INTRODUCTORY ESSAYS

EUROPE AND CONSTITUTIONAL PLURALISM: PROSPECTS AND LIMITATIONS

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Abstract

As far as the EU is concerned, the funding idea is that constitutional pluralism theories take the same role as Calhoun and von Seydel's ideas with respect to federal theory. They were developed at a time when coexistence seemed possible, just as in the early days of every federal union, when the sovereignty problem does not seem insuperable. The economic crisis has brought out an increasingly hegemonic reality of intergovernmental relations. This is why the only way to avoid such drift is strengthening the democratic principle.

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1. Discussion topics

Theories on constitutional pluralism in the European Union (EU) developed somehow similarly to the foundational elaborations on federalism. It is a classic theme, part of the theory of law and constitutional law. In fact, without the possibility of forming a system, the study of law risks being identified with the analysis of single legal provisions, with poor results as far as the

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function of law is concerned. At the same time, when law becomes a system and is studied as such, an issue of unity arises, which has at least two fundamental dimensions.

In the first dimension, unity implies the idea of closure, autonomy and independence with respect to other legal systems; in the second dimension, unity also implies the relationship of this closed legal system with others characterised by a similar or very similar structure, both inside and outside the legal system. This second unity dimension is useful to identify and define the system taken into consideration, to the same extent as suggested by the first dimension. To sum up, the unity of the legal system is an indispensable requirement to complete the identity of the system. Identity is formed above all through comparison with others, with a multiplicity of entities.

Traditionally, the European legal theory has dealt mainly with the closing-opening relationship of the legal system as for phenomena occurring within the single legal system. Hence, the great studies tradition that can be synthetically defined as legal pluralism: starting from von Gierke's studies, the legal theory will become, with different approaches and purposes, increasingly focused on the opportunity of a plurality of systems within the general system. This generally coincides with the State system (a representation of this plurality of approaches can be found in contributions by Ehrlich, Hauriou, Romano, Laski). In the framework of a strongly state-based tradition, which delegated the discipline of relations between national systems to international law, the great theoretical challenge focused on the possible conception of the legal system as a closed entity, at the same time possibly containing other legal systems[1].

The overwhelming European Union phenomenon has nevertheless imposed, in an increasingly intense way, the need to reconsider the problematic relationship between unity and pluralism, not only from an internal point of view, but also and above all from an external one. The theories that, until a defined moment in the twentieth century had responded to the practical needs for relations between states, are in crisis because of the peculiar traits of the community (and following, union)

[1] In this light, the first chapter of E. Ehrlich's *Grundlegung der Soziologie des Rechts* (1913) is a fundamental point of reference.

phenomenon. One single authoritative example will suffice. In a series of lectures on the legal system published in 1960, a scholar such as Norberto Bobbio organizes the relationships between systems in terms of interference, identifying three types: interferences related to the temporal sphere, to the spatial sphere and to the material sphere (when he speaks about "material" Bobbio postulates that the legal systems regulate the same subjects). According to Bobbio interferences arise because, out of three areas, the systems have two in common. Depending on the type of interference, mechanisms of reception (temporal interferences), delay (spatial interferences), *reductio ad unum*, subordination, coordination, separation (material interferences) come into play[2].

The Union phenomenon specificity lies in a hypothesis not explicitly considered by Bobbio, that is to say, in the expansion of the interference to all three areas. Interestingly, in this case, the Italian law philosopher believes that talking about interference and therefore relations between different systems is not appropriate because of the process of (potential) identification between systems, which excludes mutual autonomy. In this context, the theoretical problem of the relationship between pluralism and unity of the system takes on new forms and strength, since the idea of simultaneous temporal, spatial and material system interferences, compatible with the maintenance of the autonomy of interfering systems, was traditionally excluded from the legal cultures of the States that are currently part of the EU[3].

The complexity of the Union phenomenon arises specifically from the simultaneous reconsideration of these three elements, from the need to (re)think them as a coexisting entity. Obviously, this starting point implies an underlying epistemological relativistic assumption, namely that every concept of exclusivity of

[2] N. Bobbio, *Teoria dell'ordinamento giuridico* (1960), at 202.

[3] One of the most precise critiques to constitutional pluralism comes from J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 Eur. L.J. 4 (2008), at 414-6 and Id., *Another Look at Constitutional Pluralism in the European Union*, 22 Eur. L.J. 3 (2016), at 369-70, who, however, starts from an excessive dichotomic contrast (in my opinion) between pluralism and closure. In other words, legal pluralism in itself, if the Author is properly understood, would always come into conflict with every legal system's structural principles, such as order, security, certainty of the law.

the system is, currently, out of history and out of date[4]. The development of the history of legal culture seems to reverse its course: the unity of the system, with all its dogmatic additions, is no longer pursued, replaced by a plural coexistence of systems interfering with each other from multiple points of view. The prospect of conflict between systems thus becomes endemic.

In recent years, the relationship between pluralism and unity has taken on further forms and dimensions linked to the intensification of phenomena variously attributable to the so-called globalization. The pluralism that has always characterized the international system has, in fact, seen the rise of new entities: international organizations, regional international systems, supranational systems but also, and even more problematically, private entities acting in peculiar social spheres, such as telecommunications, international trade, sport regulations. These system entities, on the one hand, are clearly not attributable to a state-based experience and, moreover, unrelated to international law categories, which rely, for better or for worse, on statehood. Not surprisingly, scholars are trying to reorganise the fragmentary and currently precarious so-called global law by using state law categories, as shown by the debate on the constitutionalization of international law [5].

Considering the context, I would like to try to provide a concise picture of the fundamental elements that characterize constitutional pluralism theories, aimed at explaining the relations between the EU and the member states through constitutional law categories, or rather through a reformulation of these categories. These theories have also developed because of the famous *Maastricht-Urteil* with which the German Federal Constitutional Court placed a heavy mortgage on relations between the EU and the member states[6]; however, their theoretical perspective has proven to be long-term.

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[4] N. Walker, *The Idea of Constitutional Pluralism*, 65 The Modern L.R. 3 (2002), at 338.

[5] On this point, please refer to R. Bifulco, *La c.d. costituzionalizzazione del diritto internazionale: un esame del dibattito*, 91 Riv. int. fil. dir. 2 (2014), at 239 ff.

[6] This link is emphasized by J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, cit., in part. at 412.

Their interest features at least two aspects. Firstly, these theories, strongly rooted in a European pluralistic culture[7], offer a very interesting escape route to the well-known discussion on the true nature of the EU, namely whether it is a federal state, a confederation or a peculiar entity. The second reason concerns the ability of these theories to describe the actual state of the art of the EU and its fragile balance[8].

I will afterwards try to describe the main features of constitutional pluralism theories (2), and then show the opportunity (or as someone would say, the need) to go beyond the precarious balance which currently characterises theories of constitutional pluralism. This theoretical effort, which obviously presupposes highly significant social and institutional changes, is necessary in order to avoid an unconscious shift towards forms of relationship between systems that are no longer sustained by a logic of balance, but rather of hegemony (3). This will be followed by a few short conclusions (4).

2. Theories of constitutional pluralism: pluralism beyond the state

Theories of constitutional pluralism use the same conceptual root upon which pluralistic democracies have developed. However, the system level at which these theories work is different: if the concept of pluralism arises within the state framework, theories of constitutional pluralism are mainly aimed at inter-

[7] M. Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, in J.L. Dunoff, J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, (2009), at 371, which highlights how constitutional pluralism follows the same path as constitutionalism.

[8] For a review and reconstruction of the debate on constitutional pluralism see L. Pierdominici, *The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?*, 9 Perspectives on federalism 2 (2017), at 119 ff., which highlights its descriptive and regulatory aspirations (part 127); please also cf. M. Avbelj, *Supremacy or Primacy of EU Law – (Why) Does it Matter?*, 17 Eur. L.J. 6 (2011), at 760-3, who observes how the pluralistic model (defined as 'Heterarchical Model' and opposed to models defined as 'Hierarchical' and 'Conditionally Hierarchical') is the most suitable to face the challenges of a European integration.

legislative relations, in particular in the context of the EU[9]. Constitutional pluralism thus arises from an evident need to rationalize these relationships[10].

In this regard, a preliminary question arises: is it possible to "export" the pluralism category outside the state dimension? From a theoretical point of view, an affirmative answer is easily provided by the well-known theory of the plurality of legal systems; as known, this hypothesis originated with the purpose of denying the state nature of the rule of law, as well as the state monopoly in the creation and application of law[11]. More generally, this function of opposition to the monopolization of law by the state belongs to all pluralistic theories. What is certain is that, when juridical theory welcomed a pluralistic thrust and began to elaborate it in a juridical system, it also paved the way for an extension of the pluralistic category beyond the state dimension. The fact that the relationship between the EU and the member states can be observed from a plurality point of view as for legal systems is a more than plausible research hypothesis[12].

As for constitutional pluralism, while the fundamental principle of every pluralistic theory remains, namely the heterogeneity of the social reference structure, the subjects taken into consideration are not individuals, groups, intermediate entities; on the contrary, they are the states themselves, their legal systems in relation to the EU legal system. The peculiarity of the constitutional pluralism prospect is the non-hierarchical interpretation of this relationship, therefore the main characteristic of the pluralistic theory in its inter-legislative version is, to use an expression by Neil Walker, the incommensurability of the claims originating at different system levels[13]. The same goes, although in

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[9] Please refer to M. Poiares Maduro, *Courts and Pluralism*, cit.., at 356, who places the EU in the framework of a pluralism, which he describes as "internal".

[10] M. S. Giannini, *Le relazioni tra gli elementi degli ordinamenti giuridici*, Riv. trim. dir. Pubbl., 4 (1990), at 1002.

[11] S. Romano, *L'ordinamento giuridico* [1918] (1945), II ed.; specifically M. S. Giannini, *Gli elementi degli ordinamenti giuridici*, in *Studi in onore di E. Crosa*, II, (1960), at 962

[12] See M.S. Giannini, *Gli elementi degli ordinamenti giuridici*, cit, at 966.

[13] Specifically, N. Walker, *The Idea of Constitutional Pluralism*, 65 The Modern L. R. 3 (2002), at 338, writes: "the very representation of distinct constitutional sites - EU and member states - as distinct constitutional sites implies an

a perspective focused on the relationships between the Courts of the respective systems, for the assumption according to which their respective interpretative power is always and in any case definitive[14].

The considered systems - the member states and the EU - are therefore placed on a level playing field according to an internationalist perspective, characterised by the absence of a set of rules - such as international law - aimed at regulating the relations between the different parts. From this point of view, the examined theories mark a strong discontinuity both with theses framing the Union phenomenon in the context of international law and with theses following traditional constitutionalism, namely considering states as the only subjects with constitutional authority. In a perspective devoid of any vertical logic of inter-legislative relations, these theories expressly state that the European system has developed beyond the traditional boundaries of international law and acquired a constitutional dimension, comparable to that of the States[15].

This vision brings together two theoretical moments that have marked the history of European legal culture, as well as constitutional. The first, which has already been mentioned, is undoubtedly constituted by the pluralistic current, in particular because of the way it was developed by French and Italian

incommensurability of the knowledge and authority (or sovereignty) claims emanating from these sites".

[14] Or 'finalised', according to N. MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 Eur. L.R. 3 (1995), at 264, as a comment to the German constitutional Court judgement on the Maastricht Treaty.

[15] On this, please refer to I. Pernice, who, while considering the globalisation and supranationality phenomena, distances himself from the necessary link between State and constitution (I. Pernice, *De la constitution composée de l'Europe*, 36 RTD eur. 4 (2000), at 625; Id., *Does Europe Need a Constitution? Achievements and Challenges After Lisbon*, in A. Arnull, C. Barnard, M. Dougan, E. Spaventa (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, (2011), at 96) to adopt a contractual and functional view of constitution. The outcome of this theoretical path is the recognition of the EU as a system with a constitution, partly originated from the Treaties and partly from national constitutions (*Does Europe Need a Constitution?*, quot., 89); more recently N. Walker, *The Idea of Constitutional Pluralism*, cit-, at 337.

institutionalism; this new way of evaluating law is the foundation of an idea: law does not necessarily come from a single source[16].

The second moment is provided by the Hartian elaboration of the 'point of view'. By seizing the potential of Herbert Hart's intuition, Neil MacCormick uses the relativizing *point of view* perspective to distance himself from Hans Kelsen's monistic vision and lay the foundations for a configuration of relations between the EU and the member states based on overlap, interaction and the absence of hierarchy[17]. Thus, the theoretical foundations of constitutional pluralism are laid. Pluralism takes shape specifically from a consideration of the heterogeneity of the system levels, united by prospects of value, but at the same time open to conflict hypotheses.

The characterisation of these theories in a pluralistic perspective therefore leads to the exclusion of any hierarchical logic in the configuration of relations between the EU and the member states. The same principle of prevalence of EU law is questioned when the right to the final say is an open issue, entrusted to a dialogue between the Courts based on a forceful relationship rather than on legal principles[18]. The European juridical experience - both as for the coexistence of a plurality of constitutional entities and the *Verfassungsverbund* version (as well known, this is the original concept from which Pernice's multilevel constitutionalism theory develops) - is described as pluralistic and cooperative, far from federal models that would imply hierarchical systems of logic[19].

This position can be explained partly by a unilateral concept of federal experiences (as I will try to outline in the final part of this paper), partly by the analysis method substantially followed by these theories. This method, in order to rigorously describe the complex European reality, avoids verifying the correspondence of the formulated theory to established prescriptive models. In other words, the distance from federal models is clearly explained by the

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[16] Therefore, N. MacCormick, *Beyond the Sovereign State*, in 56 The Modern L.R. 1 (1993), at 18, writes about "systems of systems of rules".

[17] N. MacCormick, *Beyond the Sovereign State*, cit., at 8.

[18] This is one of the constitutional pluralism profiles mostly criticised by J. Baquero Cruz, *Another Look at Constitutional Pluralism in the European Union*, cit., at 371-2.

[19] I. Pernice, *Multilevel constitutionalism in the European Union*, 27 Eur. L.R. (2002), at 511 ff.

intent to describe the European reality (which, at the moment, does not have the features of a federal state) and not to prescribe possible objectives[20]. At the same time, if on one hand a mere description of the situation allows these theories to criticize the most consolidated explanatory models of reality (think of the distance from EU internationalist theories, from state constitutional theories, etc.), on the other hand it risks depriving them of the prescription features which undoubtedly characterize all legal theories.

Aware of such risks, the mentioned theories highlight the evolutionary character of the European experience, so as not to exclude the possibility of sudden innovations, even far from the logic of constitutional pluralism[21].

If this is the scenario in which constitutional pluralism moves, clearly, as for a possible conflict of systems, a unique, permanent structural or procedural solution is not provided. I would indicate this as a further feature of constitutional pluralism theories. On this point, even though they are different, the positions of the authors go in the same direction. The conflict is regarded by some as an exceptional hypothesis[22] or an issue to be entrusted to political decisions[23]or even as a hypothesis to be solved according to the principles of the rule of law[24].

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[20] In this sense, cf. I. Pernice, *De la constitution composée de l'Europe*, cit., at 642, for whom multilevel constitutionalism tries to explain the existing constitutional system, not subvert it through the imposition of actions by the constitutional power. On the merely descriptive nature of Pernice's position, cf. relevant criticisms by G. della Cananea, *Is European Constitutionalism Really 'Multilevel'?*, 70 Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht 2 (2010), at 300-1.

[21] In particular, cf. I. Pernice, who, while building his *multilevel constitutionalism,* composed by two complementary but different constitutional systems, states in several occasions that it is not a static constitution, rather a constitutional process (*De la constitution composée de l'Europe*, cit., at 647; *Multilevel constitutionalism in the European Union*, cit., 707; *German Constitution and 'Multilevel Constitutionalism'*, in E. Riedel (ed.), *German Reports on Public Law* (1998), at 42).

[22] M. Poiares Maduro, *Contrapunctual Law: Europe's Constitutionale Pluralism in Action*, in N. Walker (ed.), *Sovereignty in Transition*, (2003), at 532.

[23] Same goes for N. MacCormick, *Beyond the Sovereign State*, cit., at 9, who however agrees on the hypothesis of relying on international law.

[24] I. Pernice, *Multilevel constitutionalism in the European Union*, cit., at 520, according to whom the conflict is referred to national and European Courts and their ability to cooperate. As for the solution of the conflict, Pernice's position seems to set itself apart compared to more "orthodox" pluralists. When asked whether the conflict can be resolved, depending on the case, sometimes

In the elaboration of the conflict we feel the distance of institutional and normative instrumentation that separates constitutional democracies from constitutional pluralism: the former, having at their disposal the circuits of democratic representation and judicial review, manage to channel conflict within well-structured procedures; the second, not benefitting from adequate strategies of proceduralisation and channelling of the conflict, relies above all on the dialogue between the Courts.

The consequence, in dogmatic terms, is that everything tends to become a question of interpretation, even deciding which institution is most suitable to decide[25]. In a situation of tendentially overlapping systems, the conflict linked to who has the final say, expressed by different and opposing supreme jurisdictional authorities is 'normalized', i.e. considered as a possible hypothesis; however, this does not determine the nature and outcome of relations between systems. This is why in this context the *Kompetenz-Kompetenz* criterion loses value; it is no longer used as a conflict resolution strategy, and becomes, at most, a "powerful evaluation criterion of constitutional maturity"[26]. However, this solution stems from a concept of law that could be defined as neoliberal, since it explicitly states that the law cannot provide all the answers and that conflicts between systems - such as the one

favouring the EU, sometimes the States, the A. seems to implicitly provide a negative answer, starting from the assumption that, since the superiority of EU law is based on the will of sovereign peoples, this would explain why national courts cannot question the validity and application of EU law (I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*: *European Constitution-Making Revisited?*, in 36 Common Mkt L. R. 4 (1999), at 715). In this answer, a federal inclination of the Author is perceivable, favouring the prevalence of EU law (in this regard, please refer to the detailed criticism presented by G. della Cananea, *Is European Constitutionalism Really 'Multilevel'*?, cit., at 307-308, on the use of the term 'levels' by Pernice because, unlike 'layers or arenas', it would imply hierarchy.

[25] M. Poiares Maduro, *Courts and Pluralism*, cit., at 365.

[26] N. Walker, *The Idea of Constitutional Pluralism*, cit., at 350; in this sense, see I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, cit., at 710, according to whom member states lost their *Kompetenz-Kompetenz*. M. Avbelj also highlights this aspect in *Supremacy or Primacy of EU Law*, cit., at 752.

opposing the German constitutional court to the Treaty of Maastricht - must be resolved on a political and non-legal basis[27].

Needless to say, this legal perspective risks taking the EU far back, that is to say, to a traditional international law logic, to a balance between states ensured not by law but by concrete relations of force[28].

As long as it was used within state systems, the category of pluralism, given its intrinsic tendency to deny the State legal monopoly, has certainly represented a push towards fragmentation and, therefore, towards an aggravation, so to say, of the decision-making process, which, however, did not highlight the need to attribute the *Kompetenz-Kompetenz* to a specific subject. Thus, the two polarities, pluralism and unity of the system, were held together. In a new post-national scenario, the traditional features of sovereignty can no longer be defined from a theoretical point of view or according to the reality of relations between member states and the EU[29].

The fourth characteristic of the examined theories is thus given by a concept of sovereignty that is completely open, "undecided", not closed by the explicit rejection of sovereignty as a category capable of explaining inter-legislative relations within the European framework[30]. Positions can diverge as for development models, but they aim at the same goal. This also according to dual federalism supporters, such as Poiares Maduro, who writes about competitive sovereignty - a prospect that, although in contradiction, seems to reconcile the opposing terms developed by the necessary closure of the legal system and the plurality of legal systems - consequently, the issue of sovereignty remains unsolved,

[27] N. MacCormick, *The Maastricht-Urteil*, quot., 265; in this sense, also M. Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 Modern L.R. 1 (2007), at 23.

[28] Such mention can be found in J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, cit., at 418.

[29] This according to MacCormick, *Beyond the Sovereign State*, cit., at 14; I. Pernice observes in more than one instance, that national states have currently lost their sovereignty as for their constitutions (*Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, cit., at 726; *German Constitution and 'Multilevel constitutionalism'*, cit., at 50.

[30] N. MacCormick, *Beyond the Sovereign State*, cit., at 10.

as long as legal systems are able to coexist[31]. In other studies, sovereignty becomes a precarious concept characterised by autonomy, no longer by exclusivity: regulations belonging to specific sectors or functions can become more autonomous without hindering the autonomy of the other system[32].

The fifth characteristic of constitutional pluralism is closely related to an open concept of sovereignty: the substantial acceptance of the democratic deficit that characterises the EU. I write substantial acceptance because, although awareness of the problem is tangible, no solution is offered.

We move from prospects aimed at a solution of the deficit[33], to others where the solution seems to be entrusted to the law's self-referentiality[34], and others that finally resolve the issue while remaining aware of the democratic deficit problem. They fill the democratic gap of the European institutions through the democratic nature of national representative institutions[35].

With specific reference to the issue of democratic legitimacy, the solutions - or better, the lack of solutions - of constitutional pluralism, highlights many perplexities. In my opinion these theories, starting from the "indecision" of sovereignty, are not aimed at resolving the issue of a low democratic mandate since its solution - namely the actual adaptation of the Union legal system to the demands of a representative democracy (beyond the declarations of principle contained in the Treaty of Lisbon) - would require a profound transformation of the European legal system[36]. In other words, addressing the issue of democratic legitimacy

[31] M. Poiares Maduro, *Contrapunctual Law*, cit, at 523; the same direction was already followed by I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, cit., at 706.

[32] N. Walker, *The Idea of Constitutional Pluralism*, cit., at 346-7.

[33] M. Poiares Maduro, *Contrapunctual Law*, cit., at 527.

[34] N. Walker, *The Idea of Constitutional Pluralism*, cit., 352: "from a broad constitutional perspective law and politics are most aptly conceived of as mutually constitutive and mutually contained, thus challenging the presumption of the credibility, still less of the necessity, of an *a priori* political community".

[35] I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, cit., at 725.

[36] Appropriately, M. Goldoni, *Constitutional Pluralism and the Question of the European Common Good*, in 18 Eur. L.R. 3 (2012), at 399-400, writes that constitutional pluralism (in the M. Poiares Maduro version) appears too "court centred". More generally, the Author notes that the limit of constitutional pluralism is to be found "in the absence of a sophisticated account of the interaction between the institutions belonging to different levels" (at 401).

implies overcoming the openness of the legal order and the indecision over sovereignty, thus democratically strengthening the European institutions and favouring the loss of political autonomy by the member states and the involved political communities. While theorizing the superfluity of a legal response with respect to the core of the conflict and the correlated need for a political solution[37], constitutional pluralism has become a special interpreter of this dilemma, substantially removing the issue of democracy and of the necessary complex transformations needed to overcome the democratic deficit.

The peak of the trend has been reached in an extreme form of pluralism, which defines itself as radical (radical pluralism), opposed to "pluralism under international law"[38]. While noting the change in scenario imposed by post-national space, which would turn the traditional constitutionalism schemes into obsolete strategies, based on a hierarchical logic, radical pluralism wants to favour incremental processes, able to activate forms of cooperation and mutual tolerance[39]. The prerequisite of this form of pluralism is, if not the explicit removal, surely the hindering, loss of value or circumvention of the main democratic issues, related to the goals of the community under analysis, to all supreme laws and fundamental values[40].

Another classic strategy to overcome the problem of the democratic deficit is trying to compensate the relationship between the European legal system and national parliaments. Some authors believe this is a solution allowing us to overcome, all of a sudden,

[37] This according to N. MacCormick, *The Maastricht-Urteil*, cit., 265.

[38] This is stated in his late papers by MacCormick, who also started, with his considerations, the debate on radical pluralism.

[39] N. Krisch, *Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space*, 24 Ratio Juris 4 (2011), at 399.

[40] This according to N. Krisch, *Who is Afraid of Radical Pluralism?*, cit., 407: "We find certain advantages in a truly, "radically" pluralist structure in which fundamental question - about the scope of the polity, ultimate supremacy norms, key values - are bracketed and worked around. Such a pluralism favours pragmatic, incremental process of mutual accommodation and potential convergence, without overarching the authority of the norms and institutions that form the regime". Krisch's position recalls C.R. Sunstein's position on partially theorized agreements, (C.R. Sunstein, *Designing Democracy* (2001)). For a critique of Krisch's radical pluralism cf. G. Martinico, *Apertura ed olismo nel diritto costituzionale postnazionale. Appunti per una critica al pluralismo di Nico Krisch*, Diritto pubbl. comp. ed eur. 3, at 103 ff.).

very delicate theoretical questions. It is precisely the case of those who say that Treaties have a direct popular foundation, or more precisely, a foundation in the peoples of the Union; this because primary law always finds a counterpart in ratification procedures adopted by national parliaments. Consequently, the democratic principle, which in a representative form is fully implemented in nation states, is also deeply rooted in the Union dimension[41]. Yet, you will easily observe that such a compensatory function has apparent limitations, namely that, at European level, the principle of representative democracy continues to be only partially implemented.

The link between the removal of the democratic issue and the determined will of constitutional pluralism to disconnect the Union phenomenon from the state phenomenon cannot be ruled out. Since the logic of democracy pushes for a public power rooted in popular sovereignty, the loss of value of the democratic issue could mark the discontinuity of constitutional pluralism compared to popular sovereignty theories[42].

3. The hegemonic risks stemming from the impact of the single currency and the economic-financial crisis

In my opinion, all these theories are knowingly temporary, unbalanced on top of a plural coexistence as well as on an irreplaceable principle of unity. However, complex the interrelation system, in order to allow the existence of a legal system, both are necessary.

Consequently, these theories seem to reflect a very important and recent phase of relations between the EU and the member states, characterised by moments of strong pluralism and by reactions tending to closure. The phase of openness, of creative indecision in the system - and peak for constitutional pluralism theories - could last only in case coexistence was a path accepted by

[41] I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, cit., at 716-7.
[42] Please cf. the "residual" interpretation of popular sovreignty by N. MacCormick, *Questioning Sovereignty* (1999), at 129-130, according to whom the more (internal) sovereignty is widespread, the more difficult is the search for an entity that holds sovereign power, and the more necessary is to appeal to the people as the ultimate holder of sovereignty.

all the subjects taking part in constitutional pluralism[43]. A coexistence that seem to be questioned first by the creation of the single currency, and then by the economic and financial crisis.

As for economic politics, the introduction of the Euro has resulted in the loss of a key factor, with an impact on the range of instruments available to States in order to build their own redistribution policies. By removing one of its most important economic levers, the transfer of monetary policy to Frankfurt has undoubtedly affected a key objective of pluralistic democracies, that is to say the role of the State as a regulator of social conflicts[44].

However, the economic and financial crisis, which exploded in the United States and quickly expanded to Europe, gave the *coup de grace* to a system structure that, rightly or wrongly, had resisted since 1957. This is not the proper place to list all the tools aimed at facing the biggest economic crisis since the thirties of the last century. To sum up, the EU has taken measures to financially assist member states through the transfer of economic resources; it has following profoundly revolutionized the coordination and surveillance mechanisms of national economic policies, adopting a series of deeply innovative regulatory measures; finally, it has developed programs aimed at affecting the competitiveness of national economies.

These interventions have completely transformed the balance of the relations between the EU and the member states: now the EU carries out part of the redistribution policies (even if these interventions only indirectly pursue the traditional objective of redistributive policies, namely social justice); the activation of these Union policies is subject to strict conditions controlled by EU bodies, and their compliance is entrusted to sanctioning mechanisms. The aforementioned interventions have also been inspired by an economic policy approach, which effectively excludes different national economic choices and accentuates social inequalities[45]. From this point of view, the principle of budget balance, which adoption is recommended in constitution or constitutional sources, seems to go well beyond budget policy. It

[43] M. Poiares Maduro, *Contrapunctual Law*, cit., at 523.
[44] B. de Giovanni, *Sovranità: il labirinto europeo*, 1 Lo Stato 1 (2013), at 19-20.).
[45] See F.W. Scharpf, *After the Crash: A Perspective on Multilevel European Democracy*, 21 Eur. L.J. 3 (2015), at 391.

becomes the mark of a precise economic model within the market economy context.

This model is now radiating within member states through well-defined tools and programs. Among these, first, the "Euro Plus Pact", which identifies measures to be adopted by each State in the context of stability programs: these are measures concerning fiscal issues, the financial sustainability of social security, health, social care, income policies and productivity policies. Programs, as you can see, that shape the features of a welfare state (the "Pact for Growth and Employment", concerning measures in the field of public administration and justice, is also worth mentioning).

If these are currently the main EU areas of intervention - please note that they were at the heart of the social policies of the member states - the procedural aspects necessary for these measures to be effectively adopted are defined in the "Stability and Growth Pact", built on the European Semester and on the Common Budget Calendar, which promotes a strict control of national budgetary processes by the EU institutions, firmly restricting the member states areas of choice as for economics.

The described model is definable as a radical transformation of the inter-legislative scenario on which theories of constitutional pluralism were based: the consolidation of the market economy model as developed by European and international organizations, the progressive loss of economic policy options by constitutional democracies, the erosion of the distributive role of the State. In this context, which changed in the course of a few years, thinking about competitive sovereignty is very difficult, if you do not forget how that competition is ending.

We have entered a phase where, in some cases, the member states have decided or have been forced to transfer their powers to the EU as for economic sovereignty, even if the formal framework is still characterised by openness and indecision, and the EU continues to be an entity formally devoid of sovereign powers. By continuing to reason in terms of constitutional pluralism, we risk hiding the actual reality of inter-legislative relations, increasingly characterised by the entrustment of control powers to an entity - the European Commission - endowed with low democratic mandate[46].

[46] F.W. Scharpf, *After the Crash*, cit., at 393. For a wider description, please cf. M. Everson, C. Joerges, *Reconfiguring the Politics-Law Relationship in the Integration*

This means that decisions on the contents of the Union deliberations will be taken by a small group of *élites* consisting of technocracy and political interests of the most influential States.

The budget balance issue, which led Germany to modify its constitutional framework and then impose that choice on other member states, shows that this shift has already taken place. Now it is a matter of understanding whether this arrangement will become definitive or will be susceptible to a sea change.

4. Conclusion

As I have tried to explain, indecision on sovereignty and the removal of the democratic legitimacy issue have a stringent logic, linked to the will to avoid the traumatic experience brought out by the formation of a European people. In other words, the theories of constitutional pluralism have always implied that the democratic deficit can be overcome through the creation of a public sphere, a system of parties, a European people: entities that before were not at our fingertips. The answer that these theories have provided, however, is partial because, by theorizing the superfluity of a legal solution in a conflict situation, thus paving the way for political power relations[47], they contributed to eclipse one of the fundamental functions of the legal system, namely the solution of the conflict and the reconstitution of unity.

On the other side, it should be added that, those constitutional law scholars who are most linked to a state dimension, have not been able to find solutions to the democratic deficit problem. The majority of those scholars rely on a European tradition that tends to solve the federal phenomena/processes through the confederation-federation dichotomy, formulated at the end of the nineteenth century and focused on the role of sovereignty, and have thus found shelter behind the EU as an entity of its own kind; this perhaps helps describing a complex situation but does not solve the underlying issues. Finally, the position of state-based constitutionalism, even though opposed to constitutional pluralism, has also contributed to the process of

project through Conflict-Law Constitutionalism 18 Eur. L.J.5 (2012), at 644, in part. at 663; M. Dani, *Il diritto pubblico europeo nella prospettiva dei conflitti* (2013).

[47] Cf. N. Walker, *Constitutional Pluralism Revisited*, 22 Eur. L.J. 3 (2016), at 335.

indecision and removal of problems[48]. Faced with the progressive transfer of sovereign powers, accelerated due to the crisis, we urgently need to find a way out that combines the principle of pluralism, which features European public law, with the necessary unity that, as mentioned, characterizes every legal system. In my opinion, the road opened by constitutional pluralism should not be abandoned, but only perfected and made coherent[49]. In particular, it seems to me that the logic of constitutional pluralism theories has been useful to introduce, in a seemingly unconscious manner, patterns of categorisation that are typical of federal processes in their start-up phase[50]. As I already mentioned, this aspect is not analysed by constitutional pluralism's theorists, perhaps for fear of falling into an old discussion on the European legal tradition, discussing whether the federation is or is not state-based. The consequence is the conclusion that, if the EU is a federation or develops federal traits, it is also necessarily a State or an entity with similar features[51].

On the other hand, we know that the diachronic examination of federal associative systems shows initial phases characterised by rooted contractual residuals[52], where the issue of sovereignty is not a priority[53]. Like all federal association processes - although it has specific traits different from the processes in the USA, Switzerland or Germany - the EU also experienced a long start-up phase, during which the issue of sovereignty remained open, and was kept on

[48] For a critique to this approach cf. R. Schütze, *European Constitutional Law* (2016), at 53-59.

[49]As for the usefulness of constitutional pluralism, described as a "powerful theoretical framework (and a starting point of further research)", M. Goldoni, *Constitutional Pluralism and the Question of the European Common Good*, cit., at 405.

[50] More insights can be found in N. Krisch, *Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space*, cit., at 388.

[51] Cf. D.J. Elazar, *The New Europe: a Federal State or a Confederation of States*, in 4 Swiss Pol. Sci. R. 4 (1998), at 132-3, on how European *leaderships* tend to reason in State-based terms.

[52] Please cf. S. Ortino, *Introduzione al diritto costituzionale federativo,* (1993), at 242-3 and O. Beaud, *Théorie de la fédération* (2007), in part at 108.

[53] C. Schmitt, *Verfassungslehre*, (1928), at 361 ff. for a brilliant continuation of C. Schmitt's statements from a European point of view, cf. C. Schönberger, *Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas*, 129 Archiv des öffentlichen Rechts 1 (2004), at 81 ff., in part. at 117-119.

hold[54]. This is the (unconscious) link between constitutional pluralism and federal theory: the constitutional pluralism theory was useful to shape an important phase of relations between systems in the EU. The real limitation of constitutional pluralism is to be found in the idea that this phase - during which homogeneity is based on legal and economic values rather than on traditional homogeneity factors within federations (nationality, language, etc.) - was a definitive phenomenon. In some ways, constitutional pluralism was the true and refined epigone of a successful and influential line of thought: integration through law[55].

However, the substantial depletion of the sovereignty of member states caused by the economic crisis currently calls for a different and substantial homogeneity, which can only be sought through a renewed development of the democratic principle. To this end, the most appropriate route is imagining increasingly intense forms of participation of the European Parliament and member states in decision-making processes and differentiation paths, thus allowing member states to safeguard and merge their own identity against union public policies[56]. This seems to be the starting point of a path leading to the coexistence of a plurality of 'demoi', impossible to achieve without a prior democratic homogeneity[57].

[54] See J. Elazar, *The New Europe*, cit., at 135, according to which Europe is a "revival of Confederation". This reconstruction is criticised by N. Walker, *Constitutional Pluralism Revisited*, cit., 346-7, according to whom, in the end, federal logic replicates schemes belonging to a State-based tradition.

[55] M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds.), *Integration Through Law. Europe and the American Federal Experience* (1985).

[56] For a knowingly provocative explanation of viable solutions, see F.W. Scharpf, *After the Crash*, cit., at 400-4.

[57] In other words, if the idea of "co-existing multiple demoi", shared by J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 Eur. L.J. 3 (1995), at. 252, is identified as the ideal finish line. Undeniably, its achievement cannot be entrusted to excessively constructivist solutions, largely explained by the difficulty to resolve issues related to the democratic deficit.