underlined its importance in US constitutionalism[32]. The US rationale was "to make one out of the many" as its logo "*e pluribus unum*" runs. A pre-existing plurality, an underlying constitutional pluralism is resolved, and this is a clear contrast with the European Union[33].

---

30. Cormac MacAmhlaigh ("Questioning Constitutional Pluralism", *University of Edinburgh School of Law Working Paper Series* No 2011/17: 30) points that with regard to the ECHR, domestic courts can claim that they are upholding the values of the Convention while disagreeing with the Strasbourg Court's interpretation thereof but with regard to EU normative conflicts, domestic courts must uphold the rule of EU law, which will not always be easy and may lead to occasional institutional disobedience, but this can be viewed as the normal development and evolution of any (hierarchical) constitutional system.

31. Clifford Geertz, *The Interpretation of Cultures*, New York 1973 (Fontana, London, 1993) considers ideology as a response to the cultural, social and psychological strain provoked by a loss of orientation derived from an inability to comprehend – for lack of models – the universe of civic rights and responsibilities in which one finds oneself: "The development of a differentiated polity may and commonly does bring with it severe social dislocation and psychological tension. But it also brings with it conceptual confusion, as the established images of political order fade into irrelevance." p 219. I believe this is what has happened to nation-state constitutionalists *vis à vis* European constitutionalism: constitutional pluralism and meta-constitutionalism are ideological adaptations to avoid the traditional and dated position of state nationalism or the promised supranationalism and cosmopolitanism to come.

32. One of the most impressive is Bruce Ackerman's *We The People*, Vol 1 *Foundations* Harvard UP 1991 and *Vol 2 Transformations* Harvard UP 1998, esp Vol 1, and see also "The Rise of Constitutionalism" 83 Virginia LRev, 1997, 771.

33. The logo of the EU as proposed by the failed constitutional Treaty was "united in diversity". This expression still features in the un-amended preamble of the Treaty on European Union as revised by the Treaty of Nice of 2001, although it is not announced as a logo, and this already gives us an idea of the enormous difference in focus: diversity is both the starting point and the end-point: we are somehow united in the diversity that we wish to preserve. This diversity that unites us, but it does not unify us: we are united, not unified, in diversity, we are together.

In the "We the People" discourse there *is* one people, in the singular, which is common to the states that are federating, and which is sovereign, supreme. This was a categorical step away from the sovereignty of the Crown for the colonies, even from the sovereignty of the States under the Articles of Confederation. This self-declared and self-proclaimed constituent power seems to be the result of its own illocution as a constitutive speech act. This circularity or reflexivity of constitutionalism is not exclusive to the "we the people" standard; it pervades in the self-proclaimed sovereignty of the Crown, and before that, in the sacred sovereignty of a God bestowed upon a King, a feature still common to some Muslim countries like Morocco or Saudi Arabia[34]. In these cases sovereignty derives from a mystical power. Most European kingdoms traditionally based sovereignty on theology. Some even found interesting ways to democratise this predicament later on; thus in interwar Hungary "every citizen who had a vote became a member of the Holy Crown"[35]. But in current European constitutions, the power exerted by the state is traced back to the people, i.e. the citizens of that state.

Of course part of the problem is how this constituent power is defined. Thus, the preamble of the new Hungarian Constitution ("We the members of the Hungarian Nation") seems to be placed on the antipodes of the inclusive constituent of the US[36]. Even if one concedes that there is something inclusive in it, it contains two benchmarks of ethno-political identity: the idea of membership and the Hungarian Nation. This is closer to the *ethnos* than the *demos*. This impression is confirmed by reading the rest of the Preamble and the Constitution.

In any case and whatever the rhetoric of the preambles, the Constitution as a reflexive norm allows the (ideal) constituent power to control and limit the constituted power. But if we are not to fall back unto naturalist fallacies or theocratic foundationalism, how is this constituent power to be itself constituted? Where is the rub? To avoid *Arendt's paradox*, the ultimate foundation of the Constitution as the supreme norm of the land in anything outside the very concept of normativity

34. Article 7 of Saudi Arabia's constitution expresses that "Government in Saudi Arabia derives power from the Holy Koran and the Prophet's tradition". Let it be noted in passing that precisely this derivation implies its self-imposed limitation: a religious normative order acts as a limit to positive law or will.

35. András Jakab (2012): "On the Legitimacy of a New Constitution. Remarks on the Occasion of the New Hungarian Basic Law of 2011" http://ssrn.com/abstract=2033624. Theological references are however sometimes found in Preambles to Constitutions: "One cannot nowadays use a formulation similar to that of the German Grundgesetz of 1949, which says 'being aware of our responsibility to God and man', for it would suggest that we all believe in God. The Polish way ('we who believe that God is the Lord of history, and we who seek to understand the course of history from other sources…'), however, seems to be a suitable solution", argues Jakab.

36. The Preamble of new Hungarian Constitution, which literally honours the *Holy Crown* makes other blunt illocutions, like (and note the hard nationalist take on We the People): "We, the members of the Hungarian Nation,… are proud that our King Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago … we recognize the role of Christianity in preserving nationhood. We value the various religious traditions of our country... we commit to promoting and safeguarding our heritage, our unique language, Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin…We believe that our national culture is a rich contribution to the diversity of European unity…" Amongst the interesting references to Europe, the narrative is troubling.

(authority), Kelsen postulated the validity of the transcendental basic norm, the Grund-norm. “We the people” is the self-proclaimed source of validity of the constitution. One does not question it, nor ought one to enquire into it, because once assumed as valid, the whole constituted order seems to work. If you do not buy the autonomous validity of the constitutional system, then you must derive its validity from a larger and higher system of which it is a part or a deeper norm that grants it validity, like Natural Law or a Hegelian sense of History. This is where Kelsen took the bold step in favour of international law *monism*: the source of validity of state constitutions, and the ultimate Grundnorm of international law could be the norm *pacta sunt servanda*. Under international law, the systemic pluralism of constitutional sovereignties (Krisch) seems thus reconciled, at least in the “Pure Theory of Law”. The Kantian inspiration is here expressed in the transcendental category of the *Grundnorm* and in the ideal of a Cosmopolitan order, an ideal solution to pluralism, which we recover in the conclusion.

But this is not really the gist of my pluralist *take* on the standard “we the people”[37]. I am interested in two other facets: its monism and its inclusiveness. As to monism, I am interested in how the people becomes *one* by its own illocutionary force, it conceives of itself as One, *unified*, as a single entity, not as a plural ontology. Perhaps in its origins it was plural, there were several peoples and perhaps they were together, united in diversity like Europe would like to think it is right now, but that was before it was merged or unified, before the *demos* (con)formed. It is not really the Constitution that united and *unified* the people, it is its very reflexivity and self-description as a people; for, without the people the Constitution would not have been possible. The people continued to be a melting pot[38], culturally plural but constitutionally one. What is crucial is that there was a political will to be seen as one nation, and this will was not eternally valid, as the Civil War made clear. The Constitution can only normatively proclaim the national unity and identity of a people, but it cannot configure or transform a people into something it does not will, like membership in a larger nation or people, even if it is passed in a referendum and obtains legal validity. The Catalan people, for example, declared themselves to constitute a nation in the draft Statute of Autonomy they passed in the Catalan parliament but the Spanish Constitutional Court declared this preamble and articles referring to the Catalan nation as incompatible with the Spanish Constitution. The point made here is that Constitutional reality is purely system-relative, reflexive and normative; in spite of its perlocutionary effects, it does not generate any valid claims, per se, in other normative dimensions like politics or morality, neither in interpretative social sciences.

---

37. Two fabulous studies of this symbolic reflexivity are James Tully: *Strange Multiplicity. Constitutionalism in an Age of Diversity* Cambridge University Press, 1995 and Hans Lindhal, “Democracy and the Symbolic Constitution of Society” in 11 *Ratio Juris* 1998: 12-37. I have drawn inspiration from both.

38. An excellent work on cultural pluralism in the USA, critically responding to assimilationist or separatist calls is Bill Ong Hing: “Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society” 81 *California Law Review* (1993) 863, largely anticipating his book *To Be An American* (NYU Press, 1997).

The US Constitution confirmed the constituency that proclaimed the Constitution. Pluralism of legitimacies or of constitutional authorities was out of the question because there is one *demos* and *it* is sovereign: no question of constitutional pluralism under "We the People"; at most you can have a discussion as to the extent of the conferred and the retained powers or a discussion as to how pluralistic is the Constitution itself; in other words, to what extent does it pretend to safeguard political, religious, and cultural pluralism. But although the people are now "one", every-one can be part of the people: no one is excluded[39]. This second feature is perhaps related to the first, and this is the inclusive potential of the illocution. Perhaps when it was first expressed it encompassed a certain category of white men, who saw themselves as embodying sovereignty. But the trend has been to favour inclusion of more and more "people" into the We. Not only that, more crucially the ideal has been resorted to by those excluded to demand inclusion: all groups identify with a *We the people* standard to claim being part of the (civic) *demos*. Perhaps this is what we miss and lack in Europe. Our national and constitutional identities are not always and not necessarily the result of a rational illocutionary will, but rather of power games of historically conditioned national majorities.

4. European takes on We the People

The point can be made by contrasting the "We the People" of the USA Constitution with the preamble of the currently valid founding document of the EU after the constitutional treaty failed in the ratification process. Please bear with me to translate the standard "We the People" into the Preamble of the Treaty of Lisbon:

His Majesty the King of the Belgians, the President of the Republic of Bulgaria, the President of the Czech Republic, Her Majesty the Queen of Denmark, the President of the Federal Republic of Germany, the President of the Republic of Estonia, the President of Ireland, the President of the Hellenic Republic, His Majesty the King of Spain, the President of the French Republic, the President of the Italian Republic, the President of the Republic of Cyprus, the President of the Republic of Latvia, the President of the Republic of Lithuania, His Royal Highness the Grand Duke of Luxembourg, the President of the Republic of Hungary, the President of Malta, Her Majesty the Queen of the Netherlands, the Federal President of the Republic of Austria, the President of the Republic of Poland, the President of the Portuguese Republic, the President of Romania, the President of the Republic of Slovenia, the President of the Slovak Republic, the President of the Republic of Finland, the Government of the Kingdom of Sweden, Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland, DESIRING to complete the process

39. We know that historically this is not so, that in fact many classes of people lacked the status of citizenship. But what is interesting is that the tendency has been to formally include more and more categories into citizenship, up until a certain point in (recent) time when the non-citizen becomes 'illegal'. This trend of expulsions is, sadly, common to the USA and the EU. The term expulsions is inspired in a lecture given by Saskia Sassen at Stanford on May 2nd 2012 presenting her new line of research.

Map of Europe as it was around 800 AD; a plural setting

started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action, HAVE RESOLVED to amend the Treaty on European Union, the Treaty establishing the European Community and the Treaty establishing the European Atomic Energy Community, and have named as their plenipotentiaries…

What can we make of this, other than historical clues into monarchies and republics in the EU? Is this what "united in diversity" means? Where are we the Europeans as, at least, potential *demos*? Pluralism there might well be but there is nothing constitutional about it. This treaty is the product of the Heads of European Member States (many of them "majesties"). A constitutionally pluralist preamble would read something like "We the nations" or better "We the peoples of Europe". But we are not there yet. But is this what pluralism is about? How to bring

in all the underlying diversity – i.e. We the territorial national minorities, We the immigrants, We the non territorial minorities, We the indigenous peoples, We the ethnic groups, We the religious groups, We the alternative subcultures, We the sexual minorities, above all, We the citizens? We all are part of the European *demos* under construction.

If pluralism were limited to the constitutional *topos* – the (nations or peoples constituted through the) Member-States versus the Union – it would still be normatively and institutionally relevant under the subsidiarity principle and the federal, globalising dynamics but it would fail to capture the cultural and legal diversity and plurality that characterises Europe. We need a perspectival and aspectival (kaleidoscopic) approach. We know that the most important aspect of pluralism is not this constitutional "exceptionalism" of contested but coordinated supremacies but the diversity of institutional normative orders that may obtain in any given social field at multiple levels involving multiple regulators and which can be analysed following the methods developed by cultural anthropology, even if, as legal theorists or philosophers, we, I for one, might consider desirable to strive for some form of "coherence" and meta-systematicity. Combining these two discourses – the external and the internal (cognitive and volitional) points of view – is one of the major contributions of the late Neil MacCormick, something that Habermas himself also attempted in his *Faktizität und Geltung*[40].

5. MacCormick's legacy: the theoretical framework for pluralism

MacCormick's legacy[41] for the purposes of our discussion is a concept of law as 'institutional normative order' that is very well suited to all forms of pluralism and to this diversity and this sociologically inspired practical reason, a domain where different norms interact discursively, directing socially meaningful action. This approach allows us to address under a single theory the two dimensions of pluralism: plurality of normative (and legal) orders and a principled strategy for integrating such plurality. We address both perspectives.

(i) The diversity of institutional normative orders or rethinking and recapturing normative diversity in Europe. People guide their social behaviour by relation to norms and to that extent order and *norm*ality result. When conflict arises, norms develop to deal with it and sometimes the norms according to which people guide their behaviour get modified as a result. Norms are at the same time action-guiding and action-justifying reasons and the domain of the normative ranges from the moral norms (mores) to the highly institutionalised legal norms of modern state administrations and supranational organisations, and from the relatively few precepts following from a given religious domain of social life to the comprehensive and extensive domain of contemporary state legal orders covering practically all areas of social life. Where we fix the line between social, moral, aesthetic, ethical,

40. Jürgen Habermas, *Between Facts and Norms*, M.I.T.; Harvard 1996.

41. *Rhetoric and the Rule of Law* (2005) and *Legal Institutions* (2007), both at Clarendon Press, Oxford.

Edinburgh, Old College, where Neil MacCormick taught Jurisprudence

economic, political, religious and legal norms is not always pellucid; it can be a matter of degree rather than category. All of these norms have social sources, action-guiding, justificatory and critical dimensions, and at given times all of these can clash in any given social space and for any given situation involving social actors. To the extent that those norms become institutionalised and involve institutions for their recognition, change and application, they tend to *juridify*. Rather than legal pluralism, such situations are better described or captured under the concept of *normative pluralism*.

State (official) positive law appears historically as the most complex and highly institutionalised of all normative orders, with very refined, all-encompassing (comprehensive) and commonly shared rules of recognition, with a system of legislatures and of distribution of legislative powers to adapt, adjust the normative order to changing environmental and institutional circumstances, with a network of administrative authorities to implement such general and universal norms into more concrete policies and individual acts, with a system of courts to authoritatively adjudicate upon possible disputes between citizens and/or administrations and with a system of monopoly of the (authorised) use of power to enforce such decisions.

But this is a gradual scale rather than an absolute category of state law. It might be the case that a less complex normative order manages to regulate cer-

tain spheres of social life and operates within the confines of the state with its latent consent or even without the state officials acknowledging its existence. If actors guide their action and solve their disputes according to those orders, they can be considered forms of law. On top of these "normative orders"[42] we observe that there are other regulators or standard-setters alongside state administrations and legislatures, and we also observe that there are other *fori* or instances of dispute-resolution besides state courts. These regulators and dispute resolvers operate within and outwith the state, from the local level to the transnational one, and they are the subject of new legal pluralism studies and new governance[43].

It might also be the case that above the legal order of the state we witness the development of an even more sophisticated, multi-level and multi-actor systems of governance and network of regulators. State law purports to be the centralised regulator, the 'chief enabler'[44], the hub of all forms of legal recognition. For the moment it seems that this (still) is a plausible claim; however the types of regulatory challenges we have seen regarding cultural and legal pluralism and the authority challenges posed by constitutional pluralism could lead us to nuance this statement. In the EU context, I think this is obvious, in spite of, or even as a result of, the crises described in the opening of this contribution.

(ii) Pluralist claims to validity and the search for cosmopolitan frameworks. The description of diversity of normative orders would capture an important aspect of law as an institutional action-guiding and action justifying order, but the law adds an important dimension, which is the claim to legitimacy or validity: normative orders make a claim to their correctness, legitimacy or validity, and it would be pragmatically self-contradictory and self-defeating for a normative order not to make such a claim or to claim otherwise. A normative order that does not make any claim to legitimacy would be considered as incomplete, as lacking, or as purely technical: the only reason to follow it would be utilitarian and prudential, but it could be forborne whenever it failed to accomplish its given utility functions because it withdraws the claim to legitimacy[45]. In contrast, the internally binding character of the law is based on its claim to acceptability, and to relative validity within a given community. In making such claim, the law enters the broader and deeper domain of practical reason, where, in ideal discourse conditions, it can be contrasted with other co-existing normative orders making equally forceful claims to validity. We now face a new dimension of the issue of plurality of validity claims, not only of constitutional systems, but also of all normative domains of practical reason – ethical theories, moral systems, religious codes, political moralities and ideologies, different law-like orders within the same social space, or also transnationally.

---

42. See below, footnote 65, Maleiha Malik's report on *Minority Legal Orders in the UK.*

43. For the course we have followed closely Paul Schiff Berman, "The New Legal Pluralism", *Annual Review of Law and Social Sciences* 2009 (5): 225-42 and the classic by Sally Engle Merry, "Legal Pluralism" in 22 *Law and Society Review* 1988 (5): 869-96.

44. This is the term used by Dani Rodrik, "Who Needs the Nation-State?" in his *Arrow Lecture on Ethics and Leadership*, Stanford, 24 May 2012. Questioning hyper-globalisation, Rodrik insists on the nation-state's resilience as the principal locus of governance.

45. This point is convincingly made by Habermas, *op.cit*, 121 and 130.

Again, if each makes a claim to validity and legitimacy, and some of the normative systems – eg. major world religions – make an additional claim to universal validity, we might be interested in asking whether there might indeed be, and if we conclude affirmatively, in setting out to look for meta-normative or transcendental practical criteria to deal with such contrasting legitimacy claims. Are there and can we find any common, shared criteria independent of the normative claims and premises of each order according to which we may critically evaluate such claims and premises? If we answer in the negative, then we probably cling to incommensurability and ethical relativism, a position some have wrongly identified with multi-culturalism. If we answer affirmatively, we need to substantiate our position with credible candidate criteria and theories for a cross-system evaluation[46]: theories and normative proposals like liberalism or versions of it (Ackerman, Dworkin, Rawls), communitarianism or versions of it (MacIntyre, Sandel, Selznik, Taylor, Walzer), libertarianism or versions of it (Hayek, Nozik, Oakeshot), social-welfarism, different conceptions of the common good, Aristotelian communal or general justice and particular justice[47]. We could envisage procedural criteria that focus on the discursive conditions for making and testing validity claims. Rawls' veil of ignorance and reflective equilibrium, Kant's golden mean and categorical imperative, Habermas' ideal discourse, MacCormick's Smithian Categorical Imperative[48], or we could envisage substantive criteria like Dworkin's rights thesis or MacCormick's and Alexy's fundamental rights. Perhaps *the Human Rights Culture* is the hermeneutical synthesis. This takes us to the next step, which tries to articulate both dimensions hermeneutically, culminating in a celebration of Human Rights cosmopolitanism and individual autonomy.

6. Five steps of hermeneutic pluralism

We are now at ease with the thought that Heterogeneity and Diversity are structural features of the EU[49]. In order to capture the full "diversity of pluralism" in Europe, five steps would need to be adopted hermeneutically combining both the descriptive and the normative approaches.

(i) To begin with, and remaining in the institutional level, we need to bring in the wealth of pluralities at a *vertical* territorial axis (multi-level governance: from the local to the global).

(ii) Next, we need to examine the inclusiveness claims at each of these levels – from the local to the European – and ask ourselves whether im-

46. See Paul van Seters (ed) *Communitarianism in Law and Society*, Rowman and Littlefield, Lanham, Maryland, 2006, introduction.

47. Claudio Michelon, "The Virtuous Circularity between Positive Law and Particular Justice", *Edinburgh University School of Law Working Paper Series*, No 2011/11.

48. *Practical Reason in Law and Morality*, Oxford 2008.

49. Ulrich Beck and Edgar de Grande, *Das Kosmopolitische Europa* (2004), *Cosmopolitan Europe*, Malden, Ma., 2007.

portant communities or groups might be excluded from each of the pluralistic mosaic of "we the peoples"; for instance is this EU only a club of nation-states? Are nation-regions or national minorities forced into the straight-jackets of their Member-States like e.g. Quebec in Canada, Scotland in the UK or the Basque Country in Spain and in France?

(iii) We would need to be aware of the fact that these territorial jurisdictions, at each level, are implicitly contested or challenged by legal pluralism at the level of norms or even normative orders that are competing if not as global regulators, at least in specific areas of social regulation (typically family law, but also commercial law) and at local, regional, national, state, transnational, supranational and international levels. This raises, again, the classical issue of legal pluralism, or the coexistence of normative orders that could be called minority legal orders[50]. There is not only a plurality of norms, but also alternative *fori* and methods of dispute resolution at each of these levels. "Where the practices of communities or individuals do not conform to State law requirements, or where communities turn to their own legal regimes or tribunals, the reasons behind these developments need to be understood"[51].

(iv) Then, we could continue on a *horizontal* axis of inclusiveness to study if there might be groups or collectives that are not territorially based but are neglected or ignored since they are under the sovereignty of the institutional bodies that do get formal representation in "We the Peoples". It might be that in new forms of governance the same type of stake-

50. In the UK context see the recent and very interesting report by Maleiha Malik for the British Academy (2012) "Minority Legal Orders in the UK. Minorities, Pluralism and the Law." I have tried to summarise its main contribution as regards legal pluralism, but the report is worth a read also from the perspective of liberalism and accommodation strategies. Minority legal order is a non-state normative field of social action. It may refer to cultures or religious groups that regulate their social life by reference to norms that are coherent and consistent, rather than random or arbitrary. In some situations, the state legal system may recognise or incorporate the minority legal order's norms, with the consequence that these 'norms' become 'law' in the official and ordinary sense. The cultural group's claim to have 'law' or a 'legal system' need not be an ideological claim to political or legal power. Many of these cultural or religious groups do not seek to compete with the state. The minority legal order may, however, be able to communicate effectively thereby creating a relationship of reciprocity with its subjects which is also an important aspect of effective legality (Fuller, 1969). Moreover, in some situations the norms of a minority legal order may be organised into a reasonably coherent institution, with a dynamic and coherent character, which has sufficient stability and consistency to enable identification, change and enforcement of social norms. This allows us to say that there is something akin to a legal order. If there is some mechanism, albeit informal, for resolving disputes about validity, interpretation and enforcement, then this institutional aspect will make it more likely that there is a minority legal order. Despite the public anxiety that minorities are following their own 'parallel' laws that could be a threat to the unity of the state, there is no necessary tension or conflict between a minority community's understanding of itself as having 'law' and the state's claim that the national legal system is 'sovereign'. In many situations, the cultural group's claim to have 'law' or a 'legal system' is neither an ideological claim nor a claim for political or legal power. One reason that the term 'law' or 'legal system' is now often applied to non-state norms and communities is because of the emerging body of scholarship on legal pluralism, law and anthropology and socio-legal studies.

51. Religare Project. On religious plurality, see generally the many excellent works of Prakash Shah and of the Project and network RELIGARE www.religareproject.eu.

holders elite regulators (repeat players) get to set the standards, because they are better mobilised, or consulted more regularly, or more powerful. We would find inspiration by theories of multiculturalism or inter-culturalism, even by more group-oriented communitarian theories to push towards inclusiveness and participation.

(v) Finally, "the wind of freedom blows" within minorities as well[52]; this inclusiveness has to be carried deeper, as an ideal normative framework, to each of the communities claiming recognition of difference, and enquire how each of these groups is itself handling internal endogenous claims of difference and of participation and exercises of individual autonomy or personal self-determination (internal minorities[53]). This is where we reintroduce important values of liberalism and individualism as enshrined in most of our Human Rights instruments. Here, obviously, we are ideologically loaded by the value of autonomy.

7. We the cosmopolitan Peoples of Europe

In doing so, we also reintroduce popular mobilisations and claims for Human Rights, for participation and deliberative democracy, but also the supervision and control by the key European supranational institutions, the European Court of Justice and the European Court of Human Rights; and these are important aspects of the cosmopolitan vision of Europe. As regards Human Rights standards, social inclusiveness and solidarity, this seems to be the way to recapture the inspirational combined sovereignty of the abandoned constitutional treaty (which could have been reframed in this manner: We the Citizens and We the Peoples of Europe!). The Member States and the Autonomous Constitutional Regions will be recognised a margin of appreciation and subsidiarity according to local standards, but there will be Europe-wide supervision and control on the basis of any achieved consensus or *acquis* on agreed standards. This fine balance could be carried through to the issues raised by cultural pluralism and accommodation and to the coupling of the economic and the social constitutions. But Europe as a project covers other important domains, many of them related to the regionally perceived global risks: security agenda, environmental risks[54]. But as regards other domains where com-

52. The first principal of Stanford, Jordan's first idea for a Stanford logo was inspired in the German version of Luther's *videtis illam spirare libertatis auram.* See President Gerhard Casper, "*Die Luft der Freiheit weht – On and Off*". On the Origins and History of the Stanford Motto, 5 Oct 1995.

53. See Sarah Song, *Justice, Gender, and the Politics of Multiculturalism*, CUP, Cambridge, 2007.

54. European steps have been taken, slowly, towards security integration (NATO and WEU, but also cooperation in the fight against global terrorism and in the former Third Pillar), and more decisively in environmental standards and climate change like the Kyoto protocol or in the principle of precaution and control of GMOs, or development and multilateralism and in areas like competition or data and consumer protection where Europe has become an international regulator. The point, perhaps understated, is elegantly made by Gráinne de Búrca in her Guest Editorial: "Europe's raison d'être", of the 18 *Maastricht Journal of European and Comparative Law*, 2011 (4): 418-20: "The capacity to provide its Member States and their citizens with collective power and coordinated problem-solving capacity on the one hand, ...

Maastricht City Hall, the city where the European Union was devised

petition and relocation are easier like economic or financial risks, the EU still has to take the lead, that is, coordinate. Many economic policy aspects like welfare politics, monetary, regional cohesion and fiscal solidarity are crucial areas for cooperation, coordination and harmonisation if Europe is to find the balance between the social constitution (now largely under Member State control) and the economic (monetary) constitution (now under EU control). The *institutional design* of the Lisbon Strategy inherited by the Europe 2020 Strategy proved all its weakness: the soft law new governance strategy was not taken seriously by those who had to carry it forward. The *institutional design* of the Economic and Monetary Union (EMU), on the other hand, is based formally on hard law, but has remained unapplied for too

... and to offer global leadership on a range of the most crucial and pressing transnational challenges on the other hand, provide a powerful rationale for the European Union system today, and a strong reason for Member States to fight not only for its survival but also to strengthen it."

long, operating as soft law instead[55]. The *institutional design* of the Treaty of Lisbon is no better. Now, it has become clear that EMU was a lame duck. Member State sovereignty and interests are at the same time the problem and the solution. High time to move on.

We still have no constitutionally organised European *demos* to adopt the necessary strategic decisions to face the risks and the crises threatening Europe; the euro is falling prey to internal and external predators because, according to those who are making the key decisions, there are no mechanisms to react other than austerity and structural reforms. Populism – a mix of nationalism, Euroscepticism and xenophobia in Piris' words[56] – and anti-cosmopolitan feelings are in the air and the worst strategy is to play their game. Sarkozy should have known better. He could have sought inspiration from *l'âge des Lumières* or he could have read some passages like the following from Beck and Grande's *Cosmopolitan Europe*:

> "Everything that the fundamentalists hate is to be celebrated and cherished as what is authentically European: the much lamented 'vacuum of meaning', the 'decadence', the 'loss of the middle', the rejection of the metaphysical image of 'the' human being and 'the' European West. Why? Because the cosmopolitan-European character of a society consists in the fact that nobody lays down what is right and good and how people should live their lives as long as they do not harm others" (105).

The current European crises could after all be an opportunity for a We the (cosmopolitan) Peoples of Europe to take the bold step into the European Federation[57], at least for those Peoples of Europe that wished to take such step to the *avant garde*. This step is in reality a discursive "double step": the economic-cum-monetary and social integration-cum-solidarity also at European level, in other words the reflective equilibrium between the economic and the social constitutions and the federal and pluralist cultural dialogue between European citizens and European peoples inspired by the Cosmopolitan legal order and human rights. The crises are after all, an opportunity for *We the European Peoples*.

---

55. See Jean-Claude Piris, *The Future of Europe. Towards a Two-Speed Europe?*, Cambridge, 2012: "The criteria that were adopted when the rules of the euro were established (i.e., less tan 3 per cent of GDP for Budget deficits, a maximum of 60 per cent of GDP for public debts) are no longer respected". Piris provides a clear prognosis of the economic prospects mentioned in this contribution and adds factors like the catastrophic demographic trends, energy dependence, low investment in R&D, low competitiveness and entrepreneurial spirit.

56. Piris, *op.cit*. 104 mentions the following as populist threats to a number of European countries: Vlaams Belang, Danish People's Party, True Finns, Front National, Freedom Party, National Party and Sweden Democrats. He considers the two-speed Europe solution could be a means to fight the populist trend.

57. In a cosmopolitan legal order every public authority, including the UN, bears a duty to justify acts that would have the effect of violating the fundamental rights of individuals, as Alec Stone Sweet, *art. cit.* aptly observes. Already in 2003 the Basque Society of Studies (Eusko Ikaskuntza) produced a Constitution of the European Federation, which went in this direction. It was presented as a regional contribution to the Convention for the Future of Europe.