

Is European Constitutionalism Really “Multilevel”?

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Abstract

In the history of European integration, few concepts have been so fortunate as the concept of “multilevel constitutionalism”. It helps us to understand that the EU is not a State and focuses on the correlation between EU and national law. Multilevel constitutionalism thus supplies the basic theoretical framework for analyzing both traditional and new issues. This does

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not exclude, however, the need to verify its adequacy, descriptively and normatively. Not only is the concept clearly a descriptive one, but it over-emphasizes the vertical dimension, while connections between national legal orders are increasingly important. Moreover, this concept is not successfully explanatory in a prescriptive sense. Indeed, it places too much emphasis on levels and the underlying ideas of hierarchy and coherence, absent the hierarchical structure which has characterized the States. Therefore, although the concept of multilevel constitutionalism makes sense of modern constitutionalism as a European phenomenon, rather than a mere addition of the Union to its Member States, it is not entirely convincing. Alternative attempts to conceptualize the legal order of the EU, more oriented towards legal pluralism, are more adequate to understand many of the new challenges faced by European institutions.

I. “Multilevel Constitutionalism”: Concept and Issues

In the history of European integration, very few concepts have been so fortunate as the concept of “multilevel constitutionalism”, especially in the last ten years, which were characterized by an unprecedented growth of the legal literature concerning the European Union, even outside Europe. Unlike other concepts, such as that of supra-nationalism, that of “multilevel constitutionalism” does not emphasize the higher status of EU law. It points out, rather, the interaction between EU and national sources in fulfilling the traditional tasks of constitutionalism, that is to say “establishing, organizing, sharing and limiting powers”, to borrow the words of Professor *Ingolf Pernice*, who is commonly and correctly regarded as the author of this legal concept, which was expressed in the form of essays.¹ Although he has recognized the importance of other contributions,² there is no doubt

¹ See *I. Pernice*, Constitutional Law Implications for a State Participating in a Process of Regional Integration: German Constitution and “Multilevel Constitutionalism”, in: E. Reidel (ed.), *German Reports on Public Law*, 1998, 40; *I. Pernice*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited, *CML Rev.* 36 (1999), 703 et seq. (hereinafter: Multilevel Constitutionalism); *I. Pernice/F. Mayer*, De la Constitution composée de l’Europe, *Revue trimestrielle de droit européen* 36 (2000), 629 et seq. (hereinafter: De la Constitution composée); *I. Pernice*, The Treaty of Lisbon: Multilevel Constitutionalism in Action, *Columbia Journal of European Law* 15 (2009), 349 et seq. (hereinafter: The Treaty of Lisbon).

² See *I. Pernice*, The Treaty of Lisbon (note 1), 352 (fn. 2), with reference, among others, to the works of scholars such as *A. von Bogdandy*, The European Union as a Supranational Federation: a Conceptual Attempt in the Light of the Amsterdam Treaty, *Columbia Journal*

that both the form and the substance of his approach have assumed an authoritative status and have played a major role in shaping the legal field.³

Though Sir *Isaiah Berlin*'s remarks about the importance and frequency of “fashions” in the field of political studies have some explanatory capacity also with regard to legal scholarship,⁴ it ought to be made clear from the outset that, if multilevel constitutionalism is a widely used concept, it depends on other causes. In part, this achievement derives from the fact that this approach expresses the state of European constitutionalism in a clear and systematic manner. The success of this theoretical approach depends, too, on its capacity to bring together the traditional doctrine of supranationalism with the awareness that the constitution of the EU does not simply bind those of the States, but at the same time is included with them in a “composed constitutional system (*Verfassungsverbund*)”.⁵ This is a fascinating example of how legal theories evolve by accumulation rather than by drastic changes, a point which differentiates legal culture from “hard” sciences. Another positive element of this approach is the combination of method and values which underpins multilevel constitutionalism. This approach does not merely aim at conceptualizing this composed constitutional system, but it also considers its capacity to limit and organize power.⁶

As a result of all this, the concept of multilevel constitutionalism has become so familiar in public law thought that it may seem coherent with the “order of things”. Professor *Pernice* has recently showed several implications of this theoretical framework with regard to the institutional innovations introduced by the new Treaty of Lisbon. More generally, multilevel constitutionalism supplies the basic theoretical framework for analyzing both traditional and new issues, including the protection of rights and the role of the courts. The status of the concept is such that those who work

of European Law 6 (2000), 27 et seq. and political scientists, such as *L. Hooghe/G. Marks*, *Multi-Level Governance and European Integration*, 2001, 3 et seq.

³ See, among others, *S. Dellavalle*, *Constitutionalism Beyond the Constitution. The Treaty of Lisbon in the Light of Post-National Public Law*, Jean Monnet Working Paper, 2009/3.

⁴ See *I. Berlin*, *Does Political Theory Still Exist?*, in: *P. Laslett/W. G. Runciman* (eds.), *Philosophy and Society*, 1962, 1 et seq.

⁵ *I. Pernice*, *The Treaty of Lisbon* (note 1), 352.

⁶ *I. Pernice*, *The Treaty of Lisbon* (note 1), 353; *I. Pernice*, *Multilevel Constitutionalism* (note 1), 706, holding that national and EC institutions act within “a coherent institutional system, within which ... the power is divided among two or more levels”, (emphasis added). It should not be forgotten, however, that although the task of limiting power certainly lies at the heart of constitutionalism (*C. H. McIlwain*, *Constitutionalism: Ancient and Modern*, 1947), modern constitutions fulfil other tasks, too, notably that of expressing values, see *J. H. Weiler*, *Un'Europa cristiana. Un saggio esplorativo*, 2007.

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within this approach sometimes look inclined to get on with their own line of research without having to reflect on its theoretical foundations.

Precisely for this reason, however, a twofold risk may arise. The first is that, as it often happens when a concept or a set of concepts (or, better, in *Thomas Kuhn's* words, a paradigm) is established, people tend to work within it for reasons that are not anymore properly articulated and, most of all, justified. The other risk is that this kind of concepts deeply influences the analysis with regard to the choice of topics. This may happen if it is only problems which are set within this framework that are viewed by the legal community as being worth considering by scholars. Other problems and issues, by contrast, may be marginalized because they are considered either as less important (the "low" brackets of public law, to say so) or as too distant from constitutional reality, that is to say as abstract issues. To bring this hypothesis to its extreme consequences, such problems and issues may even be regarded as being more properly the concern of another discipline.

While these are only potential risks, other reasons suggest that the concept of multilevel constitutionalism ought to be assessed critically.⁷ The first is that one of the tasks of scholars in any scientific field consists in verifying the adequacy of the concepts and, more generally, theories which are elaborated and used.⁸ This task is particularly important when such concepts and theories are so established and shared by others, in this case by the legal community, that they become the term of reference for other purposes, such as teaching, or they serve as a normative base for policy change.⁹ Assessing the adequacy of a concept or a theory, therefore, is important for several reasons even though the main one is still that of its scientific soundness.¹⁰ And such an assessment would be useful even if its results were such as to confirm fully the adequacy of the theoretical framework (as provided by *Popper's* theory of falsification), though I do believe that if such framework is discussed critically, at least in relation to its central tenets, its weaknesses emerge.

⁷ Although Professor *Pernice* himself qualified multilevel constitutionalism as a "concept" (see especially *I. Pernice*, *Multilevel Constitutionalism* (note 1), 706 and 715), in my opinion, it lies at the heart of a broader conceptual framework.

⁸ See *S. Cassese*, *Che tipo di potere pubblico è l'Unione europea?*, in: *S. Cassese* (ed.), *Lo spazio giuridico globale*, 2003, 45 et seq.

⁹ See *F. G. Snyder*, *Editorial: Ratification, the EU Constitution and EU Legal Scholarship*, *European Law Journal* 11 (2005), 261 et seq., arguing that "we should be aware that our understanding or the social and legal implications of constitutional deliberation would be substantially impoverished without innovative legal scholarship".

¹⁰ *A. Stone Sweet*, *The Judicial Construction of Europe*, 2004, 1 et seq.

After clarifying this, the ensuing discussion will be directed to the following issues. First, some aspects will be clarified with regard to the context and methodology which will be used. Secondly, after a quick description of the essential elements of the concept of multilevel constitutionalism, there will be a discussion of what I consider to be its main points of strength. As a third step, its adequacy will be critically assessed in the light of the legal experience accumulated within the EU.¹¹ More specifically, the assessment will concern multilevel constitutionalism from a twofold point of view, including its aptness to describe the constitutional settlement of the EU and its normative value. Finally, some alternative theories of the legal order, which place greater emphasis on pluralism, will be briefly considered.

II. A Methodological Premise

1. Facts, Problems and Theories

Since my introductory remarks mentioned very quickly the theories of scientific progress which are associated with the names of *Kuhn* and *Popper*, at least two preliminary points ought to be clarified.

First of all, there have been several attempts to press legal scholarship into a natural scientific framework based on the rigorous collection of data, the formulation of hypotheses (or abductions)¹² and the dispassionate verification of their validity. However, whatever the intellectual validity of this theoretical framework in other fields, its applicability to the legal field is, to say the least, highly controversial.¹³ In this respect, *Berlin's* argument that political beliefs as well as their underlying values deeply influence the conduct of human beings, whether they are aware of it or not, retains considerable importance.¹⁴

¹¹ This concept (*esperienza giuridica*) is borrowed from *Riccardo Orestano's* masterly systematic analysis of Roman law, see *R. Orestano*, *Introduzione allo studio storico del diritto romano*, 1963, 359 et seq.

¹² Abduction is a method of logical inference introduced by *Charles Sanders Peirce*, as a variant which designates the process of inference that produces a hypothesis as its end result.

¹³ On the role of constitutional scholarship in a comparative perspective, see the exchange among *A. von Bogdandy*, *The past and promise of doctrinal constructivism*, *International Journal of Constitutional Law* 7 (2009), 364 et seq., *M. Kumm*, *On the past and Future of the European constitutional Scholarship*, *International Journal of Constitutional Law* 7 (2009), 401 et seq., *R.C. Post*, *Constitutional Scholarship in the United States*, *International Journal of Constitutional Law* 7 (2009), 416 et seq.

¹⁴ See *I. Berlin* (note 4), 1.

However, this does not rule out the relevance, for example, of *Popper's caveat* against the pitfalls of positivism, particularly as far as not falsifiable statements are concerned.¹⁵ Nor, more importantly for our purposes, does it rule out *Kuhn's* remark that in the history of ideas there is often a period in which a new “paradigm” emerges (such as Copernican astronomy), becomes established, and supplies the theoretical framework for a number of solutions which practitioners may employ.¹⁶ *Albert Venn Dicey's* famous theory of the English Constitution¹⁷ and the *Allgemeine Staatslehre*, as exposed by *Georg Jellinek*,¹⁸ are but two very well-known examples of this. The same may apply to *Laudan's* idea of research traditions, which imply different assumptions and different ways of viewing relevant facts and their measurement.¹⁹ To make just an example, this methodological position not only reveals the weaknesses of the assumption shared by the great masters of public law working in the first quarter of the twentieth century, namely that some legal concepts designate phenomena which do not vary in time and space, but it also sheds some light on the importance of mechanisms of scientific advancement.

Second, *Berlin's* caveat is all the more valid in the legal field because of an important feature which characterizes legal scholarship. Legal scholarship, arguably, does not simply collect evidence or seek for empirical confirmation of a given theory. It often interacts directly with its object and may even modify it. This happens, for example, when the courts, either explicitly or implicitly, dismiss a certain argument of the parties on the basis of an established authority. With regard to European Community (EC) law an important example of this may be identified in *Hallstein's* thesis according to which the EC is a *Rechtsgemeinschaft*, that is to say (though the two con-

¹⁵ See *K. Popper*, *Conjectures and Refutations*, 1972. But see also, for criticism, *K. Feyerabend*, *Structure and Development of Science*, 1979.

¹⁶ *T. Kuhn*, *The Structure of Scientific Revolutions*, 1970, (arguing that the evolution of scientific theory does not emerge from the straightforward accumulation of facts, but rather from a set of change in the beliefs shared by a group). For further remarks on *Kuhn's* theory, from a legal perspective, see *M. Loughlin*, *Public Law and Political Theory*, 1992, 31 et seq.

¹⁷ See *P. Craig*, *Dicey: Unitary, Self-Correcting Democracy and Public Law*, L.Q.R. 106 (1990), 105 et seq.

¹⁸ *G. Jellinek*, *Allgemeine Staatslehre*, 1900. Both contemporaries and later writers acknowledged the importance of this treatise, see *V. E. Orlando*, *La dottrina generale del diritto dello Stato*, 1948, 10 et seq. and *P. Badura*, *Die Methoden der neueren Allgemeinen Staatslehre*, 1959, respectively. See also *O. Juanjan*, *Une histoire de la pensée juridique allemande (1800-1918). Idéalisme et conceptualisme chez les juristes allemands du XIXe siècle*, 2005, pointing out *Jellinek's* idealism.

¹⁹ See *L. Laudan*, *Progress and its Problems – Toward a Theory of Scientific Growth*, 1977.

cepts do not coincide) a Community based on the Rule of law.²⁰ This idea was at the centre of the reasoning followed by the European Court of Justice to recognize the standing of the European Parliament, absent any provision of the Treaty of Rome.²¹ In sum, not only are legal theories important *per se*, for their intellectual adequacy and elegance, but they also have consequences in the real world.

2. European Integration as a Challenge to Traditional Theories

After affirming that ideas have consequences for the events which occur in the real world, it ought to be added that the latter may exert a strong influence on the former. Studies dedicated to the EC and now the EU have revealed a recurring tendency to draw analogies between the constitutional structure of the European Union (EU) and that of the states, especially of federal orders, such as that of the United States. This tendency is increasingly frequent not only in academic studies, but also in “official” discourses about what the EU is or ought to be.

The tendency was implicit in the early years of European integration in the ethos of supra-nationalists.²² With their emphasis on the Community’s destiny to supersede the old nation-states, they were recreating a sort of national mystique on the European level.²³ An even clearer attempt to recreate such a mystique emerged more recently, when the draft constitutional treaty was in the process of elaboration.²⁴ Not only did a debate arise with regard to the use of the word “federal” (deleted well before the draft constitutional treaty was presented to the European Council of Salonicco),²⁵ but it was

²⁰ See *W. Hallstein*, *Europe in the Making*, 1972 (English translation of *W. Hallstein*, *Der Unvollendete Bundesstaat*, 1967); see also *A. von Bogdandy*, *A Doctrine of Principles*, in: *A. von Bogdandy/J. Bast*, *Principles of European Constitutional Law*, 2010, 29 et seq., pointing out that the “famous notion created by Walter Hallstein” avoids the “controversial allusion to an element of statehood”.

²¹ ECJ, Case C-294/83 ECR 1986, 1339, *Les Verts v. European Parliament*.

²² The precursor of these studies was *E. B. Haas*, *The Uniting of Europe. Political, Social and Economic Forces 1950-1957*, 1958.

²³ See *K. Nicolaidis*, *We, the Peoples of Europe ...*, *Foreign Aff.* 83 (2004), 101 et seq., holding that both “supranationalists and intergovernmentalists owe allegiance to some version of the nation-state model”.

²⁴ *J. H. H. Weiler*, *Europe: The Case Against the Case for Statehood*, *European Law Journal* 4 (1998), 43 et seq.

²⁵ The Convention’s President, *Giscard d’Estaings* had expressed the opinion that those opposed to federalism only represented 15 per cent of the members.

also proposed to enshrine into the treaty the symbols of the supra-national union, consisting of a common flag, passport and anthem.²⁶

The influence of the nation-state model is equally strong in the widespread criticism about the democratic deficit from which the EU suffers. Whatever the soundness of this criticism, the underlying idea is that at least certain solutions envisaged for the States should be replicated beyond the States.²⁷ This applies, in particular, to the role of the European Parliament, regarded as a pivotal instrument of legitimacy and oversight.²⁸

However, serious doubts may be cast on the legal relevance of any attempt to ascribe the EU to this model or the other. The reason is simply that there is no such thing as a normative model, within which a certain polity may be included with consequences that are legally relevant.²⁹ The resilience of the paradigms based on the experience of the States emerges also in those studies which emphasize that the EU is a sort of a “*sui generis*” body. That this last approach is particularly weak soon becomes evident when considering that a conclusion of this kind implies abandoning an analysis of old concepts and categories in the light of new phenomena.³⁰ It also prevents the possibility of verifying whether an analysis of the new phenomena may support generalizations which are always useful for sciences, even if they do not give rise to “grand” theories.³¹

²⁶ See *A. von Bogdandy*, *Noi europei! Sul tentativo di costruzione di una identità europea nella costituzione di Giscard*, *Rassegna parlamentare* 63 (2004), 896 et seq.

²⁷ For a convincing critique of received ideas about the democratic deficit, see *A. Moravcsik*, *Reassessing Legitimacy in the European Union*, *J. Common Mkt. Stud.* 40 (2002), 603 et seq., arguing that this claim is empirically weak; *G. Majone*, *Europe’s Democracy Deficit: The Question of Standards*, *European Law Journal* 4 (1998), 5 et seq., pointing out that the EU must not be assessed on the basis of standards elaborated for the states; *J.A. Caporaso*, *The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?*, *J. Common Mkt. Stud.* 34 (1996), 29 et seq. (44 et seq.), holding that states themselves have greatly evolved.

²⁸ For a different perspective, in which national parliaments retain a fundamental role with regard to legitimacy and accountability of national governments, see *G. de Burca*, *The Quest for Legitimacy in the European Union*, *Modern Law Review* 59 (1996), 349 et seq.

²⁹ *M. S. Giannini*, *Il pubblico potere. Stati e amministrazioni pubbliche*, 1986, 88 et seq., arguing that the inclusion of a state within this or that model of federation is legally irrelevant.

³⁰ For this line of reasoning, see *F. G. Snyder* (note 9), 261, arguing that legal scholars should “elaborate new theoretical lens for understanding European integration”; *G. Majone*, *Delegation of Powers in a Mixed Polity*, *European Law Journal* 8 (2002), 319 et seq., arguing that the model of mixed government is applicable to the EC; *G. della Cananea*, *L’Unione europea. Un ordinamento composito*, 2003, arguing that the EU should be viewed in the light of the new “composite” legal orders which emerge at regional level also in the Americas.

³¹ For further remarks on legal scholarship, see *A. von Bogdandy*, *A bird’s eye view on the science of European Law*, *European Law Journal* 6 (2000), 208 et seq.; *B. De Witte*, *European Union Law – A Unified Academic Discipline?*, *European University Institute (EUI)*

Consider, for example, a principle which has been quite important in the history of Western constitutionalism, that of separation of powers. That it is politically wise to prevent that the supreme powers of government are concentrated in a single body or institution (*plenitudo potestatis*) was already clear to Ancient Greeks. This order of ideas was deepened by English theorists such as *Locke* and *Bolingbroke*, and enriched by *Montesquieu*. While discussing the English Constitution, *Montesquieu* made an attempt to connect the organizational dimension (a plurality of institutions instead of a single one) with a sociological dimension. He showed the matching of social forces with those institutions (which he defined as legislative, executive and judicial), to the extent that the latter represented different parts of society. For this reason, he argued that separation of powers was not only essential for the enterprise of government, but was also a safeguard of liberty.³² The French Declaration emphasized this by affirming that without separation of powers, there is no such thing as a constitution.³³ Whatever the soundness of this dogmatic³⁴ approach, there is no doubt that during the nineteenth century Western constitutions were based on the doctrine of separation of powers, though in very different ways.³⁵ Precisely for this reason, however, such doctrine was very schematic. Moreover, during the twentieth century its importance as a restraint on government was weakened by the fact that, due to the widening of the electorate, parliaments became more powerful, sometimes almost omnipotent. The dominant tradition of public law has, however, continued to operate as if the institutional framework had remained largely the same, while the effectiveness of some traditional safeguards waned.³⁶ The tradition was perpetuated through the standard textbooks and was transmitted to other generations of scholars.

Working Paper RSCAS 2008/34, arguing that several factors prevent something like a “European prevailing opinion” from emerging.

³² *C. Montesquieu*, *De l'esprit des lois*, 1748 (1979, edited by *V. Goldschmit*), XI.4, arguing that “tout homme qui a du pouvoir est porté à en abuser”; accordingly, “il faut que, par la disposition des choses, le pouvoir arrête le pouvoir”.

³³ Art. XVI of the *Déclaration des droits de l'homme et du citoyen* (1789) establishes that “Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution”.

³⁴ In the sense that such a belief could not be doubted.

³⁵ On the different models followed in the UK and the US, see *C. Harlow*, *Una rassicurazione simbolica: il controllo giurisdizionale in una democrazia liberale*, in: *M.P. Chiti* (ed.), *Cittadino e potere in Inghilterra*, 1990, 202 et seq.

³⁶ *E. Forsthoff*, *Rechtsstaat im Wandel*, 1964, holding that modern legislators do not lay down anymore only general and abstract rules, thus undermining the virtues of the *Rechtsstaat*.

This becomes evident when considering the issues which arose when the EC was created. Clearly, the legislative power was not attributed to a single institution, but rather shared between the Commission, the Council and the Parliament. The executive power, too, was shared between the Commission and the Council and implementation was largely left in the hands of national authorities. Instead of considering this as a further proof that separation of powers has an increasingly limited relevance in modern structures of government, several observers made an attempt to adjust it to the new reality. In this line of reasoning, they affirmed that the traditional three powers were divided between four institutions instead of three.³⁷

3. The Theory of Multilevel Governance and Its Limits

Against the conclusion just exposed, it could be argued that both the U.S. and the EC/EU are systems in which governmental power is divided between central and local authorities. It could be added that this common characteristic has been accentuated since the Treaty on European Union (1992). It is not fortuitous that the need to find appropriate criteria for determining which issues are assigned to the domains of the EU and which to the Member States has become more intense. While the existing literature shows a widespread awareness of this need, some observers have gone further to suggest that the EU can be conceived as a system of multilevel governance. The essence of this theory, as presented by political scientists such as *Marks* and *Hooghe*, is that, unlike in traditional constitutional settings, within the EU “authority and policy-making are shared across multiple levels of government – subnational, national and supranational”.³⁸

This theory allows us to understand better at least two changes. First, although national governments retain considerable powers of impulse and decision within EU processes, as the adepts of political realism often underline, they do not enjoy a monopoly. Indeed, decision-making competences are shared by a plurality of institutions, including the Commission, the

³⁷ See, for example, *K. Lenaerts*, Some Reflections on the Separation of Powers in the European Community, *CML Rev.* 28 (1991), 11 et seq. But see also *P. Craig*, Constitutions, Constitutionalism and the European Union, *European Law Journal* 7 (2001), 128 et seq. (137), arguing that the institutional balance, instead of separation of powers, lies at the core of the Constitution of the EU.

³⁸ *G. Marks/L. Hooghe/K. Blank*, European Integration from the 1980s: State-Centric v. Multiple-Level Governance, *J. Common Mkt. Stud.* 34 (1996), 341 et seq. (342). See also *F. Scharpf*, Introduction: The Problem Solving Capacity of Multi-Level Governance, *Journal of European Public Policy* 4 (1997), 520 et seq.

European Parliament and the European Court of Justice (ECJ). Moreover, the Member States do not act as single players, but exercise those competences, rather, jointly or collectively. Secondly, decision-making processes are influenced by a variety of actors, who try to protect and promote a wide range of interests, which often cut across the national dimension, for example, when Ministers of Agriculture gather in order to take decisions concerning EC funds. Non-State actors are also increasingly important in the judicial context, where they make coalitions with the Commission and the ECJ against national governments. It is in this sense that proponents of multilevel governance argue that the EU is increasingly a sort of “governance without government”.³⁹

This, however, seems to take the issue too far. A more articulated analysis would be needed, for example, to give an account, on the one hand, of the management of structural funds and, on the other, of the policies of the EU and its Member States in the field of justice and home affairs. Moreover, the theory of multilevel governance overemphasizes the importance of decision-making processes. There is no doubt that such processes are important, since a growing number of public policies is conditioned (*encadré*) by the EU.⁴⁰ However, this is neither the exclusive aspect which ought to be considered when taking account of an institutional framework, nor the main one.⁴¹ Whether a structure of government is open to new members and, if so, which requisites for membership are established, is an equally important point, and one that influences decision-making processes. In this respect, a fundamental distinctive feature emerges with regard to global institutions such as the UN. The UN admits practically all sorts of States, including both authoritarian regimes, where no real democratic life exists, and those regimes which are based on traditional societies, that is to say where religious leaders maintain a single conception of the good that deeply influences the way of life of society as a whole. The EU is, by contrast, a very demanding club, where democracy and the rule of law are essential requisites for membership, together with market economy. As a matter of fact,

³⁹ L. Hooghe/G. Marks (note 2), 4.

⁴⁰ For this concept, see J. P. Jacqué, *La communautarisation des politiques nationales*, in: *Pouvoirs*, 1989, n. 28, 19.

⁴¹ In a similar vein, see J. H. H. Weiler, *I rischi dell'integrazione: deficit politico e fine delle diversità*, in: A. Loretoni (ed.), *Interviste sull'Europa*, 2001, 73 et seq., holding that multi-level governance reveals the “blindness” of those political scientists who are interested only in how decisions are taken.

only States respecting the principles of Art. 6 (1) TEU may become members of the EU.⁴²

The excess of emphasis on decisions, especially on macro-decisions,⁴³ which may lead the Union toward a closer integration, produces also another weakness. It neglects other changes, maybe less evident but not at all irrelevant for the daily life of individuals, groups (such as families) and other entities (undertakings, trade unions, environmental associations) which characterize our societies. Such changes derive, for example, from conflict resolution before the courts and other public agencies. Another major gap in this conceptual framework is that it says nothing about the fundamental issue of how all these individual and collective actors are related to the institutions of the EU.⁴⁴

Furthermore, another trend in the administration of EU policies is that when making decisions in the traditional areas of EC intervention (like agriculture) and in the new ones (including the licensing of genetically modified organisms and the licensing of drugs), both national authorities and either the Commission or EU agencies take part in multi-phase processes. These sequences of activities may be characterized as joint or, more precisely, mixed administrative proceedings.⁴⁵ They do not mirror a constitutional structure based on separated powers but rather highlight the interaction of a plurality of public authorities without a relationship of hierarchy, as it will be clarified later.

In conclusion, in the context of the EU the concept “multilevel governance” designates a simple thing, that is to say that the Union is a complex organization which is added to those of its Member States and interacts with them, sometimes requiring changes and adaptations. In these terms, the concept is merely descriptive of some factual characteristics of the EU, but it is, as observed earlier, a very partial description. It may be argued, therefore, that this concept is not very useful.⁴⁶

⁴² Cfr. *I. Pernice*, Multilevel Constitutionalism (note 1), 736 et seq., who observes, however, at 739, that “democracy has not been defined”; *L. M. Diez-Picazo*, *Constitucionalismo de la Unión europea*, 2002, 139 et seq.

⁴³ See *S. Cassese*, *La crisi dello Stato*, 2002, 65 et seq., holding that this excess depends on the conventional boundaries of both political science and international relations.

⁴⁴ *A. Stone Sweet* (note 10), pointing out that the building of a supranational constitution owed much to the interaction between private litigants, the Commission and the ECJ.

⁴⁵ *G. della Cananea*, *The European Union’s Mixed Administrative Proceedings*, *Law & Contemporary Problems* 68 (2004), 197 et seq., arguing that this kind of procedures raises new, complex issues.

⁴⁶ See *M. S. Giannini*, *Stato sociale: un concetto inutile*, in *Scritti in onore di Costantino Mortati*, 1977, 164 et seq., for the thesis that in scientific discourses what is unhelpful easily turns into a damage.

III. Multilevel Constitutionalism – Its Points of Strength

Unlike the idea that the EU is simply a kind of multilevel organization, the concept of multilevel constitutionalism supplies a significant progress with regard to previous theories in three respects. First, it clarifies that the EU is not a State and infers some consequences from this in the perspective of post-national constitutionalism. Second, it focuses on the correlation between EU and national law and indicates the assumptions on which such correlation is founded. Third, Professor *Pernice* advocates a shift from the institutional dimension to that of the citizenry. Each of these aspects will now be rapidly addressed.

1. Post-National Constitutionalism

Since it was argued earlier that the EU is not a State, nor has the aim of becoming a sort of super-State,⁴⁷ it becomes important to clarify in which sense it may be regarded from the point of view of constitutionalism. If constitutionalism, as we know it, emerges from the institutional practice of the States, as well as from the theories based on such practice,⁴⁸ how can we conceptualize it beyond the State? Professor *Pernice*'s analysis in his essays on multilevel constitutionalism provides us with an insight into a new approach to constitutionalism.

The starting point of his analysis is that the EU “is not a State, but a supranational polity based upon States”.⁴⁹ As a consequence of this fact, politically and legally relevant, multilevel constitutionalism has its specific features, which ought not to be ignored. Its specificity emerges in two respects. First of all, in order to situate the EU we must begin with abandoning the widespread tendency to view it through the traditional lenses of the theories elaborated in the context of the States. Accordingly, as Professor *Pernice* convincingly argues, we should be aware that, when considered as a politi-

⁴⁷ See *I. Pernice*, Multilevel Constitutionalism (note 1), 724, (according to whom the goal of the EU is not a super-State). See also *A. von Bogdandy* (note 2), 28.

⁴⁸ See *C. H. McLwain* (note 6).

⁴⁹ See *I. Pernice*, The Treaty of Lisbon (note 1), 352. See also *P. M. Huber*, *Recht der Europäischen Integration*, 2002, 105 et seq., pointing the complementarity between EU law and national law and *N. Walker*, *Taking Constitutionalism Beyond the State*, *Pol. Stud.* 56 (2008), 519 et seq., who identifies a variety of tensions surrounding the growth of post-state constitutionalism.

cal institution, the EU “does not fit within our familiar categories”.⁵⁰ In other and clearer words, the EU does not replicate the “logic of the nation-state on a larger scale”.⁵¹ This obliges observers to adapt their standards based on the States’ experience,⁵² whose reach may not be simply enlarged in order to take account of the new institution.

As a second step, Professor *Pernice* observes that the Union transforms its Member States, rather than superseding them. It does so for the very simple, though fundamental, reason that, once a State has decided to join the EU, it accepts a process of change, affecting both its internal structure and its relationship with citizens and other individuals.⁵³ As a result, most old theories are simply unfit to understand the new reality and to meet the new challenges of our time. Consider, for example, sovereignty, a main characteristic of which was that it is indivisible. Either the State could exercise it or it lacked sovereignty. Following this line of reasoning, it would not be possible to transfer some sovereign powers to the EU. However, a traditional feature of sovereignty, namely the power to create money is now exercised by the European Central Bank (ECB), at least for an *avant-garde* of countries. We may infer from this that sovereignty should not be regarded anymore as absolute and indivisible. This is a prerequisite for understanding that in the new global perspective the only way to exercise sovereignty consists in joining multilateral regimes.⁵⁴

⁵⁰ *I. Pernice*, The Treaty of Lisbon (note 1), 352.

⁵¹ *I. Pernice*, The Treaty of Lisbon (note 1), 374.

⁵² *I. Pernice*, The Treaty of Lisbon (note 1), 351.

⁵³ See *I. Pernice*, The Treaty of Lisbon (note 1), 374, holding that “the member States of the European Union ... have changed their character”; *A. Manzella*, Lo Stato “comunitario”, in: *Quaderno europeo. Dall'euro all'eurocrisi*, 2005, 99 et seq. (same thesis).

⁵⁴ *A. Chayes/A. Handler Chayes*, The New Sovereignty: Compliance with International Regulatory Agreements, 1995; *A.M. Slaughter*, A New World Order, 2004. See also *M.R. Ferrarese*, Hormones and Democracy. Inclusion, no “Exit-Option” and Some “Voice”: “Democratic” Signals in International Law?, *Global Jurist Topics* 6 (2006), 2nd issue, pointing out that exit is not a real option.

2. Beyond Monism and Dualism: The *Verfassungsverbund*

This brings us to the second point of strength of the theory of multilevel constitutionalism, that is to say its capacity to reconsider the old divide between monism and dualism. Of course, even a description of what such terms imply in the light of the works of earlier writers, especially in the literature about international law, largely encompasses the aims of this paper. A short narrative suffices to explain how multilevel constitutionalism helps us in reconsidering those terms.

The starting point of this short narrative is the dispute which saw *Flaminio Costa* opposed to *ENEL*, the public undertaking which obtained the monopoly of electricity in Italy in 1963. Both the Italian Constitutional Court (ICC) and the ECJ were requested to check the validity of the bill which nationalized electricity. The former followed a dualist approach, regarding EC law and national law as belonging to fundamentally different systems of law, which exist alongside each other, not simply distinct, but separated.⁵⁵ The latter, by contrast, did not simply assume that EC law and national law form part of a single legal system. It also affirmed that EC law enjoys a special status and cannot, consequently, be overruled by later national legislation,⁵⁶ giving weight, among others, to the aims of the founders of the Treaty (the *telos* of European integration),⁵⁷ as well as to the doctrine of “*effect utile*”. All this raised, however, a set of questions concerning the protection of the fundamental rights enshrined into national constitutions and, more generally, the role of these constitutions in the process of legal integration in Europe. As a result, national higher courts have identified some limits to supremacy, in particular the German Constitutional Court (GCC).⁵⁸

In order to appreciate the significance of Professor *Pernice*’s theory of multilevel constitutionalism we should also bear in mind the steady change of attitude that several lawyers have showed with regard to legal integration, either because they are pessimistic or because they are afraid that it went

⁵⁵ For further details, see *M. Cartabia*, The Italian Constitutional Court and the Relationship between the Italian Legal Order and the European Union, in: A. M. Slaughter/A. Stone Sweet/J. H. H. Weiler (eds.), *The European Court and National Courts*, 1998, 133 et seq.

⁵⁶ ECJ, Case C-14/64 ECR 1964, 125, *Costa v. ENEL*.

⁵⁷ For this order of concepts, see *J. H. H. Weiler*, *The Constitution of Europe*. “Do the New Clothes have an Emperor” and Other Essays on European Integration, 1999, 61 et seq. See also *I. Pernice*, *Multilevel Constitutionalism* (note 1), 711, qualifying as “dualist” the approach of the ECJ.

⁵⁸ For further details, see *A. Stone Sweet*, *Governing with Judges*. Constitutional Politics in Europe, 2000, 153 et seq.; *P. Birkinshaw*, *European Public Law*, 2003, 76 et seq.

too far. Though *Pernice* is aware of this cultural change, he takes a more optimistic view. On the one hand, he stresses the importance of the changes undergone by the institutional framework of the EU, in order to make it more respondent to the expectations and inputs coming from national political constituencies. He believes, coherently, that the development of the EU can be maintained within the limits set by national constitutions.

On the other hand, he observes, such constitutions have not remained unchanged. Indeed, several national constitutions have undergone “significant changes”.⁵⁹ Both the French and the German constitutions, in particular, were amended in view of the ratification of the Treaty of Maastricht. The Italian Constitution was modified, too, after the Treaties of Amsterdam and Nice had been adopted, precisely in order to give a specific mention to the legal order of the EC. Therefore, if this legal order must not ignore the limits stemming from national constitutions, at the same time those constitutions are evolving in order to adapt to European integration. This enhances, according to Professor *Pernice*, the coherence of their respective norms on a true understanding of the interlocking nature of multilevel constitutionalism, which sees the EU as a composed constitutional system (*Verfassungsverbund*).⁶⁰

3. “Europe Belongs to Its Citizens”: The Shift From Institutions to Individuals

Precisely because of this conceptual framework, which sees the process of European integration as a sort of silent revolution, the question arises whether the emerging “composed constitutional system” generates a risk. The risk is to sacrifice the sentiments of belonging and identity which have been developed in local and national communities. The theory of multilevel constitutionalism is not unaware of this risk, but suggests that, while that risk may be avoided, there are new opportunities, which ought not to be ignored. Such opportunities, already offered by the enforcement of the

⁵⁹ *I. Pernice*, The Treaty of Lisbon (note 1), 373 and *I. Pernice*, Multilevel Constitutionalism (note 1), 706, holding that his “perspective views the Member States’ constitutions and the treaties constituting the European Union, despite their formal distinction, as a unity in substance” and *I. Pernice/F. Mayer*, De la Constitution composée (note 1), 633 (“les deux ordres constitutionnelles sont complémentaires”). See also *B. De Witte*, The National Constitutional Dimension of European Treaty Revision, Walter van Gerwen Lectures 2 (2004), 4 et seq., pointing out the “growing constitutional intertwinement”.

⁶⁰ *I. Pernice*, The Treaty of Lisbon (note 1), 353 and *I. Pernice* Multilevel Constitutionalism (note 1), 707.

principle of non-discrimination on grounds of nationality⁶¹, are strengthened by the introduction of European citizenship.

There is an important strand in German legal thought, which is perhaps traceable to the traditional idea of *Volksgeist*, and which believes that the only way to preserve the sense of identity is by keeping its connections with the making of the nation-state, where this sense grew in the last centuries. The nation-state would thus become a sort of immutable sovereign body. This is, of course, a political idea and it is one which should, therefore, be discussed politically. At the same time, it has important legal consequences, which become evident when considering the judgments delivered by the GCC in the last fifteen years with regard to the amendments to the EC Treaty. For this reason, it is very important that Professor *Pernice* does not endorse the view elaborated by the GCC. Whatever his ideas about the sense of national identity, he makes it quite clear that, though a unified Europe now exists, it must not cancel the constitutional identity of the Member States. As *Joseph Weiler* has consistently argued, a fundamental political decision to lay the foundations of “an ever closer union among the peoples of Europe” lies at the heart of the process of European integration.⁶² That does not necessarily imply that pre-existing identities and ties of both a national and a local nature are immutable; after all, they, too, are cultural constructs. It does imply, however, that the national identity of people living within individual Member States must be respected and left to evolve. This is a legal duty of the Union’s that the new treaty emphasizes.

This treaty is important, moreover, for its impulse to another fundamental element of the European Union, notably its relationship with society. By emphasizing that the Union is “about citizens and their concerns, rather than abstract sovereign states”,⁶³ in my opinion, Professor *Pernice* means more than simply repeating what was quite clear since the first steps of European integration,⁶⁴ that is to say that the Community was a union of states and peoples. As a matter of fact, he contends that “multilevel consti-

⁶¹ See, for example, ECJ, Case C-186/87 ECR 1989, 195, *Cowan*.

⁶² See *J. H. H. Weiler*, *The European Union Belongs to its Citizens: Three Immodest Proposals*, *E.L.Rev.* 22 (1997), 150 et seq. (from which the title of this paragraph is borrowed).

⁶³ *I. Pernice*, *The Treaty of Lisbon* (note 1), 376.

⁶⁴ See the preamble of the Treaty of Paris (1952) establishing the European Coal and Steel Community (“determined to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared”) and that of the Treaty of Rome (1952) (“to lay the foundations of an ever closer union among the peoples of Europe”).

tutionalism encourages conceptualizing the Union from the perspective of its citizens".⁶⁵

Following this line of reasoning, the EU must be regarded as an organization of men and women,⁶⁶ as opposed to a simple union of states, and one that accommodates different kinds of representative institutions. The introduction of the citizenship of the EU, complementing national citizenship, is a further element confirming the new status recognized to the members of national political communities and strengthening the need to ensure an effective protection of the rights of individuals.⁶⁷ In my opinion, this is not an element of lesser importance. Quite the opposite, it suggests a very important shift of paradigm, since legal literature concerning the EC for a long period of time focused essentially on its relationship with the States. In other words, while the EC was regarded – to borrow *Norberto Bobbio's* expression – *ex parte principis*, it now ought to be regarded *ex parte populi*.⁶⁸

IV. Multilevel Constitutionalism as a Descriptive Framework

1. A Descriptive and Normative Analysis

After illustrating briefly what I consider as the main points of strength of multilevel constitutionalism, an attempt will now be made to assess it critically from a twofold point of view.

When evaluating a theoretical framework, as a first step, its adequacy to describe reality (i.e. the facts, particularly those which are legally relevant) must be considered. This applies, in particular, to multilevel constitutionalism since, as Professor *Pernice* clarified in his essays, this theoretical framework has, first of all, the task to "describe" a specific kind of constitutional-

⁶⁵ *I. Pernice*, Multilevel Constitutionalism (note 1), 739, holding that it is the peoples of Europe that are represented in the Parliament; *I. Pernice*, The Treaty of Lisbon (note 1), 376.

⁶⁶ *I. Pernice*, The Treaty of Lisbon (note 1), 401, arguing that the citizens of the EU are "the genuine subjects of the European multilevel constitutional setting".

⁶⁷ For the thesis that in the past the ECJ has protected the rights of individuals when "such protection served the greater goal of integration", see *H. Rasmussen*, Towards a Normative Theory of Interpretation of Community Law, University of Chicago Legal Forum 1992 (1992), 135 et seq. (137).

⁶⁸ For this dichotomy, see *N. Bobbio*, Stato, potere, governo, in: *N. Bobbio*, Stato, governo, società. Per una teoria generale della società, 1986, 55 et seq. See also *J. H. H. Weiler* (note 57), XI, pointing out that, beyond the rhetoric of the EU citizenship, there is sad reality of disempowerment of the individual, seen as a political citizen.

ism,⁶⁹ with a view to developing a comprehensive perspective for the analysis of a process which affects national and EU law simultaneously. From this point of view, the questions we must ask are not only if such theoretical framework supplies a convincing overall picture, but also whether it fails to account for some parts of the reality. In other words, does this theory correspond to the facts? Or does it promise more than it can deliver? And may we simply adjust the model in order to take into account those other parts of the reality or do we need to replace it with another one?

A related set of issues arises with regard to the normative validity of the concept of multilevel constitutionalism.⁷⁰ In this case, adequate attention must be placed on the clearness of the concept as well on its capacity to provide an adequate explanation of the reality which it takes into account. We need to consider, moreover, whether multilevel constitutionalism is acceptable or it has a problematic character because it emphasizes certain aspects or, instead, neglects them. Of particular relevance in this context is whether multilevel constitutionalism is an adequate framework for accommodating competing values and ideas about European integration, and, consequently, whether those values might be better expressed in a pluralist vision of the EU.

2. Levels – an Adequate Metaphor? Connecting Institutions

As a first step, the adequacy of multilevel constitutionalism must be considered with regard to its capacity to describe the dynamics of power and rights. When considering how powers are allocated and exercised, the metaphor of levels, which is inherent in the concept of multilevel constitutionalism⁷¹, leaves the observer of the EU at least vaguely dissatisfied. The reason is that this metaphor overemphasizes the vertical division of powers between the Union and its Member States. I have to add, at this stage, that Professor *Pernice* explicitly acknowledges that the vertical dimension is not

⁶⁹ See *I. Pernice*, Multilevel Constitutionalism (note 1), 353 and *I. Pernice/F. Mayer*, De la Constitution composée (note 1), 633, pointing out the “ensemble des normes constitutionnelles à deux niveaux”.

⁷⁰ On the empirical and normative relevance of constitutional theories, see *P. Craig*, Constitutions, Constitutionalism and the European Union, *European Law Journal* 7 (2001), 128 et seq. (137).

⁷¹ *I. Pernice*, The Treaty of Lisbon (note 1), 401, arguing that the citizens of the EU are “the genuine subjects of the European multilevel constitutional setting”.

the only one which is relevant. Indeed, as he correctly observes, the horizontal dimension has become increasingly important.⁷²

However, it may be argued that what characterizes the EU is, rather, the complex web of relationships which cuts across both the vertical and the horizontal dimensions of power allocation. Following *Eric Stein*, we may observe that both in the U.S. and the EU powers are separated vertically, rather than concentrated. However, there are numerous differences concerning the genesis and especially the evolution of those legal orders. Within the U.S., the institutions of federal government do not depend on the governments of the States.⁷³ By contrast, the institutional framework of the EU is closely intertwined with those of the Member States. The members of the Council of ministers are not simply “representatives” of the Member States, but are (*ex officio*) national ministers.⁷⁴ Consider also a fundamental power which does not easily fit within the classic view of the separation of powers, namely that to define the priorities. While in the Communities this power was shared between the Commission and the Council, since the 1970’s it was gradually exercised by the European Council. Accordingly, high policy choices are taken by a body which includes the Heads of State or of Government of the Member States, together with the President of the Commission.⁷⁵

This kind of technique is not limited to the high political branches of the Union.⁷⁶ Since the 1960s, one repercussion of the growth in quantity and complexity of government business within the EC was that there was a ten-

⁷² At least a difference of emphasis emerges, in this respect, between earlier works, such as *I. Pernice*, *Multilevel Constitutionalism* (note 1), 707 (“the European Union is a divided power system, in which each level of government ... corresponds to a different level of society”) and the more recent analysis, see *I. Pernice*, *The Treaty of Lisbon* (note 1), 352.

⁷³ See *E. Stein*, *On the Two Systems: An Overview*, in: *E. Stein/T. Sandalow* (eds.), *Courts and Free Markets*, 1982, 5 et seq., holding that between the EU and federal states, such as the U.S., there are at the same time common and distinctive features and that the latter are not only contextual, but also of institutional nature.

⁷⁴ See *D. J. Elazar*, *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements*, 1998, including the EC within neo-federal constitutional frameworks.

⁷⁵ For further analysis, see *P. Craig*, *The Community Political Order*, *Indian J. Global Legal Stud.* 10 (2003), 79 et seq. Art. 15, Treaty on European Union, as amended by the treaty of Lisbon, establishes that “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof”.

⁷⁶ Although the analysis developed in the text focuses on governmental structures, at least a mention should be made of the interconnection between the ECJ and national courts, see *G. F. Mancini/D. Keeling*, *Democracy and the European Court of Justice*, *CML Rev.* 31 (2004), 243 et seq. (for the thesis that this constitutes the European order’s “cornerstone”); *J. H. H. Weiler*, *The European Court, National Courts and References for Preliminary Rulings – The Paradox of Success: A Revisionist View of Article 177 EEC*, in: *H. G. Schermers et al.* (eds.), *Article 177 EEC: Experiences and Problems*, 1987, 366 et seq.

dency on the part of the Council to confine itself to the work of laying down the basic rules, and of entrusting the power of adopting secondary rules as well as of dealing with particular cases to the Commission. In other words, there was a growth in the use of “framework legislation”, but there was also an even greater need to put flesh on the framework, by way of detailed rules and individual decisions. The vesting of such powers in auxiliary bodies was not only new within the institutional framework of the EC. It also raised concern about the possible alteration of the balance of powers between the Council and the Commission. In order to prevent this, the Council set up hundreds of committees,⁷⁷ entrusted with the task of assisting the Commission in the implementation of its decisions. What was legally significant, of course, was not so much the scale of the practice, but rather the questions which it raised and which periodically re-emerged when either the Commission itself or the European Parliament contest the choice made by the Council.⁷⁸ However, the growth of governmental activities did not follow the logic of the vertical dimension of power. Nor did it imply a correspondent growth of the administration of the EC, although several agencies were set up since the 1990s.⁷⁹

One might have thought that these trends would have been regarded both as a further proof of an apparent virtue of the European Constitution, its flexibility, and at the same time of its distinctive features. Most commentators, however, did not respond to such developments in the machinery of government by adapting their conceptual frameworks. Those frameworks were essentially based on a basic division of labor between the Commission and national departments and agencies and became gradually distant from a reality in which powers were shared, rather than separated.⁸⁰ Only later did

⁷⁷ The European Commission’s Comitology Register, last updated in April 2009, shows 298 comitology committees in a variety of fields, including, for example, agriculture, the internal market and the area of justice, freedom and security.

⁷⁸ See ECJ, Case C-16/88 ECR 1989, 3457 *Commission v. Council* and, for further comments, *J. H. H. Weiler*, *Pride and Prejudice – Parliament v. Council*, *E.L.Review* 14 (1989), 334 et seq. See also *J. H. H. Weiler* (note 57) 277, pointing out that comitology poses a crucial democratic challenge; *C. F. Bergstrom/H. Farrell/A. Heritier*, *Legislate or Delegate? Bargaining over Implementation and Legislative Authority in the EU*, *West European Politics* 30 (2007), 338 et seq., arguing that procedures changed, revealing a shift in the allocation of power; *K. St. C. Bradley*, *Comitology and the Courts: tales of the unexpected*, in: *H. C. H. Hoffman/A. H. Turk* (eds.), *EU Administrative Governance*, 2006, 417 et seq., noting that hundreds of legally binding decisions are taken each year under comitology procedures.

⁷⁹ See *E. Chiti*, *An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies*, *CML Rev.* 46 (2009), 1395 et seq.

⁸⁰ *H. C. H. Hoffman/A. H. Turk*, *Conclusions: Europe’s integrated administration*, in: *H. C. H. Hoffman/A. H. Turk* (note 78), 574 et seq., holding that “the categories of direct and indirect administration are not sufficient to explain the structures” used by the EU.

lawyers begin to adjust their conceptual tools, drawing on both legal techniques which were common in some nation-states and on governmental techniques of past empires, such as the Spanish polysynody (from the Greek words *πολυς*, “many”, and *συνοδος*, “councils”).

3. Competition Between National and EC Regulators

There is also another difficulty with any attempt to describe how power is allocated which emphasizes the different “levels” within the EU. This difficulty derives from the diffusion of mixed decision-making procedures regarding both EC policies and the single market.

Consider, for example, Directive 2001/83/EC, which aims at achieving the objective of the free movement of medicinal products.⁸¹ In order to do so, the Directive establishes two alternative tracks for new drug approval, which must be mutually “consistent”.⁸² The first is the centralized procedure, which is in the hands of three bodies: the European Agency for the Evaluation of Medicinal Products, a technical committee, and the Commission. Though the committee, the Member States may submit requests to discuss new questions which have not been addressed in the opinion delivered by the Agency.⁸³ The second procedure, which is based on mutual recognition principles, or more correctly on equivalence,⁸⁴ begins with an application to one of the twenty-seven Member States’ authorities. This has the effect of preventing other Member States from assessing the product.⁸⁵ And, when a medicinal product has received a marketing authorization by a Member State, the others “shall recognize the marketing authorization granted” by that State.⁸⁶ If a disagreement arises with regard to potential risks for public health, Member States must “use their best endeavors to reach an agreement”.⁸⁷ If no agreement is reached by national authorities, it

⁸¹ Directive 2001/93/EC, of the European Parliament and of the Council, of 6.11.2001, on the Community code relating to the medicinal products for human use, § 6.

⁸² Directive 2001/93/EC (note 81), § 57.

⁸³ Directive 2001/93/EC (note 81), Art. 34, § 2.

⁸⁴ Directive 2001/93/EC (note 81), Art. 27. On equivalence, see *J. H. H. Weiler*, Epilogue: Towards a Common Law of International Trade, in: *J. H. H. Weiler* (ed.), *The EU, the WTO and the NAFTA*, 2000, 223, observing critically that “mutual recognition or parallel functionalism was, perhaps, an intellectual breakthrough, but a colossal market failure”.

⁸⁵ Directive 2001/93/EC (note 81), Art. 17, § 3.

⁸⁶ Directive 2001/93/EC (note 81), Art. 28, § 2. § 5 adds that “each Member State ... shall adopt a decision in conformity with the approved assessment report”.

⁸⁷ Directive 2001/93/EC (note 81), Art. 29, § 3.

is the Commission which is entrusted with the power to take the final decision, on the basis of the committee’s opinion.⁸⁸

The methodology of control of risks for human health which has just been described presents several interesting features. Firstly, it shows the pervasiveness of the EC regulations and its importance. The decision of a national administration concerning a certain medicinal product may produce legal effects which go well beyond national boundaries. That decision, moreover, may critically affect highly sensitive and controversial issues concerning the beginning or the end of our lives. Consider, for example, the RU 486 pill. Unlike the so-called “day after pill”, this product is an alternative to abortion. Precisely for this reason, it is forbidden in all those countries, such as Ireland and Malta, where abortion is prohibited. Nor is it marketed in Poland, where a more restrictive legislation was introduced after 1989. A similar situation occurred in Italy, though abortion is legalized. However, it was only after the EU Agency had assessed that RU 486 did not entail a serious risk for human health that mutual recognition was accepted, in 2009, and the French producer obtained the authorization to marketize it in Italy.

Secondly, and more interestingly, these administrative decision-making processes do not conform to the usual image of “divided powers”, or to the underlying hierarchical dimension. That there is not hierarchy, it soon becomes evident, when considering that, although a centralized procedure exists, it is not the only viable option. Indeed, the decentralized procedure is an alternative option. Within the decentralized procedure an intervention of the Commission is possible. However, this happens only if national authorities do not reach an agreement. Moreover, those national authorities intervene within the centralized procedure through the committee. There is, therefore, a sort of competition between the two procedures.

Thirdly, the decentralized procedure creates room for regulatory competition. Whether this generates a race to the top, thus inducing national regulators to improve their performance and to converge on certain standards of conduct,⁸⁹ or a race to the bottom, is another question, and a complex one. Whether this way to exercise administrative power needs to be rationalized and made more accountable in order to make it acceptable, is still another crucial question. This kind of administrative governance may be regarded as too opaque and distant from stakeholders. If, however, we focus on its or-

⁸⁸ Directive 2001/93/EC (note 81), Art. 34.

⁸⁹ W. Weiss, *Agencies Versus Networks: From Divide to Convergence in the Administrative Governance in the EU*, *Administrative Law* 61 (2009), 49 et seq. (for the thesis that networks and agencies have similar causes, but distinctive features).

ganizational and procedures features in an attempt to understand its overall impact, it can be said that this administrative governance does not follow the traditional separation between lines of command. Quite the opposite, it realizes a variety of forms of connections between public authorities, including integration (within the committee), cooperation (by way of exchange of information and participation in common procedures)⁹⁰ and, finally, competition.

V. Multilevel Constitutionalism as a Normative Framework

1. Concepts and Values

In addition to the limits which emerged earlier with regard to the adequacy of multilevel constitutionalism, regarded as a description of today's reality, there is a further category of difficulty with Professor *Pernice's* theory, which concerns its normative dimension. This does not call into question what constitutes evidence or the weight of such evidence, but rather the ideas, beliefs or sets of values which are enshrined into a concept or a conceptual framework, even though this is neither explicit nor deliberate.⁹¹ Such analysis may be helpful because the ideas, beliefs or sets of values that are incorporated within a certain concept or order of concepts may be pulling in different direction. Or, they may be internally coherent, whilst at the same time expressing an understanding of legal institutions and social forces which could be outdated or controversial. After justifying this further level of analysis, I have to add that it raises two fundamental issues.

First, we need to ask whether this order of concepts, which emphasizes the plurality of "levels", is in itself an adequate one. I contend that, while a broad consensus exists among those who share the same view about the in-

⁹⁰ For another example of authorization procedure concerning GMO's, see Directive 2001/18/EC of the European Parliament and of the Council, on the deliberate release into the environment of genetically modified organisms and the analysis by *E. Brosser*, *The Prior Authorisation Procedure Adopted for the deliberate Release into the Environment of Genetically Modified Organisms: the Complexities of Balancing Community and National Competences*, *European Law Journal* 10 (2004), 555 et seq., holding that the procedure requires an enormous collaborative effort from national and Community authorities, with little concrete results, at least initially.

⁹¹ See *G. Burdeau*, *Ideologia*, in *Enciclopedia del Novecento*, 1978, 505 et seq.; *R. Orestano*, *Ideologia, parola da non far più paura. Per una radiografia della "scientia juris"*, *Foro It.* 105 (1982), 157 et seq.

teraction of constitutions and institutions, there has been little genuine debate concerning ideas and values which underpins “multilevel constitutionalism”. Such ideas and values are, furthermore, questionable.

Secondly, and bearing in mind the ambiguity already noted with regard to this theoretical framework’s capacity to describe the institutional framework of the EU, we must ask whether multilevel constitutionalism fully catches the implications of the kind of legal pluralism which we witness in Europe. More specifically, it is important to verify whether, within the framework of Professor *Pernice*’s thoughts about European constitutionalism, there is enough place for different views about the basic values of our societies and even for varying conceptions of the good.

2. Levels – a Biased Metaphor

As a starting point, the meanings of the two words, “multilevel” and “constitutionalism”, must be sketched. As we shall see, it is not the latter, the more important, but the former that raises some complex issues. As a matter of fact, there is not even consensus amongst those scholars who share the same theoretical framework with Professor *Pernice* as regards the possibility of examining the EU in the light of constitutionalism. Of course, there are different theories about what constitutionalism is or should be. However, I suggest that there is nowadays a widespread consensus amongst scholars about the basic structures of constitutionalism and their relevance in the context of the EU. Whether such structures fulfill the same functions of those with which we are more familiar, in national contexts, and whether their functioning is adequate is another question and one that is not necessary to consider here.

What we need to consider very carefully are, rather, the beliefs and sets of values which are incorporated in the expression which characterizes constitutionalism in the context of the EU, namely its multilevel nature. In this respect, I shall argue that, regardless of the beliefs and values expressed by Professor *Pernice*, if not in contrast with them, the term multilevel is very questionable.

In the attempt to catch a salient feature of the EU as it now exists, this concept uses the word “level”. The least that can be said is that this is not at all a neutral word. Quite the opposite, as an expert of non-unitary polities, Professor *Daniel J. Elazar*, has convincingly argued, the word “level” has a

clear hierarchical connotation.⁹² In other words, when we speak about levels, as opposed to layers or arenas, we are using a word which conveys the idea of hierarchy.

I should perhaps clarify that I am not contesting that hierarchy can be a very helpful tool of government, used by different social orders in order to shape the relationships between public institutions.⁹³ My argument is, rather, that historically hierarchy designates social orders which “rest on relation of command and obedience” and where the will of some sort of supreme authority determines what ultimately must be done.⁹⁴ While historically this vision of social order is strongly connected with the parable of the nation-state, it is not an exclusive feature of this kind of polity. Indeed, it was shared by the Catholic Church.⁹⁵

As I said earlier, nothing suggests that the conceptual framework elaborated by Professor *Pernice* views the EU as a hierarchical organization. Indeed, he gives considerable weight to the horizontal dimension of European integration, which complements its vertical dimension. But this is precisely the issue: if we agree that the EU has at least a twofold dimension, why should we express this with a word, “level”, which refers inevitably to only one of them? Moreover, bearing in mind Professor *Weiler’s* criticism about

⁹² *D. J. Elazar*, Il “principio federale”: identità e differenze, in: A. Loretoni (ed.), *Interviste sull’Europa* (note 41), 44. For further remarks in this sense, see *P. M. Huber*, Das Institutionelle Gleichgewicht zwischen Rat und Europäischem Parlament in der künftigen Verfassung für Europa, *EuR* 38 (2003), 574 et seq.; *C. Harlow/R. Rawlings*, Promoting Accountability in Multi-Level Governance: A Network Approach, *European Law Journal* 13 (2007), 542 et seq., arguing that the hierarchical and pyramidal assumptions that underpin accountability theory in the EU context need to be tested and that evaluating frameworks may be necessary; *G. Rossi*, *Principi di diritto amministrativo*, 2009, 86 et seq. (with respect to theories of subsidiarity). The hierarchical dimension is even more evident when other metaphors are used such as that of the French word “échelle” (see *I. Pernice/F. Mayer*, *De la Constitution composée de l’Europe* (note 1), 648: “l’approche proposée d’un constitutionnalisme à plusieurs échelles”: emphasis added).

⁹³ See *S. Romano*, *L’ordinamento giuridico*, 2nd ed. 1946 and *A. Sandulli*, *Santi Romano and the Complexity of Public Law*, *Italian Journal of Public Law* 1 (2009), 57 et seq. (for the thesis that *Romano’s* pluralism differed from that of his French contemporaries *Duguit* and *Hauriou*).

⁹⁴ See *F. A. von Hayek*, *Law, Legislation, and Liberty*, Volume I, *Rules and Order*, 1973, 36 and, for further remarks, *M. Loughlin* (note 16), 85. See also *K. Nicolaidis*, *Conclusion: the Federal Vision Beyond the Federal State*, in: *K. Nicolaidis/R. Howse* (eds.), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*, 2001, 464 et seq., especially para. 5, “beyond hierarchy”.

⁹⁵ Interestingly, it was the Catholic Church that developed the concept of subsidiarity, which initially designated, in the military jargon, the troops which were located in the second row, which would intervene and bring support (subsidiium) when this was judged necessary by a superior authority. For further remarks on this legal experience, see *P. Bellini et al.*, *Storia e dogmatica nella scienza del diritto ecclesiastico*, 1983.

the capacity of “multilevel governance” theories to provide a full vision of the EU, should we not consider whether the metaphor of levels catches adequately aspects different from the machinery of government?

3. Fundamental Rights in a Pluralist Legal Order

This line of reasoning produces a shift of perspective. After considering the EU from the perspective of its institutions (*ex parte principis*), we ought to use the other perspective (*ex parte populi*), that of its citizens. In this respect, as I observed earlier, the doctrine of multilevel constitutionalism gives considerable weight to the importance which the rule of law and fundamental rights have in providing a set of principles designed to keep the government within its legal bounds and to ensure that certain policies are carried out, respectively. It clarifies that those bounds cannot be considered within a strict conception of legality, in view of the growing importance played by the general principles of (public) law. It supplies a convincing analysis of the new provisions for the protection of fundamental rights, with specific regard to Art. 6 (1) TEU, which refers to the Charter of Fundamental Rights as a legally binding document.⁹⁶

The question arises, however, whether this theoretical framework provides a sufficiently powerful representation of the interplay between the various sources of fundamental rights as well as between the courts which must ensure their respect. There is no doubt that those sources, if considered as a whole, strengthen remarkably the safeguards of fundamental rights. Sometimes, those sources may be even invoked together, as it happened in the *Akrich* case. The UK’s Home Department had held that the effects of an earlier deportation order were not affected by the marriage of a third country national with an EU citizen. The underlying reasoning was that a person who has illegally entered into the national territory may not benefit from marriage (also to prevent marriages of convenience). The ECJ, instead, held that the order was incompatible with EC law, seen in the light

⁹⁶ Art. 6 (1) TEU establishes that “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”. While this clarifies the legal value of the Charter, it raises the problem of its relationship with the ECHR, when the EU joins it. For further details, see *I. Pernice*, The Treaty of Lisbon (note 1), 401.

of Art. 8 of the European Convention on Human Rights (ECHR), which protects the integrity of family life.⁹⁷

However, despite the optimistic point of view according to which statements of rights are always compatible with one another, this is not necessarily the case. First, those statements do not always coincide. Indeed, the rights recognized by the ECHR are broadly covered by the Charter of Fundamental Rights, but not exactly replicated.⁹⁸ Hence the need to specify that nothing in the Charter shall be “interpreted as restricting or adversely affecting human rights” (Art. 53). Second, precisely the new text of Art. 6 (1) TEU raises the question whether, after the entry into force of the Lisbon Treaty, the courts and other agencies entrusted with the task of protecting fundamental rights will refer to the Charter or to the ECHR, especially when the EU joins the Convention. Third, although the Charter follows in many respects national bills of rights, in particular by emphasizing the value of human dignity, such rights are interpreted in different ways in the national constitutional settings. At least potentially, a contrast between EU law and national law may not be ruled out. Both the GCC and the ICC, in particular, have repeatedly affirmed it. The former did not hesitate to quash national legislation implementing the framework decision on the European Arrest Warrant, adopted in the context of justice and home affairs, on the grounds that it disregarded essential constitutional constraints on power.⁹⁹

A further *caveat* derives from the complex relationship existing between EU law and global law in this field. Despite the widespread belief that the judgment of the ECJ in *Kadi*¹⁰⁰ expresses the wish to isolate the legal order of the EU from global law, more specifically from UN law,¹⁰¹ a closer look at the approach used by the Court reveals more nuances than it does at first

⁹⁷ See ECJ Case C-109/01 ECR 2003, I-9607, *Secretary of State for the Home Department v. H. Akrich* and the comment by E. Spaventa, Case C-109/01, *Secretary of State for the Home Department v. H. Akrich*, CML Rev. 42 (2005) 225 et seq.

⁹⁸ See G. della Cananea, The concept of fundamental rights in the EU Charter, European Review of Public Law 14 (2002), 795 et seq.

⁹⁹ For a discussion of some implications, see D. Sarmiento, European Union: the European Arrest Warrant and the quest for constitutional coherence, International Journal of Constitutional Law 6 (2008), 171 et seq., emphasizing the need that the ECJ and national constitutional courts engage in a constructive dialogue.

¹⁰⁰ ECJ, Case C-402/05 ECR 2008 I-6351, *Kadi v. Council*.

¹⁰¹ For this kind of critical analysis of the ruling of the ECJ, see G. de Burca, The EU, the European Court of Justice and the International Legal Order after Kadi, Harv. Int'l L. J. 51 (2009), Vol. 1; Fordham Law Legal Studies Research Paper No. 1321313. Available at SSRN: <http://ssrn.com/abstract=1321313>.

sight.¹⁰² While it would be probably an exaggeration to characterize the lower court’s (the Court of First Instance – CFI) judgment as a coherent monist perspective, there is no doubt that the ECJ followed a different perspective. It fully acknowledged the relationship between the legal order of the EU and that of the United Nations. This implied that the UN resolutions against terrorism could not be disregarded, especially in a period in which the EU is trying to strengthen its role as a global player in this field. However, the ECJ was aware of the risks deriving from the line of reasoning followed by the CFI. As Advocate-General *Maduro* had convincingly observed, the Court would have deviated from its judicial policy aiming at ensuring adequate protection of the essential content of fundamental rights (whether this policy is motivated by a genuine concern for such rights or by the desire to prevent national higher jurisdictions’ reaction is another question).¹⁰³ For this reason, the ECJ did not conceive the primacy of UN law as a structural primacy, based on hierarchy. It conceived it, rather, as a functional primacy, justified by the need to achieve certain common goals and, in any case, limited by two pillars of the Court’s consolidated case-law, namely that the EC/EU is an autonomous legal order and one based on the rule of law. Hence the refusal to attribute a sort of optional protection to the rights covered by the ECHR.

In conclusion, the assessment of multilevel constitutionalism from a normative point of view contributes to leaving the reader with a sense of ambiguity. The reason for this is that, unlike mainstream national constitutionalism, the theory of multilevel constitutionalism is a product of the awareness that the assumptions which are familiar in national contexts, such as coherence, not only do not apply to the EU, but are hardly applicable to those contexts anymore. It would be unfair, therefore, to say that multilevel constitutionalism should be viewed primarily as a contemporary defence of constitutional doctrines elaborated within the nation-states. However, in my opinion, the doctrine of multilevel constitutionalism does not infer from this all the necessary conclusions. Also from this point of view, anyway, it is quite helpful, to the extent to which it is the clearest example of the difficulty to combine at least some of the assumptions of mainstream constitu-

¹⁰² G. Anthony, EU Law’s Fundamental Rights Regime and Post-national Constitutionalism: Kadi’s Global Setting, in: P. Birkinshaw (ed.), *The European Union Legal Order after Lisbon*, 2010.

¹⁰³ For this reading of the ruling of the ECJ, see G. della Cananea, Global Security and Procedural Due Process of Law between the United Nations and the European Union, *Columbia Journal of European Law* 15 (2009), 511 et seq.; P. de Sena/M. C. Vitucci, The European Court and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values, *EJIL* 20 (2009), 193 et seq.

tionalism with a full recognition of the implications stemming from legal pluralism.

The difficulty with mainstream constitutionalism is not only that in the EU, in contrast to all those theoretical constructions which are more or less influenced by hierarchical and pyramidal visions of law and society, there is not just one single guardian of the constitution and of the rights it enounces. The problem is that those rights are provided by a variety of constitutional documents, including EU treaties, national constitutions, and the ECHR. As a consequence, the possibility of conflict arises not only within the political arena, but also on the legal stage, although the courts have showed a good deal of wisdom and willingness in avoiding open conflicts.

VI. Co-existence and Conflict in Pluralist Approaches

Since there are some tensions between the theoretical framework elaborated by Professor *Pernice* and the legal experience of the EU, considered also from a normative point of view, we may be tempted to take alternative conceptualizations into account. A different, more pluralist approach may provide us with a more accurate description of the EU. Or, we may think that it is less biased by ideas and beliefs which correspond to other stages of European constitutionalism. However, the opposite outcome may not be ruled out. We may perceive also some of the problems associated with pluralism. A better awareness of these problems may reveal elements of strength of the doctrine of multilevel constitutionalism. Through this exercise, therefore, we may obtain a useful insight into the potentialities and the risks of alternative approaches. I used the word “exercise” because what is presented here is only a first attempt, which ought to be followed by a more systematic analysis.¹⁰⁴ I will consider now only two variants of legal pluralism, through an evaluation of the works of *Mario Chiti* and *Miguel Poiares Maduro*.¹⁰⁵

¹⁰⁴ Professor *Pernice* himself, whilst accentuating the unity or symbiosis of national constitutions and the treaties establishing the EU, holds that they form together one “composite legal system” (see *I. Pernice*, *Multilevel Constitutionalism* (note 1), 724 and *I. Pernice/F. Mayer*, *De la Constitution composée* (note 1), 633).

¹⁰⁵ It may be not entirely fortuitous that both *Chiti* and *Maduro* have spent much of their academic career in Florence, where the European University Institute is located and where I spent some years in the past. For a more articulated analysis, which illustrates the works of other scholars, such as *Mattias Kumm* and *Neil Walker*, see *N. Krisch*, *The Case for Pluralism in Postnational Law*, 2009, arguing that pluralist theories are more adequate than constitutionalism in a postnational legal framework. There is still another approach which must be men-

While *Mario Chiti*'s first works concerned planning at local level and participatory democracy in national administrative processes, he is one of the few Italian scholars who systematically engaged with comparative legal analysis. The periods of study he spent at the London School of Economics may have been connected with his inclination for a sort of functionalist style of public law.¹⁰⁶ However, those periods were particularly useful to confront legal institutions and the traditions of public law thought in common law countries and civil law countries and their adaptations to European integration. The comparative perspective is thus connected with the study of the role of the ECJ, which *Chiti* saw boldly in developing not only principles of judicial review, but also constitutional principles concerning the relationship between legal orders. It is in this perspective that he paid attention to the treaty of Oporto, establishing the European economic space. While the signing of the Treaty of Oporto was considered by most observers essentially for its genesis, due to the opinion given by the ECJ, or for its impact on the Single market, *Chiti* paid attention, rather, to another legal effect. The Treaty, he argued, did simply in remove the barriers between EC and EFTA countries, thus enlarging the free market area in Europe. It gave rise, according to *Chiti*, to a European legal space (*spazio giuridico europeo*).¹⁰⁷ This construction has several interesting aspects, of which two will be briefly considered.

First, whilst emphasizing the territorial dimension of the EU, it does follow the traditional conceptualization of the connection between land (*Land*) and power which we may see, for example, in *Jellinek's Allgemeine Staatslehre*. At the beginning of the twentieth century, *Jellinek* observed that the territory (*Gebiet*) designates the space on which the State can fulfill its specific mission, that is to say that to command. In this vision, territory is an element of the *Herrschaft*.¹⁰⁸ At the beginning of the twenty-first century, *Chiti* observes, the institutional bases of the EU are completely different. The EU is a political body, but has not its own people. Quite the opposite, not only is its social element differentiated, but the EU has the duty to respect cultural and linguistic diversity (Art. 22, Charter of Fundamental Rights), in addition to preserving national identities (Art. 1 TEU). As a

tioned, since it underlines the constitutional relevance of national identities for the EU, see C. Harlow, *Voices of Difference in a Plural Community*, *Am. J. Comp. L.* 50 (2002), 339 et seq. and J. L. Quermonne, *L'Europe en quête de légitimité*, 2001, 47 (emphasizing “le droit à la différence”).

¹⁰⁶ For this remark about the LSE's legal tradition, see *M. Loughlin* (note 16), 197.

¹⁰⁷ *M. P. Chiti*, *Lo spazio giuridico europeo*, in: *M. P. Chiti*, *Mutazioni del diritto pubblico nello spazio giuridico globale*, 2001. See also *A. von Bogdandy* (note 3), 34.

¹⁰⁸ *G. Jellinek* (note 18), Volume I, Chapter 1.

post-national body, therefore, the EU has a distinctive relationship with both territory and peoples.

Second, the European legal space is not limited to the market and the rights which relate to it, but it includes the space of liberty, security and justice created by the Treaty of Amsterdam in 1999. Precisely because the space created by the EU is a legal space, instead of that limited by boundaries and subject to sovereign powers, it is characterized by a plurality of constitutional documents, as well as of standards of protection. The Charter of fundamental rights shows an adequate awareness of all this when it recognizes that it “contains rights which correspond to those guaranteed” by the ECHR, but clarifies that this does not prevent EU law from “providing more extensive protection” (Art. 52 (3)). It is on the basis of the concept of the European legal space, moreover, that we may seek to avoid certain criticism that has been applied to those constructions that place too great an emphasis on the citizenship of the European Union. Some observers, in particular, have expressed the fear that the shift from Community to Union makes the new body politic less open to all those which lack the status of citizens.¹⁰⁹ In this respect, *Chiti* seeks to find in the plurality of constitutional documents which connotes the European legal space the rule of law limits on the exercise of powers.

Whether and how all this may be justified without taking a clear ideological line (not necessarily in *Hayek's* terms) in which the idea of liberty is established as the predominant value, however, it remains to be seen. Moreover, unlike the concept of multilevel constitutionalism, that of the European legal space does not devote remarkable weight to the institutional balance of the EU. The chief preoccupation is here to understand how the relationship between a plurality of legal orders may work without a clearly established hierarchical framework

A similar preoccupation emerges in the works of *Miguel Póiares Maduro*. Unlike *Chiti*, *Maduro* has devoted his early work to the analysis of the constitutional settlement of the EC. He focused on the EC's economic constitution, more precisely on free movement principles.¹¹⁰ While this line of research gave him the opportunity to shed light on the great achievements of the ECJ (of which he has become the Advocate-General, as we have seen with regard to *Kadi*) in limiting the discretionary powers exercised by national authorities, his later work clearly transcends a court-focused approach. Another relevant difference with regard to *Chiti* is the fact that

¹⁰⁹ For this line of reasoning, see *J. H. H. Weiler* (note 57), 386; *J. H. H. Weiler*, *The Promised Constitutional Land*, K.C.L.J. 12 (2001), 5 et seq.

¹¹⁰ See *M. P. Maduro*, *We, the Court*, 1994.

Maduro puts at the core of his theoretical construction a requirement of coherence. He makes this plain when he states that an admittedly pluralist and heterarchical model is the one that best captures the essence of European integration, he refers to constitutionalism.¹¹¹

Maduro argues, first, that an element which is inherent in the history of constitutionalism, in a normative sense, is the search for limits to power. Secondly, he adds, in liberal democracies constitutionalism must create a framework in which not only different, competing and even opposite visions of the common good are expressed by social forces, but in which such visions may also be made compatible with each other. In other words, whilst recognizing that nothing distinguishes pluralism from other doctrines than the rejection of a single, comprehensive system of beliefs, *Maduro* shows concern for the tensions and conflicts to which pluralism may give rise. Such tensions and conflicts are aggravated, he observes, by the fact that the claims expressed by the different groups are protected and promoted by a variety of institutions, or jurisdictions, which compete to attribute meaning to the same Constitution. Hence his concept of contrapunctual law. Recognizing that such concept is not an intuitive one, *Maduro* seeks to explicate it with regard to the distinctive features of the EU. In brief, his idea is that, in order to achieve a certain level of harmony, we need a law that acts in a contrapunctual mode.

While it is quite clear that this theoretical construction seeks to conciliate the rejection of any final and exclusive authority with the need to make the claims of the various groups reciprocally acceptable, we may wonder whether the quest for coherence and integrity in the EU, considered as a whole, does not bring *Maduro* very close to national theories of constitutionalism. An equally controversial issue is whether the social groups or the institutions that protect their claims should be at the core of legal perspective. That said, *Maduro*'s analysis is particularly helpful in shedding some light on the risk of friction which is inherent in a pluralist legal order, where the diversity of legal rules derives from the diversity of social groups.

¹¹¹ *M. P. Maduro*, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in: N. Walker (ed.), *Sovereignty in Transition*, 2003, 501 et seq.; *M. P. Maduro*, *Europe and the Constitution: What if this is as good as it gets?*, in: J. H. H. Weiler/M. Wind, *European Constitutionalism Beyond the State*, 2003, 74 et seq. I had the opportunity to discuss with *Miguel Maduro* his unpublished paper on *Courts and Pluralism: Essay of a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, in a seminar convened by *Raffaele Bifulco* at the University of Rome “La Sapienza”. I am indebted to both for their helpful comments.

VII. Conclusions

Professor *Pernice's* concept of multilevel constitutionalism may be viewed as an ambitious, though only partially successful, attempt to provide a framework in which an accurate analysis of the law as it now stands may be accommodated with a dynamic vision of European integration. His concept of multilevel constitutionalism is particularly helpful in explaining the interaction between national law and EU law, as well as the revision of the constitutional framework effectuated by the treaties of Amsterdam and Lisbon.

This does not imply, however, that this theoretical framework is wholly persuasive. First, the concept of multilevel constitutionalism is clearly a descriptive one. However, if we use it to describe the constitutional settlement of the EU, we must be aware that it emphasizes the vertical dimension, although the horizontal dimension is not neglected, as it happens, instead, within theories of the EU as a system of multilevel governance. Precisely because I think that Professor *Pernice's* analysis is much more correct and useful than this latter simplistic vision, however, I think that his choice to refer to “levels” is not entirely convincing. What the term “multilevel” should specify with regard to European constitutionalism, in practice, remains ambiguous.

Ambiguity is also a feature of the concept of multilevel constitutionalism from a normative point of view. In other words, this concept is not successfully explanatory in a prescriptive sense. Is there in fact such a concept to be maintained to describe the relationships between governmental authorities and between courts, absent the hierarchical structure which has characterized the States until the last part of the twentieth century? Once again, I ought to add that Professor *Pernice* recognizes that the European Union not only lacks that hierarchical characteristic, but also influences its Member States. However, even leaving aside the need to deepen the analysis of the connections between the institutions of the EU and those of the States, it is difficult to understand why a conception of the Union should stress the relevance of “levels”, when this metaphor evokes the idea of hierarchy and the related set of concepts and underlying beliefs about power and preoccupations about coherence. Whether this metaphor reveals the difficulty of modern legal culture, certainly not only in Germany, to get rid of those beliefs is another question, and not the least interesting one, which cannot be dealt with here.¹¹²

¹¹² An important point was made, in this respect, by *J. H. H. Weiler* (note 57), 233, who pointed out the inadequacy of the “classic European constitutional vision which privileges an

These criticisms of Professor *Pernice*'s theory of multilevel constitutionalism should not be ignored, and suggest that such theory is not entirely convincing, especially for those who do not share the underlying preoccupation for the overall coherence of the legal “system”. But it is important to recognize, as has been mentioned earlier, that in Professor *Pernice*'s theory the distinctive features of the EU are fully recognized. In particular, *Pernice*'s notion of multilevel constitutionalism stresses the need to consider both the Constitution of the Union and those of its Member States. In this respect, multilevel constitutionalism helps us to make sense of modern constitutionalism as a European phenomenon, rather than a mere addition of the Union to its Member States. Last but not least, when considering alternative attempts to conceptualize the EU, more oriented towards legal pluralism, it soon becomes evident that, if certain problems are better solved by such attempts, several other problems arise, and certainly not irrelevant ones. The critical remarks exposed earlier, therefore, should not detract from the overall value of this theory.

image of a mono-centred, vertically integrated, polity” (though his critical remarks about dogmatic legal theories, exposed in the first version of this essay [*J. H. H. Weiler*, The reformation of European Constitutionalism, *J. Common Mkt. Stud.* 35 (1997), 97 et seq. (129)] would not apply only to German theories of public law, but also to those of other European lawyers, in my country and, I presume, elsewhere).

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