Alma Mater Studiorum - Università di Bologna

DOTTORATO DI RICERCA IN

SCIENZE POLITICHE E SOCIALI

Ciclo 34

Settore Concorsuale: 14/A1 - FILOSOFIA POLITICA

Settore Scientifico Disciplinare: SPS/01 - FILOSOFIA POLITICA

REBOOTING THE CONSTITUTIONAL DEBATE: DELIBERATIVE CONSTITUTIONALISM IN THE EUROPEAN UNION

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Esame finale anno 2022

ABSTRACT

The aim of my thesis is to investigate the possibility and necessity to rethink a constitutional framework and debate in a transnational polity such as the European Union. My effort focuses on a promising theory called deliberative constitutionalism, which carries on new insights on how democracy and constitutions relate each other, compared to more old-fashioned liberal and republican visions. Moreover, the EU is a unique political entity which poses unanswered questions about its political legitimacy and constitutional foundation, if a Constitution will ever be possible. Going beyond the classical conception of the national and sovereign 'people', we keep wondering how citizens may deliberate and discuss about their rights and political communities across borders, in what could be defined as a transnational civic society. The development of the latter brings with it necessary constitutional changes, if not an evolution of constitutionalism itself. *Chapter 1* deals with defining the theoretical framework, which develops the distinctiveness of the deliberative constitutional paradigm not only with respect to other more 'classical' models of democracy, but also with respect to other deliberative models that have marked the constructivist debate. *Chapter 2* presents a conceptual history of constituent power, mainly studying the evolution of the *constitution-sovereignty-constituent power* dialectic, up to contemporary theories that explain the negation, separation, union or plurality of a transnational constituent with respect to its national counterparts. *Chapter 3* develops the discourse of constitutional pluralism, through its main claims and strands that especially pertain to Neil Walker's (2002, 2016) institutional and epistemic claims. *Chapter 4* conclusively notes the theoretical effects of applying a deliberative constitutionalist framework to the case of the European Union. In this way, through the exposition of general DC normative tenets, a form of self-learning process is proposed that can reconcile the heterarchical arrangement of constitutional claims and the new demand for legitimacy, as well as the relationship between European peoples and European citizens.

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INTRODUCTION

In the past decades transnational polities, among which the European Union represents still a unique and unresolved case study, aroused new theoretical challenges especially upon the diffusion of cross-border constitutionalism. These include the difficulty of imagining not only generically "why does Europe need a constitution?" (Habermas 2001a), but, as a result of constitutional and non-constitutional developments in the first decade - and more recent events (i.e. Brexit) - the question changes towards Mark Dawson and Floris de Witte's (2015, 2016) suggestion: *what kind of constitutionalism does Europe need?* Is it therefore still possible to imagine a constitutional future for Europe, to intertwine with the public spheres that has undoubtedly started since a decade to increasingly confront each other from one side of the continent to the other (cf. Nitoiu 2013)? And if we rethink the question in the normative key of the title, that is, rebooting the constitutional debate, the question becomes even richer: which kind of constitutionalism does Europe need in order to engage the citizenry in a rethinking process of their community within an open and inter-institutional dialogue?

In order to answer these questions, we need a framework which is not limited to the description of the challenges mentioned above, from a purely legal or sociological point of view, but which remains on the normative level of a democratic-constitutional theory. Starting from the non-skeptical premise that constitutionalism has, over the years, configured itself as a key element for interpreting European legal integration, and considering the relevance of civil society – as well as of the public sphere that it fills especially in times of crisis – an ideal candidate has been found in deliberative constitutionalism, following the path traced by Jürgen Habermas. It gathers not only the general theoretical novelties of the impact that constitutionalism has on a deliberative model, and vice versa, but an important settlement on the transnational world that presents structural conditions of post-sovereignty and pluralism.

To this end, deliberative constitutionalism differently enhances the spatio-temporal parameters of post-sovereign constitutionalism, which were paradoxical for national constitutionalism according to three main dimensions: that of performance, where the fundamental tension between constitutional protection and limitation and the democratic will is expressed; that of authority, where there is an infinite regression between constituent power and constituted power; and finally that of the clash between the political identity of the *demos* and that linked to the *ethnos*. This operation therefore recalls the fundamental concept of constituent power, wondering: can a form of constituent power survive at the transnational level? In order to address such a problem, the theoretical implications of constituent power must be traced back to its history, both ancient and contemporary, both national and post-national.

The definition of the deliberative constitutional framework is 'completed' through the most important theoretical comparison considered by the thesis: the one with constitutional pluralism. The latter is, in fact, the essential yardstick to account for how European constitutionalism has evolved, so as to push the research to reread DC through the integration of pluralism within it. However, the most important aspect of this comparison is the epistemic meta-level on which these theories operate, in search of a standard that can guide institutional ontological plurality at the first level. Now, what is defined as ‘strong normative claim’ of deliberative constitutionalism is a new standard of legitimacy, a bridge between constitutionalism and democracy on which deliberative constitutionalism acts by relieving the tension between the performances of both. This is implemented at the theoretical level in two ways: on the one hand, a detachment of the European constitutional space-time from the national one, acquiring a perspective of *constitutional future* that can really account for the evolution of constitutionalism; on the other hand, the conceptualization of a constituent process that can carry on a continuous and infinite constitutional conversation and thus rework the assumptions of political morality that legitimize this evolution.

The present work is divided into four chapters. *Chapter 1* deals with defining the theoretical framework, which develops the distinctiveness of the deliberative constitutional paradigm not only with respect to other more 'classical' models of democracy, but also with respect to other deliberative models that have marked the constructivist debate. *Chapter 2* presents a conceptual history of constituent power, mainly studying the evolution of the *constitution-sovereignty-constituent power* dialectic, up to contemporary theories that explain the negation, separation, union or plurality of a

transnational constituent with respect to its national counterparts. *Chapter 3* develops the discourse of constitutional pluralism and its strands, even though focusing especially on Neil Walker's (2002, 2016) epistemic claims. *Chapter 4* conclusively notes the theoretical effects of applying a deliberative constitutionalist framework to the case of the European Union. In this way, through the exposition of general DC normative tenets, a form of self-learning process is proposed that can reconcile the heterarchical arrangement of constitutional claims and the new demand for legitimacy, as well as the relationship between European peoples and European citizens.

CHAPTER 1

The deliberative constitutional paradigm

The present chapter outlines the theoretical framework, which starts from the distinctiveness of the deliberative paradigm in respect of both democracy and constitutionalism, worked out from the confrontation with liberal, republican and agonistic counterparties. It is immediately specified that constitutionalism has determined spatial and temporal dimensions. Especially in the national state case, they deliver paradoxes, on one side, on the constitutional performance and, on the other, on the foundational authority and identity. Laying down the premises of a deliberative model of democracy, a systemic version will be especially pointed out through the concept of civil society, which is not only a core element of deliberative constitutionalism, but a key to understand the entire argumentation of the present thesis. Thereafter, this research applies the deliberative paradigm to constitutionalism outlining the change of these dimensions and the consequent possible resolution of the paradoxes. So, for example, Ch. 1 highlights how DC alleviate the first paradoxical tension between the democratic majority will and the performance of the rule of law, or else between the so called public and private autonomy. It does so especially when DC is considered from a comprehensive point of view (Levy-Kong, 2018), namely when the influence of both the legitimation spheres of constitutions and politics cross and influence each other (therefore it is also defined as "deliberation under and about constitution"). This comprehensive view allows to widen the discussion about legitimacy to the audience of the civic society, engaging citizens in a systemic deliberation and avoiding the confinement of the debate within High Courts' jurisprudence and disputes.

The foundations of the framework are going to be explored, at first, in Jürgen Habermas' treatment (above all, *Between Facts and Norms*, 1996b; 1998, 2001) of the

deliberative normativity in relation with constitutionalism and their common problem of legitimacy. One of his core claims concerns the collapse of public and private autonomy into a co-originality, while deliberation itself follows a rigid discursive proceduralism. By doing so, Habermas highlights the importance of comprehensiveness between deliberation and constitutionalism, although his proceduralism clashes against the substantial foundation of constitutions (going under the paradox of the founding authority and identity). The last part of the chapter contemplates exactly this moral substantialism flowing between the ontological and the epistemological dimension in the constructivist literature. Thus, to assess the normative strength and anchor of deliberative constitutionalism and to overcome the limitations of Habermas' procedural account, a thorough comparison with other accounts becomes necessary, especially with John Rawls' normative conception of reasonableness and public reason (1971, 1993), and finally Carlos Nino's epistemic privilege of deliberative democracy (2007). This will allow to settle constitutional deliberation along a new way of interpreting the tension between morality and political truth.

1.1 Perspectives of constitutional democracy

Political and legal philosophy has dealt over the centuries with a conundrum peculiar of constitutional democracies: while constitutions curb the state power and protect individual rights, democracy is the voice of the majority deciding the future (and the origin) of the community. A conceptual and practical tension arises between the two, both in the process of making/amending the constitution or when we reflect on the constitutional foundations of a polity. Moreover, this tension has also notoriously expressed by an inseparable binomial between two forms of constitutionalism, a political and a juridical one: although both work toward the goal of protecting the fundamental rights of individuals from the power of government, the former emphasizes this protection through the regulation of democratic, decision-making, and participatory procedures, including the more classical separation of powers and the mechanism of checks and balances. The latter enhances protection and rule of law defining the inviolability of fundamental and subjective rights. In the context of the present thesis, deliberative constitutionalism represents the suitable alternative to appease this troubled relationship, but before addressing this issue (cf. par. 1.2) an account of different paradigms of democracy is needed, to lay the political theoretical ground of the thesis.

1.1.1 Constitutions and constitutionalism

In order to build a coherent picture of the present theoretical framework, this paragraph will briefly sketch both the tenets of the idea of constitutionalism, that is the study and practice of constitutions, and the foundational paradox that lies at its heart. "In very general terms, everybody agrees that constitutionalism means something like *limited government*" and thus that its legitimacy and authority depend on the observation of constitutional limitations, states Carlos Nino in his *Constitution of Deliberative Democracy* (1996, p. 3). He starts to depict which elements define constitutionalism by a degree of 'thinness' towards one of 'thickness', that is from a minimal conception to a richer one. So, he says, the thinnest constitutionalism includes just an essential notion of *rule of law*, namely the preservation of legal norms that indicate what a government, democratic or not, can or cannot do. By gradually thickening the concept, a 'constitution' could be recognised – not necessarily as a written document – within whose borders some fundamental laws undergo a process of entrenchment, since their reform and abrogation

become harder to achieve than the one of ordinary laws. This constitution even acquires a role of control and restriction of all laws that lie underneath. The thickness still increases by adding the separation of powers – especially the judicial from the executive one – the protection of individual rights, a process of judicial review and the guarantee of the democratic regime. Finally, the thickest conception of constitutionalism entails also the decision of which kind of democratic model and how institutions should be arranged accordingly. At the end of this process of constitutional 'growth' we obtain the thickest conception possible, whose best expression is the 'neo-constitutionalist' phase after the Second World War (Barberis 2012). Neo-constitutionalism entailed in fact the systematic recourse to human rights, the employment of judicial review with the consequent empowerment of apex Courts and the globalization of juridical sources such as international and transnational ones.

Thin and thick constitutionalism depends also on the paradigm of democracy that is concretely embraced in a determined society. In the following I am going to confront at least three of the major ones: liberalism, republicanism and agonism.

1.1.2 Paradigms of democracy

Although there are many ways, debates, and interpretations to distinguish models of democracy, here we decided to proceed with a characterization useful for introducing both the Habermasian model and subsequent developments of deliberative constitutionalism. Habermas (1994, 1998) characterizes in a clear way liberals and republicans upon different views of politics, status of citizens and, crucially, nature of democratic process:[1]

a) *Politics:* in the liberal view, politics programs the government to accomplish a good administration of society, which is itself a network of market interactions between private interests. Politics in this sense gets along with the liberal conception of the surveillance of state power by constitutional devices. Although the state apparatus mediates between private interests and collective goals, it cannot steer clear of protecting first and foremost individual rights. Republicans instead conceive politics as reflecting an

[1] Drawing from this, as it will be better explained later on, his 'halfway' deliberative alternative.

ethical and substantial form of life, carrying a stronger idea of community which acts collectively towards a common good. Politics is not much a mediator rather than constitutive of society itself. It particularly constitutes a *civil* society which achieves processes of auto-legislation through an instance of solidarity, understood as a source of social integration. It is worth emphasizing the strategic significance that civil society – and its mode of expression, the public sphere – acquires in the republican perspective, representing an autonomous sphere of politics and the fulcrum of the democratic process, other than the sovereign authority of the state or "the decentralized regulatory mechanism of the market – that is, besides administrative power and self-interest" (Habermas 1998, p. 240).

b) *Citizens*: liberals tend to *individually* frame citizens, or legal persons, through negative rights in front of other citizens and the state. They join the protection of the state from external compulsion as long as they assert their private interests within the legal boundaries. Conversely, republican citizens participate to the democratic process bearing rights *politically* understood not as negative but as positive liberties: rights to join a common practice of self-legislation. Consequently, nor citizens are conceived anymore as only focusing on their private interests, neither the state is there only to protect individual rights, as it is not opposed to the individual as an external power. The border between individuality and commonality becomes blurred, as individual autonomy and public one become interdependent. The state is constituted and legitimised by the institutionalisation of public freedom and it "guarantees and inclusive process of opinion and will-formation in which free and equal citizens reach and understanding on which goals and norms lie in the equal interest of all" (Ivi, p. 241).

c) *Democratic process*: liberal democracy is envisioned as a competition of power strategies that dominates the collective political process, ending with a quantification of aggregated votes and preferences in order to take as legitimate certain political decisions rather than others. Political/collective rights, in the liberal perspective, have the same structure as individual ones, because they consist in the clustering of private interests which, by means of election of representative bodies, can influence the administrative power. Finally, as mentioned before, the republican political process focuses on a will-formation and public communication oriented to mutual understanding that happen in the

public sphere. In the view of the praxis of civic self-legislation the paradigm to follow is dialogue and not the logic of the market.

During the second half of the twentieth century there has been a reworking of these republican fundamentals, due to a serious encompassment of the pluralist challenges of contemporary societies. Communitarian and agonistic theories have re-enacted in this sense strong critiques against liberalism. Born in the 80's as an American social and political movement, communitarianism counters an all-absorbing *general will a là* Rousseau even though it does not expect an absolute relativist conflict between different truths. Communitarian thinkers such as Michael Sandel, Charles Taylor and Michael Walzer, each one with its own peculiarity, still envision the possibility of a strong consensus and it is the main goal of democracy. These authors sustain the Aristotelian principle of the intrinsic sociability of human nature and that "individuality is the product of a social nexus of affective bonds and established norms" (Gabardi 2001, p. 549). They aim to the moral and civic regeneration of the communities, by perpetuating the common good/morality through "education, moral dialogue, faith, civic voluntarism, and moral leadership" (ibid.). The perpetration of collective goals and moralities happens through those *middle institutions* such as families, schools, neighbourhoods which constitute the social glue of civil society. Likewise, communitarians recover much from republicans to explain the three concepts listed above, and first of all the peculiar convergence between state politics and strong participatory democracy: individual rights and market negotiations of private interests lose importance, in respect of a consensus on a shared set of moral values.

On the other side agonistic democracy radicalizes the plurality of the public sphere, countering the hegemony of liberal rights and even communitarian identities. Agonistic thinkers conceive democracy as an arena of *conflict* rather than consensus, carrying with it one only common 'ethos of difference'. Drawing from Hannah Arendt and Carl Schmitt insights on radical democracy, agonism is not critical only of liberal claims but even of the deliberative possibility to always rationally reach an agreement. One innovative depiction of these critiques may be found in the French philosopher Chantal Mouffe. In her view, radical pluralism translates in a total revision of the Enlightenment concepts of liberty and equality, which should not be understood anymore as universal principles of human coexistence to be grasped through a rationalist epistemological project. Instead, liberty and freedom are social practices and thus to be

intended as pluralistic, culturally constructed and entangled in a network of power relations. It is interesting to see how Mouffe assumes the *sine qua non* of pluralism in contrast with Schmitt's philosophy. The latter was persuaded that, due to his notable conceptual opposition 'friend/enemy', pluralism would have surely led the society to conflicts and civil wars. Therefore, he thought that liberal democracy was an unviable regime, gripped at its base by an unresolvable individual rights and democratic majorities and leaving room only to authoritarian orders to preserve a political association. Mouffe instead restores the possibility of a pluralistic society precisely because politics is not populated by enemies rather than *adversaries* and conversely to Schmitt's 'antagonism' she proposes an *agonistic* view of democracy. Adversaries in fact share a common symbolic space and political principles: conflict lies in the plurality of interpretations of those principles.

It will be interesting, later on the thesis, to resume the confrontation between various paradigms of democracy, especially after I will have displayed the complex and varied debate about deliberative democracy. Nevertheless, there are some key aspects of constitutional democracies that must be considered now, aspects referred to internal conflicts on the performance and origins of constitutionalism.

1.1.3 Paradoxes

It is already important to note, at this initial stage of the research, that the complicated relationship between 'thick' concepts of constitutionalism and democracy generates certain conflicts, by virtue of their different legitimising forces. These conflicts happen within and highlight certain spatial and temporal elements of the constitutional polity. For instance, the first evident paradox refers, in the present time, to different interpretations of the constitutional *performance* as rule of law (Parkinson 2018): on the 'liberal side' they in fact curb power and majority will to protect minorities or individual rights and interests (individual autonomy); on the 'democratic one', they guarantee freedom of everyone to decide upon the decisions that affect them directly, by forming majorities (collective autonomy). This tension is intrinsic of every contemporary constitutional democracy and seems to exacerbate moving towards the liberal and republican extremes – likewise Habermas has identified it as a conflict between right fundamentalists and deep popular sovereigntists (1996).

On the other hand, two paradoxes refer not much to the performance rather than to *existence itself* of the constitutional community. These paradoxes deeply characterize the legitimacy, or even more the long-term integrity, of the community in a total sense. The first one[2] regards the past time, namely to the origins of national constitutions, due to their peculiar link to the institutions of national statehood and popular sovereignty show other contradictions. One side of the foundational debate focuses therefore on the vicious cycle of legitimation between the sovereign and founding constituent power and the legitimated constituted authority. Constituent power is in fact the power of a people to undertake a process of rational self-actualization of its own sovereignty and emancipates once for all from any holy and absolute authority. There is however a paradox which undermines the possibility of a contractual foundation: the democratic value of self-government – the addresses of law and decisions of the authority become their authors too – suffers of a causal circularity between the constituent power and the constituted authority: who legitimates the sovereign constituent power of the people/nation? Another former constituted authority? But who established that same authority? This brings clearly to an infinite regress in terms of legitimation, which has been later defined as 'bootstrapping' paradox (Zurn 2010).[3] Besides the riddle of authority itself, the other paradox considers the *spatial* identity aspect of the constituent people: national modern constitutions imply that the essence of the constituent power is a national *demos*, claiming ancient origins and identified upon a particular *ethnos* (language, culture, history etc.). Again, a conflict arises, in that the Nation is out of the political negotiation and thus its boundaries cannot be decided democratically, as originally argued by Abbé Emmanuel Sieyès in his *What is the Third Estate* (1789). This conflict becomes evident as societies tend to change and open to a more multicultural and integrated world.[4]

Now, the methodology adopted in the present research consists of evaluating the solutions to the problem of performance and constitutional existence by deliberative

[2] Defined paradox of democratic procedures Frank Michelman's words (1996b, 1997) or paradox of authority (Barnett).

[3] Not surprisingly, Barnett, an author quoted by Zurn, charges this paradox to all contractualist theories, uncapable to solve the conflict between individual consent and legal authority.

[4] It is exacerbated, for example, when migratory phenomena mean that the national boundaries of the political community are no longer sufficient to account for the subjects of constitutional rights, or otherwise said of the citizens living in a given territory.

constitutionalism. Although this chapter will mostly focus on the performative level, a few hints will be given also with reference to the authoritative paradox and the identity problem, then developed in the next chapter (cf. Ch. 2).

1.2 The deliberative constitutional remedy

Before we can investigate the effects of the association between a deliberative model of democracy and a constitutionalism, and then propose Habermas' well-known example, we need to understand what deliberative democracy is. As suggested by Mansbridge and Dryzek (2018), a minimal definition would state that deliberative democracy is

> […] *mutual communication that involves weighing and reflecting on preferences, values, and interests regarding matters of common concern*. Defining it this way minimizes the positive valence that attaches to the word "deliberation" itself, so that we can then speak of "good" and "bad" deliberation without "bad deliberation" being a contradiction in terms. We define *deliberative democracy* as any practice of democracy that gives deliberation a central place (p. 2).

Three aspects surround this definition. Firstly, as mentioned in the previous paragraph, deliberative democracy goes clearly beyond purely aggregative methods of liberal democracy, although it is not antithetical to them. Deliberation and voting processes such as referenda or elections are both present in contemporary constitutional democracies. What radically changes, as we shall see shortly, is that deliberative models remodel political legitimacy and, when considering the issues of constitutionalism, political autonomy too. Secondly, deliberative democracy is an aspirational – or regulative – ideal, namely a standard that the democratic practice strives to rather than a perfect descriptive model of the polity. By virtue of this, my thesis will undertake a normative investigation of the *ideal of deliberativeness* for the case of deliberative constitutionalism, instead of embracing a descriptive approach and an empirical analysis of real-world examples. However, a third and last consideration warns us that this ideal has not passed identically and consistently through decades: Mansbridge and Dryzek identify at least two generations of deliberative schools of thought, bestowing that this differentiation is incomplete and may be used only for expositive ease. Attempting to correct this incompleteness, I shall integrate the two generations with Parkinson's (2018) assumption of two different macro and one micro approaches to deliberative democracy, obtaining the following partition:

Deliberative theories	*1st generation*	*2nd generation*
Macro	Constructivist approaches	Systemic views
Micro	/	Mini-publics design

1.2.1 Generations of deliberative democrats

First-generation scholars have applied a first macro approach, because of their viewing "deliberation fairly generically" and combining it with "high quality argumentation or rational-critical debate, a focus on common good, mutual respect, and the concept of a rationally motivated consensus to which all could agree" (Mansbridge-Dryzek 2018, p. 3). Even though more contemporary authors have changed their priorities in defining deliberation, the first generation has laid down the philosophical principles of every deliberative model of democracy.[5] The generic rational debate is in fact brought on by citizens and rulers within a wide space of confrontation known as the 'public sphere'. As it is particularly evident in Rawls and Habermas, public justification, namely the invocation and offer of reasons acceptable to all citizens, merges with legitimacy in one comprehensive concept. It becomes clear how here deliberation departs from previous liberal and republican interpretations of democracy. Classic liberal theories considered the two terms separately: on one side, justification referred mostly to philosophical work aimed to establish truths – likewise John Locke justified the State through a social contract theory together with a natural account of law[6]. Legitimacy on the other side was a political concept that included the aggregated consensus of citizens towards state actions.

From a deliberative point of view things are a bit different: public justification is not much abstract – or metaphysical, in Rawlsian terms – valid reasoning, but consists of political arguments addressed to other fellow citizens, along with the necessity to tackle plural modern societies and respect their claim for political autonomy (freedom and equality of all citizens). This is not to suggest that deliberative democracy totally contrast and reject liberal or even republican thought, but rather that, as in the Habermasian

[5] With a wide range of different approaches: take for instance the discursive democracy of Habermas and Benhabib, Rawls and Cohen's theory of justice, the civic republican tradition.

[6] We will get back to this point in the following paragraphs when discussing about the concept of constituent power.

reading (1994), it carefully recovers both liberal proceduralism and republican demand for public conversation, placing itself at an "halfway" of the two lines of thought. So, for example, Habermas follows liberals by lowering the republican normative expectations on the process of auto-legislation, focusing only on communicative proceduralism. Those expectations are in fact too high – especially when considering the communitarian interpretation – while the political discourse is limited by a strong ethical background (a common *ethos*) making communities weighing too heavily on the individual. On the other side, he embraces the republican claim for a strategic civil society compared instead to the liberal state-centred mediation between individual interests. At this point, in comparison with the minimal and descriptive definition at the beginning of this paragraph, the ideal of deliberativeness could be prescriptively investigated as well through the categories of *politics, democratic process* and *citizens*. Politics and democratic processes seem to converge into a relationship of interdependence, meaning that:

> It is a necessary condition for attaining legitimacy and rationality with regard to collective decision-making processes in polity, that the institutions of this polity are so arranged that what is considered in the common interest of all results from processes of collective deliberation conducted rationally and fairly among free and equal individuals (Benhabib 1996, p. 69).

Democratic process thus complements the aggregation of votes with these processes of 'collective deliberation conducted rationally and fairly'. However, first-generation theories lack of a strong awareness of which role *citizens* should have. This is particularly evident in the 'discursive approach' of some first-generation scholars (Dryzek 1990), following Habermas, where proceduralism overshadows the identification of the political subject and makes the public sphere appear 'subject-less'.[7] This deficiency leaves the question on the border between the private and the public sphere – and thus between morality and politics – unanswered (see par. 1.3.1).

Beyond formal philosophical reconstruction of deliberative and argumentative preconditions, second-generation authors have attempted, for their part, to bring deliberative theory back to the 'real world' and have employed both micro and macro

[7] This has been the target of communitarian critiques to Habermas' philosophy.

perspectives. The former "focused very quickly on deliberative mini-publics, small-scale democratic innovations involving randomly selected citizens" (Parkinson 2018, p. 247). However, besides the benefits of local mini-publics to understand good procedures and innovative practice, the micro approach has considered mostly technical and academic aspects of designing deliberation and citizens' samples, rather than on an effective citizens' empowerment and representatives' accountability.

A new macro perspective, labelled as 'systemic deliberative democracy' (Mansbridge 1999), has thus intervened to fix these flaws: it attempts to "model the roles that different institutions and actors play in a democratic system […]. Systemic analysis looks at the connections between sites of law and policy-making and the wider public sphere" (Parkinson 2018, p. 249), paving the way for what will be explained in par. 1.3 as a serious combination between deliberation and constitutionalism. Deliberative systems differentiate themselves from first-generation theories, starting from the above-mentioned role that citizens should have in deliberative processes. In this sense there is a much greater sensitivity to the institutional practice of deliberation and its concrete manifestation, away from the constructivist research of *ad hoc* and hypothetical conditions – through counterfactual reasoning. This sensitivity reiterates the questions about the real *sites* of deliberation and *who* actually joins them, together with a discourse on how to settle institutions to be more inclusive. They do not take for granted that proper deliberative processes flow automatically from the wider public sphere to the empowered space, that is the one of representatives and officials: "casual engagers – the vast majority of citizens – look at such processes in bewilderment, uncertain where the door is, let alone how to get in" (ibid.). This is particularly evident when the constitutional deliberative framework is applied to the argument around the foundations of the polity.

One last consequence of adopting systemic views relates to the previous one in terms of engaging with the pluralist shades of society less 'naively': amidst the automatism of discursive procedures and the relativistic competition of different views, systemic explanation of institutions makes an effort of *combination* – what I will also call *synthesis* – between the elements, and therefore not only aggregating them (in a liberal way) or differentiating them (in an agonistic one).

1.2.2 Deliberative constitutionalism

Deliberative constitutionalism was not born certainly as a theory of the European constitution, like CP, and neither as a theory concerning constitutional pluralism in general. It starts rather from a normative theory of democracy – deliberative democracy – which eases the tension between private and public autonomy, contrasting a purely aggregative or majoritarian vision of democracy and targeting instead the wider political debate in the public sphere. DC normativity implies then a peculiar epistemic value, that is legitimacy of constitutional deliberations. This legitimacy is the common issue concerning deliberation and constitutionalism: if on one hand constitutions continuously ground and reinforce polity's commitments public debate, on the other deliberative democracy raises the question about the inclusiveness and the correctness of constitutional deliberative procedure. However, as mentioned by Levy-Kong (2018), there have been limited perspectives in past literature: on one side, deliberative democrats unveiled deliberative processes, informed and rational discussions within constitutional institutions such as high courts and parliaments. In this manner, however, they have been focusing on how governmental elites deliberate in a democracy, neglecting the constitutional plural sources and effects on the public sphere. On the other side, most constitutionalists have overlooked deliberative processes, sticking instead to a more classical liberal view of democracy. Put aside the quality of the public debate in the civic society, constitutional theories focused on "notions of liberty, equality and integrity (or anti-corruption) conceived narrowly as ways of curbing political power" (Levy Kong 2018b, p. 2). The relevant point here is that only recently some authors have been focusing on how constitutions can epistemically contribute to shape the deliberative public debate and, at the same time, be object of discussion themselves.

The tendency of DC towards an epistemic research of democratic legitimacy is reflected in the differentiation of its descriptive and normative claims. DC descriptive claim identifies, in the first place, two orientations of influence between constitutionalism and deliberation: (1) deliberation-to-law, or how deliberation contributes to generate legitimate constitutional law; (2) law-to-deliberation: how constitutionalism may enhance deliberative processes. These explanatory objectives are often treated separately. For instance, legal scholars appear to be particularly interested in the second direction, in how "law – especially constitutional law – extensively colours and channels democratic decision-making" (Levy-Kong 2018b, p. 4). Meanwhile, other scholars pertaining to the

political and social field follow the first direction, since deliberations of political actors, such as parties, officials or citizens, may involve constitutional aspirations. Consequently, also there arise the two abovementioned normative orders, guiding the influence between deliberation and constitutionalism: (3) first-order norms indicate how laws and settled policies enhance deliberation that directly affect citizens' interests, following direction (2); (4) second-order norms regard deliberation about those political and legal institutions that make first-order deliberation possible and follow both direction (1) and (2).

From this two-fold background, DC develops its peculiar normative part under three main perspectives. Firstly, it accounts how deliberation occurs 'under' constitutions, namely under the constitutional authority and regulation of the three fundamental offices – executive, legislative, judiciary – and involve therefore first-order norms that address citizens directly. The major question here is: how much do these offices deliberate according to constitutional norms and principles? The answers to this question involve many different issues. Regarding for instance the relationship between deliberation and the administrative power of the executive, David Dyzenhaus criticises DC for holding to a dualist account of democracy, where constitutional reasoning and deliberation are kept separated from the ones of ordinary law. As we have seen in the previous paragraph, along the Kelsenian lines, he proposes a model of justification based on a unique principle of 'legality'.[8] This makes us reflect on the rivalry between legitimacy and legality as polar stars for the orientation of constitutional theories, as well as deliberative constitutionalism itself. If on the one hand legality refers all components of constitutionalism to a compliance with the legal framework, on the other hand legitimacy draws a broader path, because it also requires ethical references and conceptions of justice.[9] Others, such as Alison Young, focus on how constitutions interact more with 'discursive' exchanges between institutions – exercising different powers – rather than with a general theory of deliberative democracy. Although discursive institutionalism will be further considered, also in the terms set out by Vivian Schmidt (2008), my thesis does not reduce deliberation to these institutional discursive processes, but it is considered within a new kind of constitutionalist framework (in particular, the European one). Secondly, Levy and Kong

[8] This approach will be also discussed in the next chapter when taking into consideration the debate about the constituent power and in particular forms of skepticism (cf. par. 2.12). Similarly, Dyzenhaus (2007, 2012) will criticize the dualist account of Ackerman (1993).

[9] But also, as we shall see, a more complex query for political truth epistemically speaking.

also provide an account for deliberation 'about' constitutions, involving second-order norms and addressing the boundaries of the legislature's authority themselves. This debate entails how constitutional reform happens, for example through popular referenda, and who should be part of it: questions are thus raised about the relationship between judges and popular deliberation and the problem of constitutional elites.

Notwithstanding, the present paragraph focuses on a third way of considering deliberative constitutionalism, that is a 'comprehensive view'. It is important to note that the differentiation of these three perspectives is not only theoretical, but it represents a different way to explain and normalize deliberative practice between institutions and citizens. Comprehensive views gather in particular discussions on both first and second order norms and thus refer to deliberation 'under and about constitutions'. Thus, this perspective allows to grasp in the best way possible the dialectical relationship between deliberative democracy and constitutions, namely the fact that "a full account of a deliberative democratic constitutional order should examine the reciprocal influence of, on the one hand, deliberation that generates legitimate constitutional law and, on the other hand, constitutional practice and norms that enhance democratic deliberation" (Levy and Kong 2018, p. 6). Furthermore, comprehensiveness highlights more than all how DC works when dealing with the beforementioned constitutional performance and bootstrapping paradoxes. Comprehensive DC bridges democracy and constitutionalism through the common issue of legitimacy, easing the tension between democratic majority will resulting from the aggregation of preferences and the individual constitutional protection. The domain of constitutional legitimation is thus stretched within the dialectic between deliberation and constitutionalism and consequently the conversation about the community commitments and institutions opens up to the wider public sphere. In this sense, DC reflects on "how to use laws to establish and enforce a polity's foundational commitments – as these are reflected in its institutions, values and collective mission – without wholly ceding power over those commitments to the closed band of elites – judges, lawyers, administrators and legislators – who tend to be a constitution's day-to-day stewards" (Levy-Kong 2018, p. 7).

DC embraces a multi-actor perspective, beyond the borders of those institutions that are traditionally called to apply constitutional norms (Chambers 2018, Parkinson 2018). This in the wake of a systemic view of deliberative democracy, that catches how deliberation interrelates among different bodies and actors and overcomes the exclusive High Courts standpoint on constitutional matters – and other band of elites. The most

important and varied political body is precisely civil society, constituted by the participation of citizens and their will-formation through deliberative channels. If within the public sphere the latter are confronted with the gap of distrust towards the setting and the constitutional commitments decided by the founders, a new present form of constituent power looms, rethinking those same purposes. In this way DC responds to the bootstrapping paradox by identifying a continuous 'bootstrapping process' of constituent legitimacy. To better understand this point, one must recall Habermas' (1996) theory that presents the ultimate inclusive view of DC.

1.2.3 Habermas' paradigm: opportunities and criticalities

At the end of the previous century, Jürgen Habermas has developed in *Between Facts and norms* (1996b) the most significant connection between his discursive democracy and a comprehensive view of deliberative constitutionalism. Attempting to answer to the questions around the nature of democracy and law, the author maintains, first of all, the work of 'rational reconstruction' of the logic of discourse starting from social phenomena, such as consensus; second of all, he resumes the conclusion of his previous discourse ethics (1990), that is moral and juridical principles have a common discursive origin. Habermas had in fact argued that, in order to deliberate about the validity of moral norms among a limited number of participants, "only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse" (principle of the discourse ethics D) (1990, p. 93). However, when we think collectively, we should wonder what gives us the guarantee that everyone will respect valid moral norms as much as we do. Differently from the Kantian solution and more closely to Hobbes, it is law that enhances obedience offering an autonomous and practical difference from morality, although it is a direct development of the latter. Moreover, law is the unreplaceable mechanism of regulation and coordination for modern and plural societies and their institutional sub-systems (e.g., free market or state bureaucracy). Law manifests a sort of double face: it is simultaneously 'facts' (*Factizität*) and 'norms' (*Geltung*), namely it is constituted by social facts of coordination, with the sanction attached, and by norms that require legitimation.[10] But, even if law is indispensable, it will work only if it is considered legitimate. Assuming a similar

[10] Here Habermas attempts to unify the approach of the Critical theory, which had a realist functional perspective of law, together with a more normative theory on the model of John Rawls.

discursive process of validation as for moral norms, and that law and morality stand in a relationship of complementarity, Habermas formulates a new 'principle of democracy': "only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted" (1996b, 110). The democratic principle represents the institutionalization of those cognitive aspects of the discourse ethics in terms of a rule of law, which enables everyone to join the discursive legitimation of juridical norms. For this purpose, the principle necessitates a relation of 'co-originality' between private and public autonomy at the beginning of the discursive process: the legal (constitutional) guarantee of basic rights for the individual freedom (private autonomy) is inextricably tied up to the necessity that each citizen participates to the democratic decision-making process (public autonomy). Set in the terms before in this paragraph, Simone Chambers explains how co-originality entails deliberation under or about constitutions:

> Jürgen Habermas's co-originality thesis collapses these two perspectives together. According to this thesis, the only plausible justification of the rights and freedoms enshrined in a constitution is that they are the outcome of a popular discursive process; popular discursive processes only have the power to justify constitutions if they are undertaken under conditions that respect the rights and freedoms of participants, that is, under constitutions (Chambers 2018, p. 258).

In this regard, Habermas elaborates a comprehensive deliberative constitutional theory, where politics and law intertwine in a relation of mutual influence. This relation causes an enlargement of the constitutional conversation, beyond High Courts judicial review, and embraces a multi-actor perspective. Moreover, the philosopher characterizes the normative connotations of deliberative participation as a middle way between a weak liberal conception and a strong republican one (see par. 1.1.1). The detachment from the extremes of rights fundamentalists and deep popular sovereigntists shows a distinctive opportunity for the co-originality thesis, especially when dealing with the bootstrapping paradox of constitutional foundations. As I have shown before, constituent powers suffer of legitimacy deficit at the beginning of national democracies: an infinite regress comes out from the search of the ultimate source of authority and identity between the constituent power and a previous constituted form. Habermas' solution consists in accepting the deficit and then understanding this paradoxical regress as rather a 'self-correcting learning process', stretched towards the future and not the past. Consequently,

the bootstrapping paradox turns into a bootstrapping process over time, demanding to every new generation a revision of the system of rights. Specifically, "all the later generations have the task of actualizing the still-untapped normative substance of the system of rights laid down in the original document of the constitution" (Habermas 2001b, p. 774). Keywords of this process are the 'inclusion' on egalitarian terms of all-affected voices and perspectives to the public conversation and the interdependence between democratization and constitutionalisation. Habermas dispels the paradox by not assuming an essence of the demos that teleologically reveals to itself – in a Hegelian way – but rather conceding that constitutional political communities do not come out *ex nihilo*. Instead, constitutions reflect a previous set of moral values and commitments and constituted communities from which the learning process proceeds.[11]

Habermas' view of discursive democratic legitimation seems however to conflict with his view of constitutional births. Although his theory starts from moral premises – in particular principles U and D – these are to be thought as universal and not particular moral standpoints elaborated in the private moral argumentation. Rather, his principle of democracy and theory of legitimation of law configures as 'epistemic proceduralism', for discursive procedures (and seemingly community learning process) detach from specific 'moral substances'[12] and follow formal criteria instead. More specifically:

> If we follow a procedural theory, the legitimacy of legal norms is gauged by the rationality of the democratic procedure of political legislation. As already shown, this procedure is more complex than that of moral argumentation inasmuch as the legitimacy of legal statutes is determined not only by the rightness of moral judgments but, among other things, by the availability, cogency, relevance, and selection of information; by how fruitful such information proves to be; by how appropriately the situation is interpreted and the issue framed; by the rationality of voting decisions; by the authenticity of strong evaluations; and above all by the fairness of the compromises involved. (Habermas 1996b, pp. 232-233)

Yet, it is not clear whether Habermas embraces pure proceduralism: he admits that other ethical and pragmatic reasons, besides moral ones, are needed for the discursive process of juridical norms, starting from a collection of shared values and believes. Proceduralism

[11] The values to which Habermas refers for Western democracies are the ones pertaining to the phenomenon of modernization (cf. *The philosophical discourse of modernity*, 1985).

[12] Defined by Habermas as the many *ethoi* pertaining to the 'lifeworld'.

is generally contested in practical philosophy because, by not ensuring a 'datum', it generates an infinite regress of justified beliefs, similarly to the one regarding the constituent authority: who or what represents the basis from where the justification of subsequent beliefs derive? An epistemological skeptic would therefore conclude that we find ourselves in front of an unresolvable paradox. Other authors reply instead with substantial accounts of legitimacy, looking for moral starting point of the justification process. In the context of constitutional foundations, political philosophers provide an analogous substantial answer to stop bootstrapping paradoxes at an original pool of commitments and values. On this basis many critiques have been addressed to the procedural discursive democracy, among which Frank Michelman's one (1997). Michelman appears to be very critical towards deliberative democracy by virtue of the above-mentioned paradox of democratic procedures (see par. 1.2) and the consequent infinite regress between the constituent and the constituted authority. People, he claims, will never be able to make their own laws in the terms of a pure procedural theory of deliberation, and thus a proper theory of constitutional legitimacy needs first of all to be substantive: in a republican civic meaning, there must be a thick ethical consensus at the beginning of a constitutional adventure to stop the infinite regress. Notwithstanding, Michelman adjusts his theory in a procedural sense for what regards the long-term legitimation of the polity and those facts of reasonable pluralism – remembering Rawls – which threatens the substantialist consensus. Therefore, it follows that: a substantial answer to the sceptical query on the bootstrapping paradox is needed; proceduralism seems to be naturally more apt to deal with the facts of reasonable pluralism.

In the remaining part of the thesis, the debate between a formal proceduralism and an ethical substantialism will remain relevant and I am going to preserve, under certain conditions, Michelman's substantial claim against Habermas' account. Now, it is worthy to mention how Christopher Zurn (2010) has depicted an alternative version of this debate, shifting away from the question around substance or procedure and focusing instead on assessing the 'logic of legitimacy'. He draws an important distinction between a threshold logic of legitimacy and regulative one: the former seems to work similarly how positivist authors envisioned legal validity[13] and it is a matter of criteria-fulfilment with just two possible outcomes, whether the sufficiency threshold is met or not. Rather different is regulative logic: it is scalar, indicating no binary fulfilment or nonfulfillment,

[13] A renowned formal system is Hans Kelsen's pyramidal scheme of juridical norms.

but a greater or smaller approximation; it is processual, that is it entails an achievement over time, although this achievement is just ideal but never perfectly realizable. Zurn explains that, in the context of legitimising constitutional democracies, their self-regulation processes and bootstrapping paradoxes, procedural-substantial quarrels are not as much relevant as changing perspective on the logic of legitimacy. Moreover, it is only by focusing on a regulative characterisation of legitimacy that we can actually stop the infinite regress of bootstrapping paradoxes. This is possible, according to Zurn, following the Habermasian rightful thesis of co-originality and the consequent bootstrapping process across generation.[14] In this regard one question, as Zurn warns, remains open: what is exactly that remains continuous between the founders' intentions and commitments and the posterity, in order to install coherent learning process and regulative legitimation over time? It seems to me that this question is the same as wondering if there are meta-criteria, constitutionally speaking, which works as measurement of the greater or lesser achievement of the regulative legitimacy, and thus remains a constant across constitutional time. The meta-criteria are comparable to second-order norms in the deliberative constitutionalist framework and it is because of these that I do not believe that a regulative reading of legitimacy, although correct, dismisses the procedural-substantial debate. In this sense I may outline the last piece for the present theoretical framework.

[14] As it will be shown below in the thesis, this is a necessity dear not only to Zurn, but to other Habermasian authors too. The bootstrapping process remains anyway a fulcrum for the revision of the concept of constituent power by deliberative constitutionalism.

1.3 Another view of deliberative constitutionalism

The Habermasian account and its criticisms have been useful to lay the foundation for a discussion on the normativity of deliberation in relationship with constitutionalism and their common problem of legitimacy. Now it will be necessary to evaluate the proper normative strength of deliberative constitutionalism – which entails to find its peculiar normative anchor: in this regard the procedural level of Habermas' discursiveness, John Rawls' normative conception of reasonableness and public reason, and finally Carlos Nino's epistemic privilege of deliberative democracy will be thoroughly weighted. Consequently, my quest is going to be addressed towards other problematics involving justice, truth and morality, showing that a purely procedural conception of deliberative constitutionalism is not enough. Throughout the contribution of third commentators who have confronted the abovementioned three authors, the present paragraph will not only move against proceduralism, but it will try to complete the theoretical framework in order to make it conceptually useful for the case of a post-sovereign and transnational polity such as the EU. In particular, resuming some of the previous discussion about constitutional foundations, deliberation and constitutionalism should be settled so that they can answer to the following questions: what does it mean that *original* constitutional values are still valid and legitimate today? What does it mean for the EU and what can deliberative constitutionalism say about it? Which normative guide should I follow to tackle such issues?

1.3.1 Public reason and constitutionalism in John Rawls

I would like to start outlining the Rawlsian framework of reasonableness and public reason, which will be certainly a key concept for this thesis and its further developments. In order to give some context, it is worthy to mention the 'self-correction' that Rawls implements between *A Theory of Justice* (1971) and *Political liberalism* (1993). The former is an attempt to develop a comprehensive liberal theory of justice, where a hypothetical state – defined as the '*original position'* – illustrates the citizens' capacity for a sense of justice and for the acceptation of background rules that enable their full cooperation, making them free and equal members of the society as dictated by the two most important principles of justice. The original position thus seeks for the "most

appropriate principles for realizing liberty and equality once society is viewed as a fair system of cooperation between free and equal citizens" (Rawls 1993, p. 22). The problem arises in the *Theory* being contractarian: the participants to the original position hold no religious or moral comprehensive doctrine and undergo a so-called 'veil of ignorance', where they do not know their own bargaining preconditions. This allows them to agree as free and equal citizens on principles of justice offered by the reasons and not favoring a political conception of justice over another. However, this has been a largely contested aspect of the *Theory*: a metaphysical claim that participants are essentially prior and independent from their own conceptions of good.

Political liberalism proposes a political conception of justice which would justify the stability of contemporary constitutional democracies, instead of a universal liberal theory of justice. It switches in the original position from a metaphysical to a pure political view of the citizens involved. It uses this position only as a representational device, where the parties play – like actors – a sort of impartiality to their own comprehensive doctrines. When it comes to the fundamental constitutional questions, it is public reason that, as a set of arguments based on the principles of justice, justifies the institutions of the constitutional democracy itself. In the latest Rawls' conception, public reason has three core features: firstly, it is the reason of the public, according to the aforementioned principles of liberty and equality. Secondly, it behaves as the common basis among different conceptions and in the same social context, but only to political societies that are constitutional democracies. Thirdly, not every possible doctrine is considerable by virtue of the principles of justice and, on the contrary, the admissible doctrines are those ones deemed as 'reasonable'[15], namely compatible with the essential constitutional standards. In order to define another important aspect that is the extension of scope of public reason, Rawls refuses the distinction 'public/private' and replaces it with 'public/non-public'. Above the so-called 'background culture', which is only social and not public at all, Rawls sees three different political spaces: the mediation space, constituted by the media; the political public culture in a broad sense, driven by citizens and their exercise of rights; the political public culture in a strict sense, which is the only space where public reason is applied officially by the judiciary and the legislative power. This leads Rawls to the conclusion that public reason is one, while non-public reasons

[15] "It should be remembered that, in Rawlsian discourse, reasonableness is different from rationality; the latter, in fact, indicates the ability of individuals to pursue their own specific ends and interests and to put their ultimate ends in order in light of an overall life plan." (Schiavello 2001, p. 3, my translation).

can be many. Moreover *Political Liberalism* observes that "in a constitutional regime with judicial review, public reason is the reason of its supreme court" (p. 231). The problem is that we still find ourselves in front of the 'fact of pluralism' that constitutional democracies witness. The philosopher's doubt – similarly to the question posed by Zurn (2010, see the previous paragraph) – is thus how we can have legitimated institutions of the liberal society from the original foundation until the present day and grant them stability. Rawls in fact, at the beginning of *Political Liberalism*, wonders: "How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?" (p. 4). The answer in this respect is found in the 'overlapping consensus', which allows the coexistence of several comprehensive doctrines without being just a 'residual' space among them, rather than relying on the self-standing set of values of the liberal society. Object of this consensus will be than the public reason itself and it will be up to the single citizen, thanks to the predisposition to a 'reflective equilibrium' to conform his own comprehensive doctrine to the collective political conception.

1.3.2 Rawls-Habermas debate (1995-1996)

The discussion on both the place and scope of public reason is extremely relevant also for deliberative constitutionalism, despite the relevant differences with Rawls' conception and, first of all, with the closure of deliberation within the borders of constitutional courts' jurisprudence, in order to preserve pluralism outside in the non-public political arena. Therefore, although he supports the idea of deliberative democracy, he never theorizes public deliberation apart the solitary one in the original position, under the veil of ignorance (Viola 2003). This limitation is evident in notorious debate between Habermas and Rawls, which has taken place on the pages of the *Journal of Philosophy* in the period 1995-1996 and has been widely commented by third authors (Mancina 2008, Finlayson 2016, Liveriero 2017). Habermas and Rawls confront in a total of three articles and within the borders of a "familial dispute", as Habermas defines it (1995, p. 110), namely sharing the 'Kantian' intent to justify normativity starting from formal presuppositions. However, there is a profound discrepancy "about the nature of legitimacy and the production of legitimate law in liberal constitutional democracies" (2016, p. 8). Moreover, there is a strong differentiation in terms of methodologies: Rawls has a strong 'normative' and less explanatory approach, which recalls above all ideal-

philosophical arguments for the justification of liberal institutions; Habermas follows a more 'explanatory' or sociological – ergo, normatively light – point of view, assessing the 'real' political support to the institutions in the public sphere.[16] This can be especially observed in the two phases of the dispute, the first of which is initiated by the article of Habermas *Reconciliation Through the Public use of Reason: Remarks on John Rawls's Political Liberalism* (1995, vol. 92, n. 3). He objects that, if Rawls relegates public reason to the elitist expertise of officials, such as the strict political culture of Supreme Court's judges, he is not able to account for the democratic dialectic and the full political autonomy of citizens.[17] They have to accept the 'fait accompli' of the political principles ruled in the original position by the constituent authority. Despite his 'political turn' from the *Theory* to *Political Liberalism*, Habermas does not see the possibility in Rawlsian theory to embrace the factual plurality of the liberal society. The German philosopher consequently extend the scope of public reason to the plural discourse of the public sphere, opposing to Rawls' *monological* public reason a *dialogical* one. In the same volume Rawls replies to Habermas that, even though constituent events are not open to everyone, citizens can still comprehend, evaluate and apply constitutions in their reflective equilibrium.

A second phase is identifiable in a new criticism from Habermas – *'Reasonable' versus 'True': Or the Morality of Worldviews* (1999) – which focuses the dispute on the epistemological and ontological characterization of the two theories. It goes more profoundly into how the moral stands to the political, namely into how the two authors deal with the difference between political and individual truths. Habermas refuses Rawls' opposition of the criterium of 'reasonableness' to truth: according to the former, as mentioned before, to be reasonable refers means to be compatible with constitutional standards, while truth(s) refers to the multiplicity of individual comprehensive doctrines – in other words, their singular claims to truth – which should not be considered in the political elaboration of public reason. Habermas, on his side, considers this vision too 'ontologically heavy' and epistemologically weak: it obliges citizens to adapt their claims to truth to a transcendental platonic world (Mancina 2008, p. 55). Moreover, reasonableness would be just another way to mask the pretense to universality of the

[16] In fact, this differentiation reflects two different 'attitudes': the normative search for universal moral principles that can transcends individual moralities; the interpretive effort for inclusion of the plural political points of view.

[17] That is, their capacity to assess the legitimacy of laws to which are subjected.

previous *Theory of Justice*. Habermas rejects consequently every ontological aspect[18] in favor of a pragmatic-discursive one: as shown in par. 1.3.2, his theory stands on an empirical-sociological basis in order to account for the epistemic exchange among citizens in the public sphere. This goes alongside with Habermas' formulation of 'co-originality', that is he attempts to preserve citizens' private autonomy by merging it with their collective political autonomy. Rawls, instead, intends to build a 'stricter' conception of the 'political' – with the principles of justice that provides the basis the individual moral reasoning – and charges Habermas's theory instead to be just one of many possible comprehensive doctrines. Despite the Rawlsian critique is ambiguous in regard of the meaning of 'comprehensive' itself [19], I welcome the feature of comprehensiveness in the terms of a theory, as explained at the beginning of this paragraph, that brings together the discussions about both political and legal legitimacy, while it extends public reason to the conversation within the public sphere. Yet, it is better to deepen some last issues, to ensure a proper deliberative constitutional theorization of the case study coming in the next chapters.

1.3.3 Deliberation between morality and truth

Since I am talking about constructivist legitimation of liberal democratic institutions and, more abstractedly, of political and legal normativity, I cannot leave out questions about how we as citizens get to know these norms (the epistemological aspect) and how the latter motivate our actions (the motivational one). As previously explained, Habermas attributes an epistemological thickness to the public discourse – due to the actual presence of many conscientious world-views – while at the same time defining his procedural legitimation as normatively light. Rawls instead stands on the opposite side, given that it proposes an epistemic withdrawal (or ethical vacuum) in the 'neutral' original position, while setting strongly normative standards for every member engaged in the deliberative process. Now, following Viola (2003), one question arises: is it necessary, in front of the

[18] Coherently with his 'post-metaphysical' paradigm.

[19] Finlayson notes three possible meaning of 'comprehensive doctrine': "(a) worldviews, religious and secular; (b) actually existing moralities or conceptions of the good; (c) philosophical theories of one kind or another, including moral theories such as utilitarianism or Kantianism" (2016 p. 168), adding that Habermas' theory is comprehensive in sense (c).

'facts of pluralism' and the multiculturalism that characterise contemporary societies, to uphold a procedural view democracy – be it a classical liberal conception of majority or a discursive model of deliberation– or even an epistemic abstinence to the bitter end? This question is even more justified due to the diffusion of constitutionalism in multicultural political societies, such as the EU, that find themselves at a 'transnational crossroad', where the political unity is shattered by the facts of pluralism. My answer tends to be negative, but it becomes necessary to introduce a third point of view in order to overcome and adapt Habermas' and Rawls' perspectives to the present research.

The argument of the already mentioned (par. 1.2) Argentinian philosopher Carlos Nino (1996) is suitable in this regard. In the fifth chapter, Nino defines his epistemological constructivism as a middle way (p. 107) between, on one side, Rawls' monological theory of justice and politically elitist identification of the public reason; on the other, Habermas' social practice of intersubjective discourse and his theoretical rational reconstruction of the discursive consensus. For sure it seems that Nino shares more with Habermas than with Rawls (Oquendo 2002): they both conceive the justification of constitutional democracy only in proper deliberative terms, namely when a real dialogical exchange happens and if it depends on the presuppositions of the practical discourse. Yet, Nino differs significantly from Habermas in placing democratic deliberation within the moral dimension of the individual and including substantial other than procedural criteria. Nino starts from Mill's anti-paternalistic premise the everyone is the best judge of her own preferences, but nevertheless he thinks that the democratic process is not simply an aggregation of votes (see par. 1.1). Democracy, besides quantitative reasons, should be justified by its epistemic value and capacity to achieve moral truth in the intersubjective exchange of perspectives. Furthermore, democratic deliberation holds an epistemic privilege (cf. Menéndez 2000) and it is almost equivalent to moral discussion, apart one difference:

> The introduction of a time limit to the end the discussion and to vote crucially differentiates the informal process of moral discussion from its institutionalized surrogate, democracy as majority rule. Therefore, democracy can be defined as a process of moral discussion with a time limit. (Nino 1996, p. 118)

Moral truth is therefore achieved through intersubjective discussion if the presuppositions of the practical discourse are respected: participants need to be equally included and free to expose their perspective, while at the same time be ready to change their own and

others' requirements with impartial arguments. It is quite clear that Nino defines practical discourse based on both substantial (autonomy) and procedural (impartiality) principles. Notwithstanding, Viola (2003) well explains the issue with Nino's approach: the most relevant deliberations in a constitutional democracy does not consist in individual preferences, rather than in more general conceptions of common good which can orient the collective decision-making. Such conceptions cannot be treated as preferences, because they deliver an ideal of good society which is itself a comprehensive doctrine and functions as an impartial fundament for all the moral standpoints underneath. This is why, in order to frame a deliberative constitutional theory, it is necessary to always examine private autonomy in relation with its public counterpart – thus the autonomy of the community in general, as Habermas specifies with his thesis of co-originality (see par. 1.3.2). Viola consequently describes the proper deliberative attitude: "public discourse on different impartial conceptions of the common good is in substance an interpretative discourse about the common values of public affairs" (2003, p. 63, my translation). Constitutional deliberation witnesses the prevalence of argumentation over the primacy of identity and it acquires a feature of meta-impartiality, namely an impartiality towards the impartial conceptions of the common good. Likewise, I include such a second-degree normativity, according to the distinction between normative orders within constitutional deliberation (par. 1.3.1)[20], in the *comprehensive* version of deliberative constitutionalism I adopt for the present framework. Following in fact comprehensiveness and multi-actor perspective, deliberation and constitutionalism mutually relate on this second-degree level, despite Rawls' first-degree view where the specificity of comprehensive doctrines is parenthesized waiting to be judged reasonable or not. Public reason and public discourse need not to be limited to the jurisprudence of constitutional courts but enlarged to the wider public sphere. Similarly, citizens participating in the public discourse do not undergo a Rawlsian epistemic self-restraint; rather it is required from them a further epistemic effort when it comes to justify different conceptions of common good in a context of constitutional pluralism.

In conclusion, this deliberative constitutional framework is going to be posed in a context where political and juridical unity of identity and sovereignty breaks apart. As a last remark, let me resume what of the previous discussion between the three authors shall be preserved: besides the already mentioned Habermasian comprehensiveness and the

[20] Second-order norms regards deliberation about those political and legal institutions that make first-order deliberation possible and follow both direction 1 and 2.

epistemic depth derived from the discursive exchange in the public sphere, the present theory will certainly acquire a stronger normative stance when it comes to tackle constitutional pluralism in a transnational context and finding new commitments for the society. Even though deliberative constitutional normativity will be assessed, similarly to Rawls, according to substantial principles at the heart of public reason, it will be redirected towards the intersubjective moral exchange in the public sphere, drawing its strength from the community query for political truth. This exchange is justified not just by discursive procedures but also by a motivational driving force for political action.

CHAPTER 2

Past, present and future of constituent power

In the previous chapter, the foundation of the theoretical framework of deliberative constitutionalism was laid. It was defined in relation to: characteristics of democratic constitutionalism; issues related to paradoxes that arise; liberal and republican versions of constitutionalism along with other forms of democracy. In this chapter, it acquires particular importance how to delineate the deliberative constitutionalist model according to the constitutional space-time, observing its behavior with respect to both the constitutional performance at the present time and the founding past.[21] Here other fundamental characteristics emerge that need to be studied in depth, especially related to the dialectic *constitution-sovereignty-constituent power*, and that in particular found the paradoxes mentioned above and the difference between national and post-national case. After having examined this relationship in modern terms, the chapter presents the sides of the contemporary debate (constitutionalist and democratic approach to constituent power) and their continuous interaction. It then changes the field of confrontation accounting for a post-sovereign case of constitutional foundation and constituent power: the European Union one.

For this last point, a foreword summarizing the themes that will be frequently mentioned throughout the chapter and research is helpful. The European constituent power, together with its theoretical alternatives, is more easily postulated perhaps thanks to the peculiarity of European integration, which develops a particular situation with respect to international cases or other forms weak collaboration. On the other hand, even before a constituent power, the European juridical integration soon led theorists to hypothesize the possibility of a European constitutionalism, whose assumptions of democratic legitimacy remain to be investigated. A first question to be posed in this

[21] Introduced through Habermas' co-originality and Rawls' original position.

regard is of what nature a theory of European constitutionalism and constituent power should be. And by this we refer to the opposing monist or dualist structures that we have already observed for the theories previously set forth. But if these explained a monism/dualism within the sovereign constitutional states, in the transnational case of the EU the transfer of the monist/dualist debate also applies to the relationship between national constitutionalisms and the European one. Here, therefore, it is possible to adopt different constitutional perspectives: monist, dualist, trialist, pluralist, holist, etc. ... Depending on the perspective to adopt, the normative difference between the national sovereign case and the transnational post-sovereign case changes, on a scale ranging from a strong difference (and therefore identifying a dualist matrix) to a weak difference (typical of a homogenizing monism).[22] To what does this normative difference then refer? What kind is it? Speaking of constitutionalism we would naturally be led to identify it as a difference of a purely juridical nature (as well as a dualism or a monism which would result from our evaluations), but as we have seen, contemporary political constitutionalism has traced a path to connect definitively political and juridical foundations in constitutional phenomena. A path that even deliberative constitutionalism, in its own way, follows. However, important are the novelties that DC brings with it, some of which, at a generic level, have already been outlined in the last chapter. Now, these novelties are contextualized in the sense of DC as a theoretical framework for European constitutionalism, starting precisely from the identification/distinction of a constitutional ontological plane of institutions and an epistemic plane of a constituent process, which is drawn from the aforementioned work of Habermas. If some conclusions are anticipated at the end of this paragraph, the argument will be developed definitively in the fourth chapter.

[22] Of course pluralism and holism represents cases on its own: the former imagines an integrative system as composed of heterarchical countless number of claims, which interacts with each other according to some principle; the latter, denies the systemic line of thought itself, abstracting the entirety from its components. See Chapter 3 for further discussion.

2.1 The evolution of constituent power through and beyond sovereignty

Constitutionalism, and the concept of constituent power, are born within the paradigm of the modern sovereign state. This historical and political context configures, in the course of time, the relationship between the Constitution and political power, generating at least two important characterization that we have already seen in Chapter 1 (par. 1.1.1): a scale of constitutional "strength", namely from a thinner to a thicker constitutionalism in terms of limitations to the power; the two inseparable types of constitutionalism, a political and a legal one, which co-participate to the limitation and the rights-protection. Beyond these categories, the historical/national context changes the way how constitutionalism develops in a radical way, taking English *rule of law* to differ much from German *Rechtsstaat* or from French *etàt de droit*.

The chapter however will not be able nor willing to cope with a historical and empirical compilation of the various adventures of the constituent power, in Andrew Arato's words (2017). This is not to diminish the relevance of these adventures, but to keep the attention on the normative theory of constitutional democracy, and to understand how much sovereignty had had, and still has, to do with the normativity of constitutions and constituent powers. Thus, the chapter focuses on the normative relationship they have in common, *constitution – sovereignty – constituent power*. Moreover, behind this relationship, and every constituent adventure, rest the already mentioned paradoxes. Besides the performative tension between constitutionalism and democracy scrutinized in the previous chapter through deliberative constitutionalism, if we consider the modern state as a monistic expression of sovereignty and nationality (Fioravanti 2008), we may recall the other two paradoxes, regarding the space-time of national foundations: on the one side, the causal infinite regression between the authorities of constituent and constituted powers (paradox of authorization); on the other, the democratic deficit in delimiting the territorial and identity national space, or else the conflict between demos and ethnos (paradox of identity).

2.1.1 From modernity to the twentieth century debate

To provide a definition of constituent power is no easy task. It entangles with a long history of philosophical thought and revolutionary events which have produces many different outcomes. However, a suitable starting point seems to be the liaison between

constituent power and sovereignty. Suffice it to think that at the end of modernity, through the three major English, American and French revolutions, sovereignty gradually detached from the personalistic and coercive doctrine of an ultimate authority of Thomas Hobbes and the highest power in command of Jean Bodin. With the new forms of constitutionalism, sovereignty characterizes a creative and foundational *act*. Notes Andrew Arato:

> […] Sovereign constitution making involves the making of the constitution by a constitutionally unbound, sovereign constituent power, institutionalized in an organ of government, that at the time of this making unites in itself all of the formal powers of the state, a process that is legitimated by reference to supposedly unified, pre-existing popular sovereignty. (2017, p. 31)

In the compatible words of Andreas Kalyvas (2012), popular sovereignty and constituent power are co-original and coeval: the 'expression' of a Constitution starts from the premises that this sovereign people is politically autonomous, namely both addressee and author of the fundamental law, conversely to the premodern multitude subjected to an uncommanded commander, a supreme authority that cannot be ruled by any superior law. In the mind of the great revolutionary thinkers, such as Thomas Paine and Emmanuel Joseph Sieyès, the philosopher who came up with the idea of constituent power, the constitution rises from the state of nature (and on the ashes of enlightened monarchies) through the claim of a national "We the people" which grounds the social contract. This power (and the nation itself) is prior both from the temporal and from authoritative point of view: "It is the source of everything. Its will is always legal; indeed, it is the law itself" (p. 124).[23] However, rising before the positive legal system and exceeding it at the same time,[24] constituent power has a tension relationship with the constituted power which translates in the abovementioned paradox.

Doing a temporal leap forward, it is to be recalled the fundamental debate that, during the 20th century, tackled this tense relationship at the base of a community political-juridical unity. This debate, that Hans Lindhal (2007) has defined a "conceptual impasse", happened between Hans Kelsen's positivism and Carl Schmitt's decisionism.

[23] Emmanuel-Joseph Sieye`s (1789) What is the Third Estate?, tr. M Blondel, p. 124. London: Pall Mall Press (1963).

[24] Following the meaning of the German word '*Grenzbegriff*'.

In the former case it is known that Kelsen resolved the tension denying the relevance of the constituent political unity (the "We the people") as independent from the constituted legal unity. Legal positivism as framed in works such as *Pure theory of law* (1934) defended the principle of legality, namely the autonomy of the legal order from any external moral or political consideration: at the system's apex there can only be a *Grundnorm*, a fundamental norm that kicks off the validation chain of the following norms. It is precisely intended as the basis of the formal constitution of the state, rationally assumed and not obtained from any foundational 'will'. Constituent power has no legal value and is reduced to a political myth, to a metaphor part of the foundational fairy tale.[25]

Conversely, in his *Verfassunglehre* (1928), Carl Schmitt subverts Kelsen's stand: "The unity and order lies in the political existence of the state, not in statutes, rules, and just any instrument containing norms" (2008, p. 65).[26] So that, the state constitution exists not only in a written form, already posed, but rather as a function of the political community unity. This function is itself expressed from a popular will which becomes sovereign on its own fate. Constituent power is

> [..] the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence. […] A constitution is not based on a norm, whose justness would be the foundation of its validity. It is based on a political decision concerning the type and form of its own being, which stems from its political being. (Schmitt, 2008, p. 125)

Schmitt reinterprets Sieyès in a decisionist sense: on one side, he identifies a national people who locates *before* the constituted legal order and expresses his foundational will; on the other however Schmitt detaches from the abstract idea of constitution as a social contract,[27] collectively signed by that same people. His idea of constitution is substantial and entails the concrete decision of a people expressing the sense of its own political existence. And not only that: in contrast to the revolutionary exception of contractual theorists, Schmittian constituent power is a decision-making process that lasts over time. Therein lies the recovery and refoundation of constitutional *sovereignty*, which distances

[25] Likewise the anti-positivist, naturalistic normativist version, which imagines a morality that gives law inherently 'good' autonomy.

[26] Carl Schmitt (2008), *Constitutional theory*, Duke University Press.

[27] From that tradition that goes back to Hobbes and Bodin.

Schmitt not only from Sieyès,[28] but from all the tradition of social contractualism: the existence of a contract limits in some extent the power of the state, be it an absolute sovereign or a more moderate legislative power. Thus, while for Hobbes and Bodin sovereignty is framed and regulated in the content of the contract, for Schmitt it represents instead the *genetic* of constituent power itself in the decisionist shape.

Just through the snapshot of these many confrontations, the relationship between sovereignty and constituent power results mutable and complicated, leaving open the question whether constitutions acquire their normativity from sovereignty or not. If we consider contemporary constitutionalism, together with the phenomenon of internationalization of human rights and (in fewer case) the trans-nationalization of fundamental rights, it seems that constitutional safeguards are not compatible anymore with a classical concept of sovereign power, drawing from sources that goes beyond the national state borders.[29] Hannah Arendt in this sense lays the foundation to crack the solidity of sovereign nations, criticizing their totalitarian drifts and moving away from both Sieyès' nationhood[30] and Schmitt's sovereignty. Throughout different writings (1951, 1958, 1963), Arendt analyzes the inegalitarian and arbitrarian effects of sovereignty: it destroys the plurality of voices in the public sphere thanks to the illusion of a unique general will.[31]

Thus, in order to replace the concept of sovereignty, Arendt proposes the reworking of a constituent power as guided by neo-republican principles of action and participation: in this sense Arendtian constituent power is direct political action, not mediated through representation. However, it is not the same thing as the "full immediacy of a legal power not mediated by laws" of the Schmittian constituent power (2003, p. 73),[32] whose major problem is for Arendt the feature of arbitrariness. The sovereign power could lose sight of its purpose and, on the basis of its exceptionality, forget to actively recognize the role of citizens. Thus, on the contrary, Arendt *advocates* for constituent power to be equipped with an immanent principle and not subsuming it in

[28] Who rejected sovereignty as a conservative principle of the old system, in favor instead of nationhood.

[29] Still they remain compatible with a lighter concept of popular sovereignty, as we will resume at the end of this chapter.

[30] Arendt criticizes Sieyes by ascribing to him, too, the sin of a sovereign conception of constituent power. In fact, as Rubinelli has shown (p. 203), Arendt misunderstands the abbot cause of her reading through Schmitt.

[31] Cf. Hannah Arendt (1963), *On Revolution*, Penguin Books.

[32] Carl Schmitt (2003), *The Nomos of the Earth*, Telos.

constituted legal norms: "What saves the act of beginning from its own arbitrariness is that it carries its own principle within itself, or, to be more precise, that beginning and principle, principium and principle, are not only related to each other, but are coeval" (1963, p. 212), as for modernity were constituent power and popular sovereignty. The principles of action and participation establish the antecedence of constituent power to constituted power, but without allowing to the former to degenerate. Kalyvas writes: "they protect the constituent power from losing sight of what it has to accomplish, thus preventing it from turning into either a self-defeating whimsicality or a self-deceiving permanent revolution" (2005, p. 235). The purpose for this is to take constituent power to be the *joint* political action, free from domination, without transforming in a new general and totalizing will. Besides, the neo-republican reading of Arendt limits only to recognize the issue of political reflexivity thanks to the constituent power thus configured.

Notwithstanding, there is a theoretical dilemma which should be addressed to anticipate the next paragraphs. Ontological rooting of Arendt's constituent power comes from an "institutional materialism", namely from a reduction of political action to a space specifically and concretely created by an institution, where the quintessence of this acting is democratic agonism.[33] It struggles to explain political reflexivity as it is intended by contemporary neo-republicanism: as well observed by Goldoni (2014), republican politics must have a thorough discussion and reflection upon what can be politicized and what cannot. This includes the perimeter itself of the ontological space of discussion, designed by institutions; and if politics is not always about agonism or *joint* participation as it happens in those spaces, political reflexivity should address, for example, also where formal equality is not enough to set a proper equality, due to structural inequalities. Moreover, Arendt left the principles of agonistic action loosely defined, making it difficult to understand how they emerge from the constituent power practice.[34]

Therefore, in the logic of this research, one step must be made *beyond* the ontological premises which entrench constituent powers and constitutional foundations. These premises, when applied to national sovereignty and identity as in the modern debate, would lead to again to configuration of those paradoxes of authority and identity. Therefore, it is necessary to configure this step as a normative *epistemic* analysis, much wider and more flexible, as did Habermas in the nineties (1996b), renewing the Arendtian immanent norms of political action and self-constitution. It is a revision of the republican

[33] Cf. Par. 1.1.1.

[34] Cf. Kalyvas (2005) p. 235.

thought in deliberative and constitutional deliberative terms which has already been treated in Chapter 1, although not completely in an exhaustive manner. The relevant issue now is what *epistemic* means: if constituent power is the truth of modern constitutionalism (Kalyvas 2012), contemporary constitutionalism settles, nationally and transnationally, a new question of political truth about constituent power, legitimacy, sovereignty, identity.

2.1.2 Constitutionalist and democratic approach to constituent power

Before reaching an effective post-sovereign theorization of constituent power and the European case, some demarcation lines must be identified between the sides of the contemporary debate, the major part of which still fits in the borders of national constitutional democracies. As said at the beginning of the first Chapter (par. 1.1), as soon as we try to classify constitutional limits to political power, we may recognize the two-faced nature of constitutionalism, with one political and another juridical side. Both express a complementary work on the protection of fundamental rights of citizens from government power. Moreover, republican and liberal views of democracy intervene in highlighting one or the other side, striving in the normative field of constitutional performance.

Here remains the question on which impact this double face of constitutionalism has on constituent power. Immediately a similar differentiation, among the twentieth-century normative visions, can be acknowledged: a more political constituent power in Schmitt's decisionism o in Arendt's republicanism; a constituent power more likely to be reduced to the constituted power of the legal order, or to a superfluous political myth, in Kelsen's normativism. These categories are projected to the contemporary and prolific debate which is reborn in recent decades. There still are *radical democrats* (Negri, Kalyvas, Cólon-Ríos) and *constitutionalists* (Ackerman, Loughlin, Arato); among the latter there also normativist skeptics in the wake of Kelsen, like Dyzenhaus and constitutional pluralists such as MacCormick and Walker. Not only that: much of this literature is reborn with the aim of combining an empirical and comparative study among past and recent constituent experiences and a new normative theory of constituent power. The present thesis will not undergo an empirical analysis but will focus on normative theories of constitutional democracy: as already said at the beginning of the paragraph, this is not to diminish the importance of the various constituent power "adventures", but

rather to focus what is necessary normatively speaking for a common adventure such as the European one. At this point it must be said that it is also about a theoretical preference: this is not the case for a constitutional sociological review of the ontological premises of power, but rather it deals with the normative (epistemic conditions) so that a democratic process can be set in motion.[35]

Among radical democrats, it is worth to mention Joel I. Cólon-Ríos (2012, 2020), who, similarly to Andreas Kalyvas, advocates for a constituent power which allows citizens to recreate the fundamental laws with *democratic acts of reconstitution* and, when these acts are prevented, tackle the deficit of democratic legitimacy. Such a constituent power is part of a more complex framework called *Weak Constitutionalism* (2012), which refuses the supremacy of an unmodifiable constitution over the people's constituent power, or the supremacy of the totalitarian power of a political majority. Such a weak constitutionalism leaves the future open to new constituent episodes "in which new or radically transformed constitutions are produced through the most participatory mechanisms possible" (2012, p. 11). There are certain moments in the constitutional life when changes are necessary, when "democracy should trump constitutionalism" (p. 168) through extraordinary participatory processes. It shall be borne in mind that plebiscites and referenda do not satisfy these principles of popular participation an d open democracy, instead of processes which concretely involve citizens in "proposing, deliberating and deciding on a set of fundamental constitutional changes" (p. 91). These arguments clearly recall those of deliberative constitutionalism, despite the latter represents an half-way between a republican democratic vision and a liberal constitutionalist one. Moreover, the deficit of democratic legitimacy is similarly one of the typical issues of European integration.

From the constitutionalist perspective on constituent power we may find a varied spectrum of authors, among which three categories can be identifies: the pure constitutionalist, the skeptical normativist, the post-sovereign constitutionalist. The first and more ample strand includes a multiplicity of theories which advocates for the constituent power as the "moment" of change and revision of constitutions, *but* within

[35] From this point of view, it is useful to recall the conclusions of Chapter 1 following the debate Habermas-Rawls (cf. par. 1.3.2 and 1.3.3), where it has been clarified that the present theoretical framework would derive the epistemic dimension from Habermas and the strong normative engagement from Rawls, without transforming in a purely explanatory enterprise, on one side, or a strict ontological conception of the political on the other.

certain *constraints* and rigid scopes, regulated by the principle of entrenchment. In this sense, constitutions do not loose their prominence in the protection of fundamental rights at the expense of any majority will. Who talks, in fact, about "constitutional moments" in these terms is Bruce Ackerman (1993), defining his theory as genuinely dualist. It points out two fundamental moments in constitutional time: on the one hand, the "ordinary" constitutional politics, in which the Constitution can be reformed only through the normal procedures indicated by the Constitution itself (such as judicial review); on the other hand, the *higher* law-making where the people cause "unconventional changes" outside the classical rules of amendments. Dualism in fact "occurs between the people and their government: moments of higher law making are rare, these are the moments when the People speak, while the rest of the time the government governs for the people" (Bashkina 2020, p. 4). The moments of higher constituent law making are so rare that, for the rest of the time, the sovereign people remain "dormant", allowing ordinary politics operate on their behalf. It is interesting to note how Ackerman's dualistic framework locates between the two extreme monisms of legal constitutionalism, or rights fundamentalism, and political constitutionalism, or popular fundamentalism. By distinguishing between two different moments of law-making Ackerman justifies the presence of both, offering a peculiar resolution to the paradoxes we have presented earlier in this thesis, particularly the difficult relationship between constitutionalism and democracy and the causal relationship between constituent power and constituted power.

Who can be classified instead as skeptical constitutionalist, recovering Kelsen's normativist opposition to constituent power, is David Dyzenhaus (2007, 2012, 2018). Dyzenhaus (2018) criticizes Ackerman,[36] as even his dualism assumes that popular deliberation, albeit in rare and revolutionary moments, is automatic and not designed by any other authority. Ergo, he falls into the trap of the usual causal paradox between the popular (constituent) assembly and the (constituted) government, which Dyzenhaus traces from a positivist point of view to the discussion of whether authority is internal or external to law. His solution, however, remains of Kelsenian inspiration: normative theories of law should not be subject to the ambivalence between constituent and constituted authority and focus entirely on the principle of legality, "since they explain law's authority in general by reference to law's intrinsic qualities, hence the question of constituent power does not arise for them" (Dyzenhaus 2012, p. 234). Coherently,

[36] Interestingly, in the context of defining his theory a deliberative constitutionalism (Levy-Kong 2018) (cf. CH 1 par. 1.2.2 p. 15).

Dyzenhaus has recently shown (2018) the form of multi-level monism that is worth to recover from Kelsen: his monism accepts either a Grundnorm at the international level, with the result that national legal orders' validity derives from it,[37] or the either way around: a Grundnorm at the domestic level, so that international law's validity rests ultimately on national law. In any case a comprehensive theory of the national/international level must be conceived, rotating around a common democratic subject.[38] Dyzenhaus, recalling Dieter Grimm's position, sees the proliferation of studies on these paradoxes coming from the "theoretical anxieties" that envelop the contemporary surge of constitutionalisation. Anxieties that include constitutionalism's internal loss of control over politics and external debates between national and inter/transnational constitutionalisms, and thus about sovereign states' loss of control over their own constitutions. Dyzenhaus's skepticism seems to positively answer the question of the famous volume *The Twilight of Constitutionalism?* (Dobner-Loughlin 2010), precisely because - ironically, he adds - too much emphasis had been placed on constitutionalism and constituent power in the first place. The deflation of this pretense is carried on through the idea of legality as the only validation mark to account for the phenomenon of global administrative law.

The third and last constitutionalist approach focuses instead on the critique of the concept of sovereignty, in the wake of Arendt, as Andrew Arato (2017) well shows us: constituent power must avert the danger of dictatorial abuses by freeing itself from the burden of sovereignty,[39] i.e. by abandoning the Schmittian idea of "any single agency, institution or individual that claims to embody the sovereign power and authority of the constituent people" (p. ix). However, the "adventures of constituent power" should not be put to an end: they continue in a post-sovereign and post-revolutionary phase that replace Schmitt's political subject with a "pluralistic liberal as well as democratic pouvoir constituant" (2017, p. 418). Post-revolutionary therefore means that constituent power no longer manifests itself modernly as a single entity and only in exceptional cases such as revolutions. Conversely, it is enacted in multiple moments by a plurality of actors negotiating with the people on their participation to ratify the new constitution. From this

[37] This is the perspective, as we shall see, embraced by constitutional pluralism as late Neil MacCormick, that is to solve judicial conflicts the answer should be found in the international law.

[38] I.e. the citizen subject to both national and international law.

[39] See Arato's quote above, p. 4.

derives what Arato calls *multi-stage constitutionalism*, which seeks a middle-ground between the two normative insurances of radical democracy and liberal constitutionalism:

> What is crucial for me, however, and more important than mere empirical relationships, is the presence of two normative logics in the post-sovereign paradigm, the normative logic of insurance that follows from the plurality of necessarily uncertain actors in the comprehensively negotiated cases, along with the normative logic of institutionalizing the democratic post- revolutionary founding experience. Insurance […] opens up a link to the founding experience through the institution of a suitably structured and enforceable rule of revision. While most of the post-sovereign negotiated cases produced such a rule, only some of them produced the multi-track rule open, though procedurally limited on the highest replacement level. While all these cases generated constitutional courts, only some explicitly established amendment review. Yet on the level of the normative logics of insurance and foundation it is that combination that best expresses the meaning of post-sovereign constitution making. (2017, p. 418)

The negotiation of a multi-track, open amendment review is based on a dualism that, as Bashkina (2020) notes, is aimed to be complementary with Ackerman's. Arato focuses only on Ackerman's constitutional changing moment, breaking it down into the further dualism of the two agencies doing the negotiation: central representation and councils. These separated actors participate simultaneously at the constituent process, whenever it is “awaken” (following the terminology of Ackerman). The central point for Arato is that even when there is a constituent monopolizing assembly that speaks in the name of the sovereign people, the plurality of voices and representative institutions is preserved, in order to democratize the processes of constitution-making and make them no longer exceptional. In this way he also distinguishes himself from the Kelsenian multi-monism of Dyzenhaus and from the "sleeping" and dualistic constituent power of Ackerman. Focusing on separating the institutions participant in constitutional change, rather than on separating ordinary politics from higher constitution making, it results much easier to normalize and democratize constitutional change. However, a lack from Arato's theory stands out, well exposed by Melissa Williams: "Arato's well-developed institutional model of post-sovereign constitution-making falls short of a full-blown normative theory of constituent power because it lacks the crucial conceptual piece of representation that played such a potent role in Schmitt's theory" (2019, pp. 163-164). The democratic

process that grounds the legitimacy claim of constituent assemblies in the post-national dimension, albeit in their institutional pluralities to ward off a monopolizing entity, is not sufficiently specified. This is due to, in the opinion of the present research, two main reasons: firstly, the lack of discernment of how the epistemic implications of constitutional democracy change in the post-national world; secondly, the afore-said matter of ontological rooting of institutions, as we have seen with Arendt, seems to restrain the openness of republican political reflexivity.[40] A constituent reflection should set free to address both citizens and institutions, in two directions. This is not to say that institutions should be left excluded from the constituent process, but similarly not kept separated and unchanged as multi-track constitutionalism expects. In this regard an epistemic *step beyond* has been mentioned before, as well as proposed by the comprehensive view of deliberative constitutionalism: the "stitching up" between ordinary politics and higher constitutional moments, in order to escape the authoritative paradoxical dangers, may be not completed through just institutional plurality. A further question of constitutional truth must be asked for the post-national world.

[40] This is also the result of a historical/sociological analysis of the adventures of constituent power, as in the case of Arato, compared with epistemic normative research conducted in the present thesis.

2.2 Constituent power and the European case

Resuming the question anticipated in the foreword, it can be applied to the fertile ground of European integration, in order to understand the normative nature of a European constituent power – and more generally of European constitutionalism. As it will be seen, this epistemic step beyond is not a critique of ontological fundamentalism (or foundationalism?) as an end, but as a division between the two epistemic and ontological planes. This dualistic theme, which will be addressed again with Habermas, will be definitively concluded in chapter 4. Before that, it is necessary to pose some more questions useful to further investigate the current characteristics of European constitutionalism and the main theories that have described/guided it. These include the skepticism of an author such as Dieter Grimm and his comparison with the mixed theory of constituent power, testing finally the latter with the conflictual reverse of constituent concerted action. The discussion will be even more enriched in the next chapter with the introduction of constitutional plurality.

2.2.1 The debate of the nineties: Grimm's skepticism

The promulgation of the Maastricht Treaty in 1992 marks an important historical date, not only for the integrative boost of the nascent European Union, but for the reinvigoration of the more general debate on a possible European constitutionalism. A few months after the signing of the treaty, the German Constitutional Court (BVerfG) responded with the *Maastricht-Urteil* ruling,[41] which had two objectives: on the one hand, to counter the loss of German sovereignty due to the European legitimacy deficit;[42] on the other hand, to defend the authority of the sovereign Court by virtue of its legitimacy. This striking case of judicial authoritative conflict (defined as *Kompetenz-Kompetenz*

[41] Case 2 BvR 2134, 2159/92 Maastricht [1993] BVerfGE 89, 155.

[42] "The principle of democracy and the requirement of legitimacy which applies to governmental administration would be distorted to mean just the opposite, because the governmental administration which enforces the laws would itself make them. This deficiency is not compensated for by sufficient co-operation from the parliaments of the Member States in the making of laws at the Community level.
By contrast, the complainant claims, every citizen has the right to ensure that an election maintains its substantial function, i.e., to elect the actual legislative body. He claims that he is restricted in his freedom to vote and to stand as a candidate in elections because citizens of the Union from other Member States are granted the right to vote and to stand as candidates in local German elections. (Ivi, II, 1.a)

debate) was actually the result of a long judicial process which saw the formation of two opposed alignments towards the constitutionalisation of the EU: on one side, the European Court of Justice (ECJ) who implemented the idea of primacy of EU law upon the national legal orders with the ruling Van Gen den Loos (1963) and Costa vs ENEL (1964); on the other, the BVerfG and other constitutional Courts (cf. Pierdominici 2017, p. 123) who already contested this primacy with rulings previous to the Maastricht-Urteil (one thinks of the double case Solange, 1986).[43] These conflicts will be recalled, in the next chapter, to introduce one of the most successful theories to tackle the European condition: constitutional pluralism.

However, it is important now to recall that among the judges of the German Constitutional Court was Dieter Grimm, who commented on the ruling in an article in 1995 entitled *Does Europe Need a Constitution?* and from which arose a debate with Habermas (1995). Grimm adopted a skeptical approach towards the possibility of defining the European Union as governed by a constitutionalism in general. And even if it were possible to constitutionalize the (then still) European Community, this would have counterproductive effects for itself, its member states and its citizens. What Grimm calls 'constitutional illusions' would mean that "the Community would after its full constitutionalisation be a largely self-supporting institution, further from its base than ever" (1995, p. 299). As mentioned before, Dyzehaus recalls what is Grimm first concern: a theoretical anxiety accompanying the illusion of constitutionalism as the solution to post-national changes. Grimm, in this regard, is more incisive than Dyzenhaus in highlighting the specific European legitimacy deficit. The transformation of the Treaties into a constitution would lead to a devaluation of the States, which are the only democratically legitimized bodies and which should remain the 'masters of the Treaties'. He argues that, while preserving the European community in its particularity, it cannot be entrusted with legitimacy or constitutional responsibilities that instead belong to the states:

> The legal foundation that fits an association of States is the Treaty. It has all the features that allow legal binding of Community power, yet leaves the basic decisions

[43] A *kompetenz-kompetenz* dispute which clearly lasts in more recent times, with rulings *Lissabon-Urteil* to the Treaty of Lisbon (2009), or the notorious conflict between the ECJ and the Constituional Court of Poland.

> about the Community with Member States, where they can be democratically checked and accounted for. A European Constitution would not be able to bridge the existing gap and would consequently disappoint the expectations associated with it. The legitimation it would mediate would be a fictitious one (1995 p. 299).

Grimm has recently taken up his argument (2015): over the past two decades, the ECJ has kept constitutionalizing the treaties, if only because of the incorporation into European law and treaties of fundamental principles that all constitutions must respect. However, this (over)constitutionalisation has the negative effect of de-politicizing the European Union, creating a "democratic cost". The responsibility and developments of European integration are thus entrusted almost solely to the courts and their jurisprudence, not to the democratic will of the citizens. This non-political integration leads to two major consequences: the first is that constitutionalisation of even ordinary laws[44] renders both the Commission and ECJ jurisprudence almost immune to democratic accountability; the second is the limitation of the power of allocation of competences of sovereign states.

This thesis, and the version of deliberative constitutionalism it embraces, shares a skepticism toward non-political integration and the democratic cost.[45] However, Grimm's skepticism also invests positive normative proposals for re-politicization, especially with regard to strengthening the European Parliament as a democratic counterweight to the power of the European Council and the ECJ itself. A strong parliamentarisation of the EU would not solve the problems, as it would simply create a dualism (rather than a monism) between the European Parliament and the national parliaments, in which, however, internal legitimacies have a decidedly different weight. These problems of legitimacy would continue to arise precisely because according to Grimm EU is taking the path of constitutionalisation. And there is an aspect of this constitutionalisation that Grimm highlights, and which echoes the no-demos thesis:[46]

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[44] One of the biggest problems for Grimm are not the laws that refer to European governments and peoples, but those ordinary laws that concern individual or groups of citizens and that enjoy primacy and independence from national laws. On the other hand, Grimm sees in non-political integration, recalling Fritz Scharpf, a direct abolition of national regulations.

[45] As will be shown in the next chapter in the comparison with constitutional pluralism, particularly with respect to the relegation of European constitutionalism to debate among High Courts.

[46] "If there is no European Demos, there can be no democracy" (Weiler 1999 p. 337).

> […] The European public sphere and European public discourse are weak compared with their national counterparts (even when the latter are sufficiently strong). The institutions that mediate between the people and the political organs of the EU are either missing or underdeveloped. There are no Euro- pean parties. Interest groups, popular movements and non-government organizations are quite weak on the European level and, most importantly, there are no European media. The absence of the societal substructure needed for a vibrant democracy makes it unlikely that full parliamentarisation would reach its goal, namely to close the gap between the citizenry and the institutions. (Grimm, 2015, p. 472)

What is missing according to Grimm is a mediating subject (the demos) that legitimizes any institutional body or constitution. Here DC disagrees with Grimm and follows more the part of the debate framed by Habermas: if it is true that the European public sphere is weaker than any national one, the skeptical argument loses its effectiveness when it does not explore the normative potential of the processes that take place in the public sphere. Indeed, one could accuse Grimm's skepticism of confusing the descriptive and normative planes in order to devalue the latter *ad hoc*.[47] Instead, it is much more useful to imagine a future for European constitutionalism through the experiment, albeit ideal and counter-factual, of Habermasian constructivism.

2.2.2 Habermas and the pouvoir constituant mixte

One can well understand the influence of Habermasian thought on the present work. This is not to say that Habermas is sufficient on his own, but he is certainly a multifaceted term of comparison to investigate different debates that cross the theme of this thesis. In this sense, since the first chapter (par. 1.2.3) the theoretical position of Habermas of *Faktizität und Geltung* (1992)[48] was addressed, where the most comprehensive version of rational discursive reconstruction showed the interdependence between social coordination and the legitimation of norms. Indeed, Habermas' theory reconstructed how, based on his principle of democracy, there is a co-originality between private autonomy and public autonomy. It has not only lightened the difficult relationship between constitutionalism and democracy, but it also proposes to resolve the paradox of constitutional foundations (at least that of authority), transforming it into a bootstrapping process in which the

[47] The distinction of descriptive and normative plans will be taken up in the next chapter.

[48] *Between Fact and Norms* (1996b).

participants are engaged in a self-reflective and constituent process, unveiling over time the moral substance that founds their demos.

But what happens when we talk about a post-national democracy where the existence of the demos itself is questioned? One of the most significant cases arises with the aforementioned response to Grimm on the European *Kompetenz-Kompetenz* debate, in which Habermas attacks precisely the no-demos thesis and the non-legitimacy of the EU. Although both Habermas and Grimm distance themselves from a substantive conception of a constituent subject *a la* Schmitt, which homogenizes the identity of the people into a single will of preservation and creation, they still differ on what kind of demos is needed to legitimize a state and whether it serves Europe or not. For Grimm, the *ethnos*, i.e. the ethical substratum that identifies the substantial identity of a community in various forms, is not sufficient to define a demos, and that this definition must also be sought elsewhere. However, the ethnos is still necessary and the European community lacks it. Habermas, for his part, thinks that the identity of a community of citizens "must have another basis if the democratic process is to finally guarantee the social integration of a differentiated - and today increasingly differentiating - society" (1995, p. 306). In this sense, the ethnic nature of the demos completely loses its importance for a post-national state, because says Habermas, as we will see better in a moment, the European identity can only be a unity in the plurality of nations. Thus, Habermas revives the republican concept of *solidarity* between strangers, which is the very essence of democratic citizenship, however legally mediated. It is formed in fact, through the democratic process of discourse, including a wider slice of national citizens in civil society and in the public sphere. A public sphere that through the bootstrapping process completely reconfigures the relationship between constituent and constituted power.

What significance does this reconfiguration have for the case of the European Union? Following the *querelle* with Grimm, Habermas had begun to imagine a different future scenario of European integration, with respect to a peculiar relationship between supranationalism and intergovernmentalism of the EU.[49] To justify it, he elaborates a new

[49] Here we are talking about the texts that, since 2001, have marked a change of course in Habermas' imagination especially with regard to the future European Union as a German-inspired federalism, i.e. as he had proposed it in his reply to Grimm. So, during the decade of constitutional experimentation of the EU, Habermas argues that it can absolutely not develop in the image of a nation state, be it federal. Conversely, transnational democracy reveals a different constitutional nature, explained in fact through the mixed model that we address in this chapter. Cf. “Ach, Europa. Kleine Politische Schriften XI 2008,

theory of sovereignty and constituent power looking with particular interest at the process of law-making of the Lisbon Treaty (2009). There his theory again applies a rational reconstruction from democratic discursive processes. Specifically, thanks to a thought experiment, Habermas reconstructs counterfactually (i.e. with respect to the actual intergovernmentalism process/outcome of Lisbon) the normative expectations that citizens would have as participants in a constitution-making process (Patberg 2017).[50] The reconstruction leads Habermas to see in European citizens a splitting of their exercise of constituent power: one customary exercised at the "domestic" level of the nation state, while the other levelled-up to the supranational dimension. Thus we witness the distinction between different stages of constituent power, in a perspective that in its heterarchy of places of constitutional power may recall Arato's (2017) multi-stage constitutionalism approach. The mental experiment in facts claims that:

> Let us imagine a democratically developed EU *as if* its constitution had been brought into existence by a double sovereign. The constituting authority is to be composed of the entire citizenry of Europe, on the one hand, and of the different peoples of the participating nation states, on the other. Already during the constitution-framing process, the one side should be able to address the other side with the aim of achieving a balance between the interests mentioned. In that case, the *heterarchical relationship* between *European citizens* and *European peoples* would structure the founding process itself. (Habermas 2015, p. 554)

As Bozzon (2018) well observes, the splitting of constituent power binds the two communities, national and transnational, in an inseparable relationship that is that of citizens as belonging to the sovereign national people and at the same time to European citizenship. Therefore, Habermas accompanies the change of the classical conception of sovereignty, which is transformed into a transnational sovereignty, into an ambiguous division between and at the same time sharing of national sovereignties: on the one hand we would have the plural division between the existing single entities, on the other hand a sharing space that is not merely the sum of its components, but transcends it. Not reducing the components in a monistic European constitution, or in a new homogenizing

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Suhrkamp Verlag, Frankfurt am Main"; Zur Verfassung Europas.Ein Essay, Suhrkamp Verlag, Berlin 2011;

[50] Recalling that the Lisbon Treaty inherits, at least as far as the Charter of Fundamental Rights is concerned, part of the normative thinking of the Laeken constitutional process.

European subject, Habermas proposes a dynamic dualism, not fixed on a single identity. The already constituted and legitimized national subjects are *levelling-up at the higher level* of the transnational and post-revolutionary constituent process, allowing each demos to inform the European debate with its own identity and create an environment there mutual review on the basis of the rule of law. Although the tendency of this splitting/dualism towards division or sharing has never been clarified, it is therefore useful to define the constituent process in terms of deliberative constitutionalism, where citizens are not a passive legitimizing subject but actually participating. It is here that Habermas emphasizes, on the one hand, the importance and distinctiveness of the transnationality of this cooperation, of the search for a new constitutional compact and, on the other hand, of the new challenge that opens up for democratic theory (cf. 2014, pp. 25-26).

Several criticisms have been addressed to this theory (Bozzon 2018), concerning in particular Habermasian reconstructive intent (thus the normative side of his theory) that suffers from excessive "optimistic" ideality in the vision of European Union that it imposes and in its aim to legitimize it. Authors such as Grimm himself (2012) have in fact observed that Habermas' conclusions are not effectively reflected in the Lisbon Treaty, which does not encompass the conditions to overcome the main reason for conflict between the two authors: the fact that member states should or should not remain the *masters of the treaties*. Therefore, Habermas' theory would remain in the counterfactual dimension and would not have real normative feedback on the development of European integration, which would in some extent account for EU legal autonomy. Since it is already clear that this thesis does not criticize Habermas in this way and indeed preserves the strongly normative intent in deliberative constitutionalism, we want to focus rather on an issue that concerns what lies behind his rational reconstruction. This is, as we have already considered in Ch 1, the limiting formality of discursive epistemic proceduralism, that is, the identification of formal discursive criteria that can guide debate both in the ordinary public sphere and during a constituent process, regardless of particular moral substances. Such a framework could fall in the epistemic trap of the skeptics, that is an infinite regression of justified beliefs. We have also seen how, in an applied macro-perspective, this would lead to Michelman's paradox of democratic procedures, also translated into the infinite regression between constituent and constituted power: people, he claims, will never be able to make their own laws if the constituent process follows

only procedural deliberative rules, because it would cause a lack of ultimate authority who approves them and of ultimate subject who legitimize them.

Still from the macro point of view, but contextualized in the European case, Habermas has been criticized, in particular by Étienne Balibar, not much for his normative reconstruction rather than for the risk of standardization that deliberative constitutionalist formalism brings with it. To focus on formal democratic procedures would risk building a theory that is unable to account for plurality, not only of the substantive plurality of identities but also of the formal plurality of the procedures themselves. Consequently, it could not explain the conflicts that occur within this plurality and that seem to radically characterize the dimensions of political participation. So much so that, as we shall see in the next chapter, (constitutional) plurality can become the key to understanding the true essence of the European Union. Before that, however, we can briefly investigate the aspect of "conflict" that has been neglected by Habermas and that, applied to the concept of constituent power, manifests itself in the new form of *destituent power* in the European dimension.

2.2.3 Destituent power

The assumption here is that the renewed interest in constituent power has spread widely in international legal and political theory, thus also beyond the boundaries of European integration (Loughlin-Walker 2007, Dobner-Loughlin 2010, Thornhill 2012, Arato 2017). As one might expect, the theoretical question guiding this research is what normative space constituent power opens up in the international and transnational dimension, where there is no substantive basis of a national people acting as a single foundational will or a single body of state. This recalls the common ground between Habermas and Grimm: the presence of a structural deficit of democratic legitimacy and participation in decision-making processes that take place across national borders.

In order to respond to these problems, some authors opted for a skeptical view that would abandon the concept of constituent power to explain contemporary post-national constitutionalism (Walker 2017). Others have opted instead for an emerging form of destituent power (Krisch 2016, Patberg 2018, Möller 2018,), which draws a normative space outside the positive creation of the classic constituent power. In particular, destituent power

> stands for forms of political action that seek to escape the regulatory grasp of public authority, to render political institutions inoperative and to dismantle constitutional orders. At the same time, it is usually introduced as a category of democratic theory that provides (or is at least compatible with) normative standards as to which acts of contestation can be deemed justifiable. (Patberg 2018, p. 5)

This power too, like constituent power, profiles its normative force according to its relationship with constituted power, taking one side or the other of the paradox of authority. Thus, in order to reduce the ambiguity surrounding this category, Patberg proposes distinguishing between an anti-juridical and a juridical conception of destituent power. From the anti-juridical point of view destituent power "aims at the 'deactivation' of political institutions and the parallel creation of new forms of (democratic) politics that operate outside legal-institutional frameworks" (p. 5). Although a similarity rests between destituent power and constituent power defined by decisionist or radical-democratic theories, i.e. in their being unbound and unconstrained by legal power, there can be a profound difference: destituent power is a creative act that consists in deactivating the consensus of constituted power, counteracting its ruling capacity, without thereby undertaking a new higher constitution-making that replaces it. From this point of view, the anti-juridical conception resolves the paradox through the opposition between (political) sovereignty and law, and by annulling the second part.

On the other hand, the juridical conception of destituent power "is that structures of public authority can be transformed through acts of opposition and withdrawal" (p. 8), from within the constituted system itself. However, one must decide between two versions, the first and best known of which is that of civil disobedience internationally widespread. The congregation of various local movements under the aegis of common struggles, especially for human, civil and social rights have pushed towards the concretization of a constant transformation of local institutions, exercising a destituent power in the form of language of protest. Important to disobedience is its application within a constituted normative framework common to both those protesting and those defending it. A shared political space is necessary for the act of disobedience to be public rather than revolutionary, and in this respect, the European public sphere is at a greater advantage than the more fragmented international environment. Integration also creates a concrete basis for the language of protest (Niesen 2018). Nevertheless, the empowerment of civil protest remains an unsurprising issue: who grants the authority to protestants?

The other version of destituent power looms large in a debate that observes the crisis of popular sovereignty in global constitutionalism - of which the EU seems to be a worthy representative. The main issue is the deficit of democratic legitimacy, from which transnational institutions such as the EU suffer. This can manifest itself due, for example, to hegemonic tendencies (Möller 2018): the tendency to relegate decision-making procedures to the hands of a technocracy or a juristocracy;[51] the properly substantive limitation of certain policy-strands to the single transnational and international level. For these reasons it has been argued that it is impossible to conceive of constituent self-legislation beyond the boundaries of the traditional state: constituent power has lost its credentials of legitimacy in a post-constituent post-national order. The subject of destitute power, the sovereign people, are left in this new world with sporadic manifestations of counter-power that Nico Krisch (2016) has defined as *pouvouirs irritant*, i.e. embryos of popular participation that irritate the constituted power.

Nevertheless, the juridical conception do not abandon the normative plane of constituent power entirely. Both Krisch and Möller, Patberg reminds us, reuse it through its symbolic value, at least on a discursive level. Destituent power itself can act in the name of constituent power. Patberg, however, proposes something different: he argues that the link between destituent power and popular sovereignty or citizenship must be recast (or rethought) and that this is the only way to respond to the democratic deficit and answer the problem of authorization.[52] But whether destituent power reconnects to popular sovereignty, it does so by assuming the Habermasian normative logic of the rational discursive reconstruction of the very conditions for destituent power to manifest itself. Finally, since the latter are, again in Habermas' view, the very normative bases of constituent power, he concludes as "destituent power appears as a dimension of constituent power" (Patberg 2018, p. 14). For this reason, Patberg is careful to limit the negativistic conception of destituent power, that is, of actions autonomously and purely opposed to constituent power. Their common normative identity makes them two sides of the same coin, also allowing for a further exploration of the (however peculiar) space of legitimacy that destituent power draws at the transnational level.

[51] Thus, purely institutional forms of decision-making, such as dialogue between courts. That is why the risk of Habermasian proceduralism at the transnational level has often been recalled here.

[52] To which both disobedience and anti-juridical conception offer no promising answers.

At this point, we move on to the chapter's conclusions. Constituent power, in the new demand for transnational political truth, brings with it several challenges: is it still one truth or more truths? What kind of truth are we talking about? How does it relate with sovereignty? How does it locate between a democratic or a constitutionalist perspective? And finally, how does it relate with its "negative" side, which manifests itself where there is democratic deficit? Along these research questions, deliberative constitutionalism envisages the uniqueness of the European experiment, precisely because of its conditions of post-sovereignty, then identifying a middle way between the democratic and constitutionalist vision of constituent power. Moreover, it comprises, along the lines of Patberg, the dichotomy of constituent power and destituent power within the already mentioned constituent process. As will be seen in the last chapter of this thesis, the dynamism of a constituent process that spans generations can neither be reduced to a single founding act, nor to single destituent or, so to speak, negative episodes. The reflexivity that normative theory of deliberative democracy also "applies" to constitutionalism leads to a particular conceptualization of constituent power, as well as its relationship with the constituted. It is precisely this paradoxical relationship that is reconfigured through an already anticipated “distinction” of the epistemic plane (i.e. that of the political truth posed by constituent power) from the ontological plane of institutions and therefore of constituted power. So that constituent power is researched with a special focus to the epistemic implications that surround transnational democracy, explicated both in council and institutional terms (to recover Arato’s words). Before that, it is necessary to consider constitutional pluralism as the theory provided with a normative criterion capable of explicating the plurality of constitutional claims in transnational democracies. This way the thesis will proceed confronting an *institutional* plurality and an *epistemic* one, highlighting ultimately how such pluralism may be integrated in a deliberative constitutionalist framework.

CHAPTER 3

European constitutional pluralism

Resuming the focus on Europe that was specified in the second paragraph of the previous chapter, here we will discuss the most important theoretical framework that has developed over decades to account for the pluralistic uniqueness of the European system. This is the set of approaches that are collected under the term 'constitutional pluralism' (hereafter, CP), which are characterized in the very first instance by the difference between a mere plurality, horizontal but lacking any integration/organization, and a pluralism, i.e. a theoretical vision that carries with it a normative criterion.

The approaches will be explored through different moments of analysis: starting from the origins of the theory, the different strands that mainly dealt with giving an answer, even if not excusive, to European constitutionalism will be illustrated; second, the common descriptive and normative claims that allow to identify a peculiar approach of CP will be illustrated. Nevertheless, two dimensions in particular are illuminated in this chapter: the first is the institutional one, i.e., the way CP reflects on inter- and intra-institutional pluralism (e.g., between peer courts, or between courts and other institutions); the second one, identified mainly by Neil Walker, investigates the epistemic (meta)foundations of pluralism. More attention will be paid to the latter 'type' precisely because it is functional, at a constructivist level, to the comparison with the deliberative framework treated in this thesis: it will therefore be deepened how Walker's idea to ‘stretch constitutionalism’ faces a normative dilemma in justifying plurality on multiple levels and how it tries to differentiate itself from monist and dualist positions. Nevertheless, both institutional and epistemic approaches, especially in recent times, have pursued a common goal of overcoming a narrow view of constitutional pluralism on the courts, in order to problematize more deeply the question of legitimacy from the national to the supranational level, passing through the usual paradox of authority between a

constituent power and a constituted (plural) one. Here then, at the end of the chapter, the view of epistemic constitutional pluralism on European constituent power will be added to the discussion brought forward in the second chapter.

3.1 Constitutional pluralism evolving

The *raison d'être* of constitutional pluralism is precisely a widespread reaction to the previously mentioned *Kompetenz-Kompetenz* debate, on which Habermas and Grimm also clashed (par. 2.2.1). The defense of national constitutional instances/identities has thus led many authors to justify the presence of structural plurality within the European Union. A plurality with which the discussion of the dialectical relationship constitution-sovereignty-constituent power must come to terms. In particular, the BVergG's ruling *Maastricht-Urteil*, with his normative robustness and expressive judicial power, has represented a decisive moment, as the first real occasion on which the German court asserted its legal sovereignty. It lighted up the instability of the ideal hierarchy between national and supranational norms and the irresolute conflict between different constitutional authorities. Another key author and father of constitutional pluralism, Neil MacCormick (1993, 1995), also intervened in those times and in two occasions in particular.[53] Firstly, before BVerfG's ruling and in the midst of the Maastricht debate, he pointed out the necessity and desirability of differentiating sovereign national Constitutions and post-sovereign judicial activities and supranational policy-making: "[…] Our passing beyond the sovereign state is to be considered a good thing, an entirely welcome development in the history of legal and political ideas" (1993, p. 1). Afterward, MacCormick assesses how the plurality of constitutional authority sources contrasts the hierarchical and monist vision embedded in the western legal-political thought:

> The most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical. The legal system of Member States and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another. (1995, p. 256)

A theory of constitutional pluralism, however, is explicitly stated a few years later, following the path of post-sovereignty research, in MacCormick's pillar of thought *Questioning Sovereignty* (1999). It acknowledges to national constitutional regimes a

[53] N. MacCormick: *Beyond the Sovereign* State, 1993, which precedes the judgement. N. MacCormick *The Maastricht Urteil: Sovereignty Now,* 1995.

peculiar relationship between juridical and political sovereignty. According to MacCormick's institutionalist theory of law, the foundation of juridical normative orders lies in social conventions upon shared values (be them juridical or moral) which are self-referential to reflect the identity of each community. MacCormick privileges a liberal view of the constitution as rule of law, meaning the juridical sovereignty of the individual safeguarding negative liberty and curbing the political power of the State.

With supranational polities it is totally another matter: MacCormick in fact identifies the mistake of other theories in interpreting the European stage with the old paradigm of sovereignty. Consequently, even though the EU new legal order can be said *sui generis*, thanks especially to the judicial activity of the ECJ, its sovereignty should not be regarded as statically opposed to the national and international orders (monistic option) or as just another international system. The European Constitution configures a confederation (a commonwealth) rather than a federation, where MacCormick acknowledges the opportunity for a pluralist and peaceful coexistence of national and supranational institutional orders rather than a hierarchical disposition, as anticipated in the 1995 paper. A coexistence that MacCormick does not frame only as normatively desirable but also fait accompli in the European Union (cf. Wilkinson 2019).[54]

It is worthy to anticipate an author who will be talked about a lot in this chapter. A decade after the Treaty of Maastricht, MacCormick's pupil Neil Walker (2002) contends that CP is a normative and explanatory theory not only for EU constitutionalisation, but for any kind plural constitutional system a much wider explanation for the constitutional transition to the post-sovereign world, while at the same time an act of recovery of the constitutional language. But why has this language to be recovered in the first place? Walker addresses the crisis of the constitutional language in the sovereign national world (or, as he defines it, "Westphalian"). The rupture of the correlation between the ultimate legal authority and the territorial sovereignty has brought constitutionalism to a general marginalization. However, this phenomenon is not much the fault of post-national 'openings', rather than of some (epistemic) flaws embedded in modern constitutionalism that we are going to deepen later (par. 3.2.1). Thus, CP represents the occasion of rehabilitating the status of constitutionalism in general, because

[54] In this sense, late MacCormick's pluralism distances from a radical version (previously shown in *Maastricht Urteil*, 1995) and embraces a coexistence between the international and the national order, each a "monism on it own", in similar fashion to Kelsen (cf. Komárek 2012).

it establishes a meta-framework attempting to manage the plurality of authoritative (epistemic) sources in the new post-sovereign world-order (called 'post-Westphalian').

3.1.1 Strands and claims of CP

The truth is that Walker's is only one of the many strands in which CP has diversified since MacCormick's 'founding' theorization. The increase of supporters and variants has been possible after the failure of the notorious 'constitutional' process of Laeken (2004), which has stimulated again the debate on the European case. Nevertheless, especially in recent years, there has been an attempt to develop the potential of the theory beyond European borders, although this type of literature is still less developed.[55] Here, for the sake of brevity, we try to characterize the taxonomy by remaining on those who, in one way or another, have maintained the focus on the European constitutional debate. In this sense it is convenient to present four main strands following the classification of Jacklic (2014):

- The cited Walker's (2002, 2003, 2016) approach of *epistemic pluralism* starts from the axiom of incommensurability of knowledge and authoritative claims among the different constitutional sites, and from the fact that there must be mutual respect. According to Walker, above and beyond this plural constitutional system there is an epistemic *meta-framework* which grounds the conditions (or the second-order principles) of this respect and which may explain effectively the developments of today's constitutionalism. It is up to CP to reconstruct such conditions and meta-framework;

- *Substantive pluralism* is the framework elaborated by Joseph Weiler (1999, 2003) and it is more focused on the balance among the constitutional identities, substantially different from the EU and its own member states. Even though his vision appears to be more hierarchical, the pluralist relationship among the different entities is driven by the substantial principle of constitutional tolerance;

[55] Cf. Avbelj-Komárek (2012), introduction, par. II.

- *Institutional pluralism*, according to Mattias Kumm (2004, 2005), envisions a cosmopolitan framework in which the different institutions (more the constitutional courts than others) fit on a homogeneous background of liberal principles and values;

- *Partecipative/interpretative pluralism* is the approach of Miguel Poiares Maduro (2003) which resembles institutional pluralism for his reception of pluralism as inherent to European constitutionalism. However, despite of the universalism of Kumm's liberal principles, Maduro focuses on a discursive proceduralism (which reminds Habermas' one) between the institutions which make their authoritative constitutional claims.

Indeed, to provide its pluralistic answer for the European constitutionalism debate, all the following CP literature stakes *descriptive* and *normative* considerations which, despite the different formulations, are based on common fundamental claims derived from MacCormick's analysis. These claims strive to define the *pluralism* of CP, especially in opposition to other *monistic* readings of European constitutionalism.[56]

Both Maduro (2012) and Walker (2016) identify three fundamental claims. Firstly, the starting point of CP is in fact a *descriptive* claim, that is its descriptive component. CP describes a pluralism of constitutional claims of ultimate authority which can generate conflicts. Moreover, CP explains the juridical reality of the European Union as an *open-ended* competition of authoritative claims that, as Maduro clarifies, come from different legal orders (national and European ones) but pertain to the same transnational system. This leads CP to assume that the EU is governed by a form of constitutionalism. Secondly, while the descriptive instance observes merely an endless constitutional plurality, its *normative claim* is that the research of ultimate authority ought to remain open – thus differentiating plurality from *pluralism*. The normative ideal of heterarchy is considered superior and preferable to the one of hierarchy in the context of authoritative constitutional disputes. Therefore, in the EU, there is not only the recognition of the equal legitimacy of European constitutionalism compared to national ones, but also the added value of the first one to the second ones. Maduro (1998, 2003) identifies three types of added value in the dynamic relationship between the national jurisdiction and the transnational one: the openness and inclusion among national interests; the maintaining of control over transnational politics; the limitation and rationalization of private interests

[56] These considerations constitute the response to the question: is CP descriptively and normatively tenable compared to monistic (or even dualistic) solutions? (as stated, except for late MacCormick, note 54).

of every single member state. Each theory of CP can be analyzed also through the normative orders/levels of applicability of norms, distinguishing usually between first-order and second-order constitutional discourses.[57] Finally, the last claim of CP is defined as *thick normative*. By virtue of its significant descriptive content and evaluative load, it considers itself as the "closer approximation to the ideals of constitutionalism than either national constitutionalism or a form of EU constitutionalism modelled after state constitutionalism" (Maduro 2012, p. 77). This claim starts from the premise that pluralism (of visions of good society) is inherent to constitutionalism. The latter works as guarantee of pluralism itself, even when it manifests as the well-known paradoxes of constitutional democracy.[58] Moreover: this further evaluative act of CP as *best theory* leads to the differentiation of CP in the above-mentioned strands, both at a global and a European level, based precisely on different statements of the descriptive and normative claims.

It will not be possible to expose here each pluralistic output of these "best theories". Rather, the chapter undertakes an analysis that has changed the direction of some strands of constitutional pluralism in recent years, namely the possibility of exceeding a strictly *judicial* vision of a pluralism of legitimate claims, produced by Courts' jurisprudence and conflicts.[59] As anticipated in the introduction, this analysis contrasts a narrower view, focused on the discussion of final authority among courts and on a form of legal constitutionalism, and a broader view of CP that wants a political discussion included in a pluralistic theory of the EU. Now, this 'political' widening of the CP theoretical spectrum can be done in different ways and, in the particular case of this thesis, it will be considered from an institutional and epistemic point of view: this means that, on the one hand, institutions beyond the courts can and should intervene in the claims of ultimate constitutional authority, may they be other branches of the government or parts of civil society; on the other hand, one can investigate not only the epistemic presuppositions of the legal reasoning that a constitutional court implements in its judicial review, but can expand these same presuppositions towards an effective constitutional legitimacy for the whole society. The chapter will proceed, firstly, juxtaposing the

[57] Especially in the case of Walker's epistemic pluralism.

[58] Maduro talks about the opposition of two modern pulls, between plurality and unity, as we shall see later on in this chapter.

[59] Besides, this argument recalls the recurrent discussion of the present thesis on contrasting a purely legal view of constitutionalism and their implications (e.g. constituent power).

institutional and epistemic visions, confronting them[60] later with deliberative constitutionalism and its consideration of plurality.

3.1.2 Institutional dimension of CP

To clarify the potential of the institutional dimension of CP, it is good to recall what Jan Komárek remarks:

> *Constitutional pluralism, which challenges the hierarchical ordering imposed by the principle of primacy, opens doors to an examination of whether the institution which takes a particular decision is in the best position to adopt it and whether the effects of its decision should persist beyond the context of that particular situation.* (2012, p. 232)

This reasoning allows CP to make the plurality of institutions "visible" (p. 233) behind a single decision and thus to counter any claim of ultimate authority by a single institution. In the wake of the reasoning in the previous paragraph, the question to be asked is: should the institutional dimension of CP be limited to the judicial dimension of courts? As we shall see, the fight against the hierarchical order imposed by the principle of primacy should not in turn derive the legitimacy of claims from the primacy of the courts and legal experts. On this point, or rather on the overcoming of a narrow vision, not all authors obviously agree. In this sense, following Goldoni (2012) it may be useful to compare two 'institutionalists' such as Mattias Kumm and Miguel Poiares Maduro and the way they define CP.

As for Kumm, his pluralism consists descriptively in a competition/conflict between constitutional authorities, which in essence remain the courts. Ergo, he goes beyond the monist view of the ECJ and embraces a pluralist perspective, but still restricted to the dialogue between the ECJ and its national equivalents. The possibility of recognizing an autonomous authority to the ECJ is based on the above-mentioned core of liberal principles common to European constitutionalism. Put differently, it is the basis of this core that makes normatively possible the harmonization of the various

[60] With a particular focus on epistemic pluralism, because it stands out as benchmark for the comparison with deliberative constitutionalism and the claims of Walker.

proportionality tests of the constitutional courts that compete with each other, a feature precisely characteristic of the European case (2005).[61] Kumm, as the legal constitutionalist that he is and in controversy with political constitutionalism, observes precisely in the proportionality of judicial review a constitutional rationality that allows courts not only to resolve conflicts among themselves but to be "the institutional embodiment of the idea of public reason" (Goldoni 2012, p. 391).[62] This dominant role of courts is certainly a stance that prompts Kumm (2004) to emphasize the 'spillover' effect that judicial deliberations can have on public debate, that is, the positive steering effect that 'proportional' rationality can also have on 'political' conflicts in society.[63] Moreover, as Kumm (2009) himself indicates, this conception of CP can be 'expanded' to become a cosmopolitan constitutionalism, precisely because the substantial core of liberal principles can also be shared at the level of international law.[64]

In a different way, in defining the institutional dimension of CP, Maduro (2003)[65] does not identify a substantial core of common principles, but rather a series of meta principles (which he calls contractual principles) which regulate the relations, even conflicting ones, between national and supranational courts. These principles are inscribed in a broader discursive proceduralism *a la* Habermas, which however has the aim of universalizing (similarly to cosmopolitan constitutionalism) the possibility of justifying one's claims to authority in a context of integration. Certainly, Maduro's gaze remains courts-centered like Kumm's, since these principles try to avoid chaos in the debates among the 'major shareholders' of the constitutional authority. Unlike Kumm, however, Maduro's institutional focus is not exclusive. In this regard one meta-principle stands out as the most innovative of all: it is the institutional choice, which founds a comparative institutional analysis to guide the choice of authority claims:

[61] Namely, its thick normative claim.

[62] As Rawls (1993) claimed (cf. par. 1.3.1).

[63] With respect to the epistemic spillover discussed below between different normative planes, in this case, spillover refers to what we defined in the first chapter (par. 1.2.2) as the direction of normative influence *law-to-deliberation*. Furthermore, two subsets could be found under this label, identified as deliberative filtering and deliberative telescoping (see Levy-Kong 2018, introduction; cf. Ch 4).

[64] As he points out (2012) regarding the well-known case (2008).

[65] M. P. Maduro (2003), *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. Walker (ed), *Sovereignty in Transition*, Oxford, Hart.

> Courts must increasingly be aware that they don't have a monopoly over rules and that they often compete with other institutions in their interpretation. They have to accept that the protection of the fundamental values of their legal order may be better achieved by another institution or that the respect owed to the identity of another legal order should lead them to defer to that jurisdiction. This requires courts to both develop instruments for institutional comparison and to set the limits for jurisdictional deference at the level of systemic identity. (Maduro 2007, p. 18)

Maduro (2012) makes another point that is interesting in the context of this thesis: as mentioned earlier, to define the thick claim of CP we must take into account the fact that pluralism is already inherent in modern constitutionalism. Pluralism and the hierarchical unity of the state have always been part of a system of *opposing pulls*, tending to conflicting values such as private liberty, on the one hand, and legal or identity equality on the other. Pluralism is therefore that of institutions, which ensure a plurality of interpretations of the *common good* (Goldoni 2012) and which can be an expression of the pluralism of the political community in general. However, the dependence of this pluralism on the primacy of the legal system, on the unity of modern state constitutionalism, has led to the emergence of the well-known paradoxes that Maduro also recalls (2012, p. 78). Now, as he argues, one needs constitutional pluralism as the best theory to explain, in a post-national context where that unity is lacking, the self-sustenance of this pluralism and the procedural discursive criterion that normatively guides it.

After all, for the present chapter it is interesting to see how "Kumm's and Maduro's theories may have the resources for avoiding that constitutional pluralism be reduced to judicial dialogue" (Goldoni 2012, p. 400). In this sense, both Komárek (2012) and Goldoni (2012) take a step forward, which we will see is also taken up by Walker (2016, cf. par. 3.2.2). It consists in broadening the vision of CP to the role of non-judicial institutions and thus to a political dimension of constitutional pluralism. This means reworking the concept of dialogue, as Komárek also does, not in the sense of a final and irreversible institutional choice, which is in charge of formulating the ultimate claim of constitutional authority. Conversely, in the sense of an institutional involvement and communication, to the ends of which the theory of constitutional pluralism must be directed. As we will see in chapter 4, these are fundamental insights that will have to be integrated, in deliberative constitutionalist terms, with the systemic and inclusive vision of a deliberation that occurs both among institutions and in civil society. First, however,

it is necessary to investigate the transfer of constitutional pluralist discourse from the ontological plane of institutions to the normative epistemic plane.

3.2 Walker's epistemic pluralism

Epistemic pluralism, as it is applied in the constitutionalist field, focuses on the relationship between the various unities of constitutional knowledge and (sovereign or post-sovereign) authority. Thus, this theory generally reconstructs the epistemic assumptions for the hermeneutic through which social agents interpret society and its constitution. Being epistemic constitutional pluralism equipped with a normative criterium, it contrasts any kind of epistemic relativism which does not envision a determinate arrangement. Moreover, after having *described* the epistemic assumptions at the core of a constitutional conception, the question is what normative procedure for epistemic CP to realize over time.

To do so, as we shall see shortly, Walker's epistemic CP does not frame a substantial alternative constitutionalism, but rather a constitutional meta-framework upon which we may assess the epistemic assumptions forming national and transnational constitutionalism. More specifically Walker critically evaluates the epistemic assumptions of modern constitutionalism which have contributed to "restrict" constitutionalism and take it to a more marginal condition. Consequently, he firstly suggests criteria for renewal of constitutionalism and then epistemic standards to "stretch" the constitutional idea and rehabilitate it even in the global plural dimension.

3.2.1 Renewal of modern constitutionalism

The way how modern constitutionalism and its claims are acknowledged suffers from significant flaws, that has been targeted by as many critiques. The five main ones gathered by Walker are: statist legacy, fetishism, normative bias, ideological exploitation and debased conceptual currency (2002, p. 319). The first critique attacks the indissoluble bond between modern constitutionalism and the state, which has hindered the former to account of sources, movements and manifestations of economic, political and social power beyond state borders, both in terms of institutions and territory. Secondly, the prominence of constitutions has even been tagged as fetishism, because the overestimation of constitutional discourse within the state, in a both explicative and transformative sense, has overlooked other manifestations of power and political will of the community. The third and fourth critiques of normative bias and ideological

exploitation counter the alleged purity of constitutionalism and its intentions: the former displays how constitutionalism could favor certain interests and values rather than others; the latter displays the possible subservience of constitutionalism to a peculiar ideological vision of society, thus its ad hoc construction. The last criticism is in a sense the consequence of these modern epistemic assumptions considered collectively: the conceptual currency or value of modern constitutionalism results debased and its signification lost in indeterminacy – and therefore in disagreement too.[66]

To fix these flaws and react to the risk of disagreement, Walker puts forward some reconstructive criteria for renewal of constitutionalism in general, in order to make the acknowledgement of constitutional claims again coherent and continuous from an epistemic perspective. Walker divides them into three categories. Not by chance: the conditions of acknowledgment of constitutionalism under investigation include a spatial dimension (institutions and territory), a temporal one (the constitutional history and future) and a normative one (the strength as moral and political guide of constitutionalism itself). So, in the first case, a renewed idea of constitutionalism requires that *spatially* the state is reaffirmed as hosting and implementing center of constitutions; nevertheless, a quest of significative constitutional processes and discourse beyond the state becomes necessary to widen the analysis spectrum. Temporal criteria require instead continuity, to maintain the sense of constitutionalism through all its transformations: on one side, historical continuity shows a causal connection of constitutionalism to its origins; on the other, continuity must be even discursive – a fundamental requirement from an epistemic perspective – so that the story of this connection between the foundational and future events is coherent. The criteria pertaining to the spatial and temporal dimensions well respond to the criticisms of statist legacy and constitutional fetichism, by giving to the state and constitutional discourse a renewed key role. However, it is important to remind that behind states and constitutions rest some paradoxes inherent in the *nationalist* reading of time and space, to which CP – as it will come out of the comparison with DC – has not paid enough attention.

Finally, the criteria for constitutional renewal require also *normative* coherence, both internally and externally to constitutionalism, in order to fight back normative biases and possible ideological exploitations. Coherence in fact does not mean accommodation to a peculiar view or to tacit constitutional believes. Rather, internally, it envisions

[66] A danger that stands out exactly in the post-Westphalian context of the new Europe.

constitutionalism as an open-ended and inclusive process and brings with a high-reflexive conception of democracy. Externally, then, constitutionalism must prove to be a moral and political guide for the entire citizenry, not exclusively for constitutionalists and judges. This criterium, by the way, raises again the issue of the accountability of constitutional technicians compared to the interests of the rest of society.

3.2.2 "Stretching" constitutionalism: a dilemma

The question remains: how should constitutionalism be renewed in a context of plurality of constitutional claims? Later in the thesis, Walker's theory will be confronted with DC on this (thick) normative ground.[67] In terms of extension of this ground, it must be noted that, even though these criteria for renewal could have a global reach (and CP a global ambition), Walker still maintains the focus on the European juridical debate.[68] He describes it as "the most pressing paradigm-challenging test to what we might call constitutional monism" (2002, p. 337) and the starting point of CP's theoretical independence.[69] He appears to be non-skeptic about European constitutionalism itself, claiming that the integration process that descends from the Treaty of Rome has led the European Community to put forward its own constitutional claims which coexist next to national ones. However, Walker shows epistemic skepticism when grounding his three claims of constitutional pluralism on an *axiom of incommensurability* of knowledge and sovereign authority among epistemic constitutional unities. In fact, his descriptive pluralism claims that there is no neutral/external historical point of view from which constitutional unities could be judged and valued, leaving a multiplicity of constitutional sources and authoritative claims on the field.[70] Normative pluralism claims that consensual sharing and coordination among these unities will remain an unachievable ideal due to the strong peculiarity of each constitutional unity and claim and the only way

[67] Answering thus to the question: which is the best constitutional democratic paradigm to account for this issue?

[68] Although he defines his claim as "modest" due to the complexity of constitutionalism under conditions of pluralism and disagreement especially in the global context.

[69] Similarly, the present paper will assume the European case as the addressee of the following argumentations.

[70] Walker talks about "foundational rules of recognitions."

forward is just *mutual recognition*.[71] Finally, descriptive and normative pluralisms derive from a thick normative claim which characterizes his theory as *epistemic* pluralism – and the latter as the best way to account for European constitutionalism.

From the perspective of normative level of constitutional discourse (cf. par. 2), epistemic pluralism is a meta-framework, a second-order thesis: "it is concerned with the question of how to develop and secure the most legitimate conception of the idea of constitutionalism" (Jaclick 2014, p. 32). It is about to understand which external epistemic borders constitutional unities themselves need to respect, in order to be part of a constitutional plural system and enhance the rehabilitation of constitutional language.[72] Conversely, possible chaotic disagreement and external arbitration in the competition among constitutional unities can threat the legitimacy of this new idea of constitutionalism and devalue the efficacy of the axiom. Thus, these borders must, at the same time, preserve epistemic pluralism as the axiom dictates and "stretch" the idea of constitutionalism enough to meet requirements for renewal. Walker suggests two directions in this regard: firstly, there are some constitutional *standards* each epistemic unity should abide to. The widening of constitutionalism aims to include also non-state and post-state constitutional phenomena. These standards imply that: (1) the constitutional claim must associate to a polity which developed an explicit and proper constitutional discourse; (2) beyond the discourse itself, the claim is supported by an instance of sovereignty (or foundational legal authority); [73] (3) a sphere of judicial competence takes shape; (4) there is interpretative autonomy of this competence within the polity; (5) there is a constitution to rule internal institutions; (6) there is a regulation of the membership to the polity, including rights and obligations of the citizenship; (7) the will and interest of the citizenry is taken into account in some way.

The second direction through which we can broaden the idea of constitutionalism is more problematic: even though epistemic pluralism is said to be mainly a second-order thesis, "it spills over also to first-order constitutional disagreement about the content and interpretation of this or that prescriptive constitutional rule […] in everyday constitutional

[71] Incommensurability should not be thought as freedom of each claim from external constraints, rather as an indispensable requirement of the plural system itself: all the claims must respect the axiom towards the others.

[72] Legitimacy will be a key of confrontation between DC and CP.

[73] Not in the traditional Westphalian sense, so without asserting one's epistemic superiority externally but only internally.

cases" (Jaklic 2014, p. 43). Such a "spill-over" is necessary because second-order and first-order discourses are interdependent to the extent that one cannot change without influencing the other. Suffice it to say that the second-order axiom of incommensurability is based on a first-order irreconcilability of different concrete constitutional claims. In this sense, constitutional disagreement remains primarily a first-order practical issue, hard to abstract to a meta-framework. Moreover: first-order discourse can be of direct interest to people lives, whether they be officials, technicians or simple citizens. Consequently, the question is how and who constitutional pluralism should normatively motivate to act towards the meta-framework ideal. In response to this, a dilemma comes to the light.

What is being questioned here is the *rationale* behind the normative driving force of constitutional pluralism. In the case of its epistemic "stretching" process and under the impact of first-order constitutional disagreement, the reason why constitutional claims should be incommensurable in the first place – and arranged in a heterarchy eventually – is not clear. One wonders therefore about the appropriateness of a non-hierarchical plural constitutional system as the best answer to the criteria for renewal of constitutionalism, compared to alternative non-systemic or anti-systemic meta-frameworks of European constitutionalism.[74] Take for example the *monistic* approach, which occurs in two manners. Firstly, it includes what Walker defines as "situated or embedded particularism" (2016, p. 337): it denies the descriptive and normative peculiarity of European constitutional perspectives. EU constitutionalism is as centralized and hierarchical as national constitutionalism, only at a higher level.[75] Thus, either a state-centered or an EU-centered vision is possible and normatively supported. Secondly, monism could also translate into *detached particularism*: all the constitutional unities would live in a compartmentalized system where only a plurality *de facto* applies. This could happen also in CP if its pluralism loses its normative criterium of mutual recognition in favor of a radical plurality.[76] Lastly, another vision is the holism of Dworkinian inspiration: it envisions a harmonic law, detached from fights for authority and sovereignty which split law between the EU and national states. Thus, it denies not only inter-systemic views, but also individual system themselves.

[74] As mentioned at the beginning of the paragraph.

[75] As monistic defenders claim has already happened with the EU judicial story of direct effect and primacy.

[76] A radical plurality is for example defended by Nico Kirsch (2016).

It is thus a question of defending the thick normative claim[77] of CP as still the best theory to account for EU constitutionalism. In response to these alternative frameworks, Walker has recently (2016) reviewed his theory to reevaluate the sources of normative pluralism and normative guidance of European constitutionalism – its motivational/legitimizing principle. He has noted that, in order to stretch the epistemic borders of constitutionalism to connect state and post-state dimension,[78] research on a legal basis is not enough. Rather, CP "must also address the political dynamics and infrastructure which underpin the legal domain, and so ultimately CP should be considered as much a matter of political theory as of legal theory" (Walker 2016, p. 335). A serious account of legitimacy understood in political terms and not only in legal ones would lead the three claims of CP to make the difference (including the axiom of incommensurability) and differentiate itself from mere legal pluralism. Constitutions are not just mere legal regulations of a society, but both 'trace and catalyst'[79] of political community and life. This virtuous circle means that, while the constitution-building process/project express the "traces" of the political community will and its commitment toward a common future, it functions at the same time as catalyst of the political community itself, as a normative guidance to constitute (and keep constituting) the collective subject that constitutions declare.

Since their foundations, constitutions entail a lot more from the political perspective of the collective project, in terms of sovereignty, identity and legitimacy. Therefore, Walker too undertakes a critical approach towards the restricted focus of CP on judicial contests between High Courts, with a limited capacity to account for Europe's problems of legitimacy. It is therefore time for European constitutionalism to engage a more productive and comprehensive conversation along the lines of the age-old democratic deficit of the European Union.

3.2.3 Post-constituent constitutionalism

In view of a constitutional constructivist comparison that will be completed in the next chapter, it is relevant to take a step back to the theme of the previous chapter on European

[77] That Walker defines also as the *distinctiveness* claim.

[78] "Those constitutional structures and values fit awkwardly with the EU's unprecedented non-state form […] The idea of CP captures this sense of awkward indispensability" (Walker 2016, p. 334).

[79] Cf. *Ivi*, p. 335.

constituent power. While section 2.2 addressed the Habermas/Grimm debate and the emergence of a 'negative' strand of destituent power, we now see how epistemic pluralism frames the concept of constituent power within the constitutional meta-framework described above. Walker's (2007) classification of European constituent power perspectives helps in this regard: (1) *non-constituent constitutionalism*, i.e., the hypothesis that constituent power is simply not necessary to describe European constitutionalism and that therefore its very idea is redundant when invoked at the supranational level; (2) *constitutional skepticism*, although it holds that the idea of constituent power is necessary and desirable for any constitutional experience, it cannot logically apply to a non-constitutional experience such as the European one; (3) the hypothesis called *constitutional vindication*, which argues in controversy with the previous ones, the maturity of the European constitutional and constituent experience; (4) finally, the one supported by Walker himself, the constructivist hypothesis of *post-constituent constitutionalism*, which argues: "(contrary to the redundancy argument) that constituent power remains a necessary feature of European constitutionalism, that (contrary to the maturity thesis) it has not yet been realized, but that (contrary to the sceptics) this constituent power is capable of being developed in the future" (2007, p. 252).

From this list, we can recognize positions already analyzed above: (1) Kelsenian normativism as found, for example, in Dyzenhaus resembles non-constitutionalism defending the possibility of a European supranational constitutionalism, but in fact reducing its validity to its intrinsic legal quality, independently of any political act/will. Non-constituent constitutionalism identifies, in fact, a negative normative conception of constituent power since the value of constitutional democracy is not based on a democratic 'pedigree' linked to a substantial self-conception of the political community. As analyzed by Walker, instead, non-constituent constitutionalism refers to a democratic proceduralism that investigates epistemic and functional qualities of the "disaggregated and mobile virtues of democratic arrangements" (2007, p. 253). Here, then, non-constituent constitutionalism could at most advance an instrumental conception of constituent power, precisely functional to the effective realization of democratic procedures. In the debate with Habermas, Grimm instead represents the perfect example of constitutional skepticism (2), criticizing the claim of a European constitutionalism as an advocate of democratic deficit and loss of sovereignty for member states. What the skeptics emphasize, therefore, are the inescapable modern, territorial and national roots

of constitutionalism and the necessary critique of the hype of the supranational rule of law.

On the contrary, an author who vindicates the maturity and achievements of European constitutionalism (3) is Joseph Weiler, whose substantive pluralism defends the course of European constitutionalism on the basis of the substantive principle of constitutional tolerance. However, in the contrast between approaches (2) and (3), Walker identifies a *false choice*: both skeptics and supporters of European constituent power would in fact share a *sui generis* perspective which associates the European system with a special trait. For their part, the skeptics would see in the European constituent power a social myth to be reduced to the symbolic convention as it is, accepting the European one as a 'small c' constitutionalism; for the vindicationalists, on the other hand, it is precisely the constituent power that invests the European constitutional imaginary with normative force. This is also due to a shared *originalist fallacy*, because every position is

> being concerned with the constitution only for what it does or does not signify about 'the people' as something prior to and already inscribed within the constitutional moment. This originalist preoccupation also indicates an emphasis upon pedigree and a neglect of the other normative dimension of constituent power—the realization of a democratic responsive system of government. The democratic credentials of the constitution depend either upon original sin (sceptic) or original grace (vindicationalist) […] (2007, p. 262)

To remedy the originalist fallacy, Walker proposes the perspective of post-constituent constitutionalism (4), which in a way continues the path of non-constituent constitutionalism (1) shifting the focus from the constituent moment to the constituted phase. Differently, however, the attribute 'post-constituent' would mean identifying the constituent power already within the constituted phase. It would thus assess the people not through the political myth or sociological lens, but rather as an actual subject integrated with the system, simultaneously performing the roles of legislator (e.g. participating in parliamentary work), editor (e.g. participating in constitutional revision) and 'reflexive interpreters', through the discursive processes that occur in the public sphere. To avoid extreme optimism or pessimism towards European constitutionalism, Walker stabilizes the discourse of its constituent power in a way that is functional to the plural epistemic framework mentioned above: as mentioned, the empirical claim for such

a constituent power has not yet been maturely realized in the European context and is in the process of development; normatively, post-constituent constitutionalism counteracts the essentialist and originalist position in a way that 'saves' the usefulness and flexibility of constituent power. At the European level there is in fact not a core of collective consciousness already formed, that is, a democratically legitimized pedigree, but still a work-in-progress.

These constructivist positions will be appropriately compared not only with the theoretical material gathered in the previous chapters, but also with the framework of deliberative constitutionalism in the next concluding chapter of the thesis. Walker's epistemic pluralism offers a promising touchstone to enrich the constructivist debate anticipated in the first chapter by reasoning about the relationship between deliberation, truth, and constitutional pluralities.

CHAPTER 4

Rebooting the constituent debate in the EU

Until this point, there remains the question about which is the truth for contemporary transnational polities. We have seen that the truth of modern constitutionalism, that is the sovereign constituent power, suffers of unfixable paradoxes, both in the form of infinite regress and contradiction. But we have also seen that things change a bit at the post-sovereign level. In this sense, in fact, the type of epistemic truth that the transnational context offers changes: from the point of view of the theoretical form that frames this truth, the normative tightness of constitutionalism, the incidence of a plural context, and the constitutional space-time framework change. The analysis on the theory of deliberative constitutionalism that will be outlined in this chapter remains, likewise, on the form of the normative framework that seeks to describe and guide at the same time a certain type of constitutional democracy. Form that is, firstly, defined since normative tenets on which DC claims are based, mentioned generically in the first chapter and adapted here to the function of theory of transnational and plural constitutionalism. Thus, an alternative is offered to the discussion, epistemically or ontologically, whether one speaks of monism, dualism, pluralism etc. in the European case. Secondly, a further step is taken into the depth of the mechanisms of the theory in order to understand what kind of relationship is established between pluralism and deliberation. In the second paragraph, then, the form is analyzed, but in a more general context and referring to the use of the concept of constituent power for the European case: here different conditions stand out, compared to those expressed by the paradoxes of modern constitutionalism. They offer a new way to resolve the fallacies and to introduce the futuristic perspective into the constitutional debate. These formal prerequisites of the theory are needed if we are to answer the question: how can we reboot the constitutional debate in the European Union?

The answer, at the conclusion of the chapter, is intermediate in offering a picture of a constituent process compared to positions analyzed above. Only in this way can the various themes addressed in the previous chapters be integrated with one another.

4.1 Deliberative constitutionalism applied to the EU

Towards its conclusion, this research aims to focus on definitively determining the theoretical scope of deliberative constitutionalism as applied to the case of the EU. To do so, it is certainly necessary to define the theory on the basis of its normative tenets, at first, and then to locate them specifically in the European context that brings with it the challenges of constitutional pluralism and democratic deficit. Before delving into these aspects in the next paragraphs, some aspects can be anticipated here. Firstly, it must be said that here we always speak of normative theory of constitutional democracy and political legitimacy, in shape of an epistemological constructivism. DC does not simply want to describe the 'supervening' of a plural transnational reality, but rather to *reconstruct* the epistemic presuppositions that can guide the realization of a new standard of legitimacy. This kind of epistemic constructivism cannot be reduced to a discursive procedure of consensus, but it must rather expand to a theory of political interpretation (or political hermeneutics). In the European field it translates into a reworking of national epistemic assumptions brought on by a bootstrapping process, in search of a new demand for shared political truth.

Secondly, DC was certainly not born as a specific theory of European constitutionalism, as CP, but it finds in the European Union the potential to reconstruct and achieve those processes that it envisages. This is the operation that Habermas has carried out over the past two decades (cf. Chambers 2018) recognizing the following objectives in the process of European integration: the loosening of the tension between private and public autonomy; the recovery of the successes and the cure of the pathologies of national democracies; a continuous process of rethinking polity commitment and the space to create a new civic solidarity; a greater democratic authoritative weight in the face of globalization; etc.[80] The present thesis also follows this path, identifying in the constitutional question on the EU a 'theoretical unicum' and the best candidate to express the potentialities described above.

[80] Along with this, there are also specifically the changes that go through the concepts of sovereignty and legitimacy, the possibility of a mixed model of constituent power. But not only that, the possibility in the European case of also confronting 'populist' constitutional models such as have recently arisen among national democracies. (cf. Chambers 2019).

4.1.1 The normative tenets of the theory

It is time, therefore, to test in this section the peculiarity and normative force of deliberative constitutionalism. In this regard it is good to recall the conclusions of the first chapter (par. 1.3.3) combining them with themes addressed in the rest of the thesis. It may therefore be a good starting point to recall the comparison between the constructivisms of Rawls, Habermas and Nino, through which a suitable model to be applied to the European system was sought. A question was posed in this way (Viola 2003), whether it was necessary or even possible to sustain a procedural vision of democracy for a normative theory in front of facts of constitutional pluralism, thus critiquing Habermas' discursive perspective. Equally, there was a critique towards Rawls' need for epistemic abstinence and the consequent ontological grounding of public reason. Finally, Nino's vision centered on a substantive and not just procedural political morality also showed the negative effect of moral individualism. In fact, it proved incompatible with general conceptions of common good that could guide collective decision-making, required for example in the case of the manifestation of constituent power, as well as in the complexity of a post-national integration. Faced with this dispute, the present research has proposed a particular definition of the theoretical framework of DC, harmonizing elements drawn from each of these authors: we have obtained a theory with a normative rather than descriptive sociological purpose (Rawls), starting from epistemic rather than ontological premises (Habermas) and basing its validity not (only) on a formal procedure but on a substantial basis of political morality (Nino). Therefore, the political epistemological constructivism of DC would be redirected towards the intersubjective moral exchange in the public sphere, drawing its strength from the community query for political truth. A query that does not consist solely of democratic procedures but is animated by a motivational driving force for political action, the same that guides a so-called constituent process. In order to explain all this, DC has to confront public discourse as an interpretative theory of common values at a level of meta-impartiality, that is, an impartiality towards the impartial conceptions of the common good. In this sense, constitutional deliberation acts on a normative second-degree plane, as opposed to Rawls' first-degree plane on which various comprehensive doctrines confront each other.

DC is the one, however, that is comprehensive, as already mentioned (par. 1.2.2), gathering constitutionalism and politics in a dialectical perspective and mutual influence: in fact, connecting two normative levels of first and second order, it considers both how

deliberation contributes to generate legitimate constitutional law and how constitutionalism may enhance deliberative processes. This is because DC goes back to the common issue of *legitimacy* between democracy and constitutionalism, enhancing its construction in a different way than its liberal counterpart. Not only that: in this way the domain of legitimacy expands beyond the institutional boundaries of who oversees democratic procedures or constitutional revision. This, from a particular point of view, addresses the problematic restriction, often recalled throughout the thesis, of constitutional deliberation within the linguistic and authoritative boundaries of the courts: DC therefore proposes a multi-actor vision within the political-constitutional system, whatever it may be. From a general point of view, however, it implies an easing of the tension between constitutionalism and democracy, in its form of the classic paradoxical opposition between the action of rule of law and the expression/aggregation of a majority will. Both constitutionalism and democracy are engaged in re-establishing polity's foundational commitments in an ongoing constituent process.

Yet, in the face of the post-national and plural European case there is a need to further specify the normative tightness of DC. To this end, discourses on the idea of constituent power in a post-sovereign dimension, a dimension also characterized by a heterarchical 'constituted power' whose organization is not taken for granted, were developed in the second and third chapters. During the research, in fact, approaches were found that differed, firstly, according to the normative 'dimension' of European constitutionalism and, secondly, according to the normative relationship it has with its national counterparts. By dimension we mean a theoretical orientation towards either an ontology of institutions or a political epistemology which they themselves develop in the direction of a democratic-constitutional truth, in concert with the subjects who legitimize these institutions. At the relational level, theories instead adopt perspectives that ontologically or epistemically 'unite' or 'separate' European constitutionalism from national constitutionalism: in this sense they can be monist, in their particularist variants (Walker 2016, cf. para. 3.2.2), dualist, pluralist, holist etc...

DC thus takes a particular normative position to account for constitutional deliberation under conditions of constitutional plurality and post-sovereignty. From the dimensional perspective, despite the specific point of view of each of its strands, deliberative constitutionalism can encompass both an ontological institutional and

epistemic constructivist perspective.[81] But when one also considers the kind of relationship DC establishes between European and national constitutionalism, it is perhaps here that a new perspective advance: from an ontological perspective, the systemic approach mentioned above (cf. par. 1.2.1) would lead DC to identify a *tenuous difference* between national and supranational institutions. DC then brings the nature of institutions in general much closer together, based on their common democratic-constitutional root.[82]

This is not monism, however, because it does not resolve the issue through a state-centered or EU-centered view. On the contrary, the presence of a structural pluralism in the EU itself is undeniable, as already observed by constitutional pluralists (cf. Walker 2016). DC, similarly, does not deny the presence and necessity of such pluralism, but reworks it in a different way at the theoretical level: as will be further explored in the next section, the constitutional deliberative framework lays the groundwork, with its meta-impartiality and affirmation of a continuous process of rethinking, for the same conditions of constitutional plurality observed by CP. To do so, DC establishes a second relationship in the epistemological dimension, this time of dualistic imprint: there is a *strong difference* between the search for constitutional truth at the European level and that at the national level.

Epistemic assumptions change considerably at the transnational level by virtue not only of the condition of plurality, but of the different spatio-temporalities that allow to conceive the community and the very democracy that animates it. For this reason, it is necessary to further develop the definition of DC's normative tightness on the basis of these themes in the following paragraphs: first, a comparison between DC and Walker's epistemic pluralism, in order to understand what relationship is established between deliberativity and pluralism; then, constitutional temporality is problematized already in the context of the 'new form' that a constituent power assumes in a transnational constitutional deliberative framework.

[81] As we have seen talking about the micro and macro deliberative approaches. Cf. par. 1.2.1.

[82] Commonality that can be expressed both in the similar legal principles among the various national constitutions and in the derivation of European constitutionalism from an integrationism (as well as internationalism) potential inherent in national constitutions.

4.1.2 Pluralism vs deliberative proceduralism

This section will address the question of whether it is possible for DC to incorporate epistemic pluralism, and of what kind. In this regard it is compared with the kind of normative framework described by Walker's CP strand, to define the difference by which a pure pluralism and a deliberative constructivism 'fix' epistemic criteria to plurality. In this sense, here we speak of European epistemic pluralisms in comparison.[83] It is therefore necessary to recall Walker's discussion in the previous chapter: his theory is on a second-order normative level, dealing with the impartial delimitation of the idea of constitutionalism in front of a plurality of first-order constitutional claims. This delimitation is indeed understood as "constitutional stretching" (2002), implemented thanks to an axiom of incommensurability and the definition of abovementioned standards, in order to make the idea of constitutionalism suitable even for post-statal/post-sovereign dimension, as for the case of European constitutional pluralism.

However, a dilemma has come up behind the normative driving force of constitutional pluralism. As soon as the constitutional stretching *spills over* the first-order normative dimension,[84] Walker's epistemic pluralism lacks normative strength to justify the (rationale behind) incommensurability itself among the discordant claims. This means to question the normative claim about heterarchy as the best representation of the European condition compared to, for instance, monist alternatives. The question that remains open is which first-order criteria should apply to the heterarchy of constitutional claims and, given that it is about first-order norms that directly concern the addressees, *who* should be involved and affected. Walker has attempted to provide an answer to this dilemma (2016) also including the political underpinnings in the scrutiny of judicial events brought on by CP. This would cause stretching the idea of constitutionalism not only through the incommensurability of the various claims but also encompassing the self-interrogation of the demos on the legitimacy of national and supra-national levels. This would therefore put incommensurability, or any criterion ordering plurality, back into the hands of democratic debate, overcoming the aforementioned view that restricts CP to the conflict between Apex Courts. Moreover, this is the meeting point between

[83] This comparison is possible even though, as noted earlier, DC is not specifically a European theory like CP.

[84] As noted above, the meta-framework cannot simply ignore first-order plural constitutional disagreement but is necessarily bound to it.

thick normative claims of CP's epistemic and institutionalist strands, as we have analyzed in the case of Maduro through Goldoni and Komárek (cf. par. 3.1.2).

Among all these useful elements to set up DC's alternative position, one can mention firstly the comparison that Walker himself makes with Habermas' theory. The inclusion of the political foundations of constitutionalism in the perspective of epistemic pluralism evidently stems from an approximation of Walker's theory to Habermasian co-originality, already introduced with the formulation of an "iterative relationship" (2010).[85] The complex and tense relationship between democracy and constitutionalism can no longer be understood modernly through a singular perspective, generating a perennial paradox when considering one side or the other. Instead, the complex interaction/iteration between constitutionalism and democracy must be highlighted, to transform the tension into a relationship of *mutual support*. This further stretch leads Walker to take up from Habermas the already mentioned fact[86] that a constitution-building process must be *both trace and catalyst of the political community*, better justifying how the meta-dimension of epistemic pluralism spills-over onto the first-order dimension of the plurality of constitutional claims.

It is therefore the opinion of this research that, although this path of epistemic pluralism is the same as that taken by DC, the latter provides a more exhaustive answer to the normative dilemma. On the first-order dimension DC makes a (descriptive) claim like CP: deliberation acts too in a dimension where there is a plurality of deliberative agents (as highlighted already by the systemic view of deliberative democracy) who makes conflicting claims of ultimate authority in an open-ended competition. However, within the meta-normative dimension, the second-order thesis of DC delimitate not much the idea of constitutionalism, rather than the one of *legitimacy* shared by constitutionalism and democracy, within what has been defined as the comprehensive view. This is to say: DC prioritizes the question of legitimacy over one of plurality redefining their epistemic relationship. The latter in fact expresses an incommensurability among *legitimated* constitutional claims, relegating legitimacy within descriptive pluralism as *datum* by the claims themselves. Thereby epistemic conditions are dictated by plurality. On the contrary, epistemic conditions as framed at the meta-deliberative framework create a favorable environment for a first-order plurality, so that the delimitation of legitimacy is the foundation of pluralism and not its implication. In the same way as 'revised' epistemic

[85] About 'iteration' Walker quotes Benhabib (2006).

[86] Par. 3.2.2

pluralism, this is possible by including the political foundations within the study of constitutionalism and thus conceiving a dialectical and interdependent relationship. In this way, firstly, it is possible to overcome the narrow vision of the debate between experts and Courts, as no longer the sole authors/actors of the judgment of legitimacy for the EU. Secondly, the same judgment of legitimacy leads the constitutions to be trace and catalyst of society, but DC offers precisely a more comprehensive response in this sense by generating a 'bridge' between the two normative levels. The bridge is the environment conducive to plurality, created by the common link of legitimacy between constitutionalism and democracy, in the redefinition of priorities in the epistemic relationship between the two. DC is thus able to generate a 'good' spill-over between pluralism and plurality, that is, between the dimension of epistemic and institutional conditions that enable constitutional deliberation and that of first-order plural claims that directly reflect and catalyze citizens' interests.

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The stretch of constitutionalism that a comprehensive DC adopts based on co-originality with its political foundations, while integrating pluralism into its theoretical

framework, entails two further considerations. At first, it prompts reasoning again about the problem that was identified by Ch. 1 (para. 1.2.3) in procedural formalism. In the comparison of the latter with ethical substantialism, the paradox of democratic procedures was seen to arise (Michelman 1997), a problem peculiar to any epistemic theory that seeks to define legitimacy under conditions of plurality. To escape skepticism, therefore, it is good to consider a substantive criterion external to proceduralism,[87] the one that will be mentioned in the next paragraphs through the concept of political morality. Consequently, DC and pluralism cannot be considered only as a meta-framework for European constitutionalism, or as a meta-theory that gathers as an umbrella concept a series of underlying strands.

Secondly, the very pluralism embedded in DC leads to take into account not only the epistemic part of DC, but also the institutional part. Although we do not elaborate here on how DC descriptively accounts for the institutional system of the EU, two important theoretical pointers are provided: the first is the macro perspective of systemic deliberative democracy, which as mentioned (cf. par. 1) seeks to model the roles of different institutions beyond the Courts, and the public sphere as a whole in the shaping and legitimizing of public discourse (Parkinson 2018); the second is the distinction between a 'weak' ontological and a 'strong' epistemic relationship that European constitutionalism has with national ones. This means avoiding a reduction of European constitutionalism to an institutional plurality, legitimately sterile. At the same time, it means to account for a new space of legitimacy that is created at a transnational level, in conditions quite different from national ones, starting from constitutional space-time.

[87] For a more in-depth critique to the forms of proceduralism, see Viola (2003 p. 70).

4.2 Issues on a deliberative constituent process

Beyond the normative theoretical framework, it is necessary to dwell on the subject/process that in practice would perform the function of creating all that DC rationally reconstructs. Therefore, this last paragraph addresses the issue of the emergence of a bootstrapping process as a new form of constituent power in a plural transnational constitutional context. However, before providing an accurate definition, it is worth exploring one of the main differences between national and supranational constitutionalism which is the new constitutional space-time.

4.2.1 A new constitutional space-time

A new constitutional space-time characterizes the epistemic space of legitimacy which the evolution of modern constitutionalism manifests at the transnational level. This evolution is not only an *ad hoc* framework for the European case, but a more general change with respect to the 'modern flaws' that were identified (Walker 2002; cf. par. 3.2.1) and that we described in the introduction to this thesis with the paradoxes (par. 1.1.3). Now, it is true that the present work embraces the proposal made by Walker that, at the epistemic level, a constitutionalism such as the European one leads to a recovery of the constitutional language that is weakened by these flaws, through the transition from a Westphalian to a post-Westphalian phase.

Besides, even thick normative CP acknowledges the existence of these paradoxes, since pluralism is intrinsic to constitutionalism from its birth. Maduro, as we have seen previously (cf. par. 3.1.2), recalls the paradox of the fear of the few and the fear of the many, the paradox of polity and the question of who decides who decides (2012, p. 78).[88] To sum them up, modern foundational acts requires, firstly, national identity to enforce the polity, thus a *demos* which cannot be decided democratically; secondly, modern constitutionalism suffers of an infinite causal regress between the authorities of the constituent and the constituted powers; thirdly, the conflict of constitutional performance refers to the ongoing tension between the realization of public autonomy and private one. According to CP, "these paradoxes are a consequence of the constitutional goal of both preserving and regulating political pluralism" (Maduro 2012, p. 80). In the case of

[88] Which the present paper prefers to refer to as the paradox of constitutional performance, the paradox of identity, and the paradox of authority, respectively.

Europe, CP rules in this situation reaffirming the priority of an heterarchy – an incommensurability for its epistemic version. The evolution of constitutionalism at the transnational level, therefore, translates in an exclusion of the research of ultimate authority or unifying identity for the EU. The question here is: how much do the perspectives of CP and DC converge? Certainly, in its narrow view on the legal pluralism of courts, it seems that CP fails to intervene effectively on the paradoxical relation between public and private autonomies, attempting to ease the tension between democracy and constitutionalism. On the other hand, its stretched version accommodates a redefinition of the space-time and normative dimensions of transnational constitutionalism as illustrated by Walker's own renewal criteria.

Notwithstanding, DC tackles the foundational question very differently.[89] Specifically, the detachment from the national space-time is sharper, for DC identifies at the transnational European level a constitutional rethinking and legitimating process that permeates the public sphere. Take first the foundational paradox of identity, which circumscribes the 'national space': although DC does not descriptively reject the plurality of identities, it overcomes in its own way the identity priority of constitutional claims. Given that constitutional identity fundamentally characterizes the work of constitutional courts, DC avoids pausing the specificity in a neutral environment (a là Rawls) or to create a perennial and unresolvable space of relativity. However, the reworking of the foundational space in a transnational evolution requires the restoration of another fundamental perspective: the temporal dimension. Massimo Fichera observes:

> [..] regardless of the position one may have in relation to constitutionalism's desirability, importance, or appropriateness, the notion of constitutional time is crucial for the purposes of framing the contours of the debate on constitutionalism in general and on its applicability beyond the confines of the traditional State. (2021, p. 155)

Therefore, regardless of the thick normative claims of any theory as DC, constitutional time is essential to understand the functioning of a political-legal system that lives in a structural condition of plurality and that creates a connection that can no longer be denied

[89] We refer to the two paradoxes concern not so much the performance as the very existence of the constitutional community. These paradoxes perhaps affect more deeply the legitimacy, or even more so its integrity over time, of the community in the total sense.

between the international legal order and the domestic one. Nevertheless, it is true that the strand of deliberative constitutionalism proposed by this thesis makes the theoretical terms defined by Fichera its own and it is therefore possible to expose its main features 'in unison'. The first aspect to consider is certainly that constitutional normativity itself demands temporality, extending the commitment that a community defines over a wide and indefinite period.[90] In this sense, the *premise and promise* of self-government on the basis of the core values of the community cannot rest on a definitively 'written' past, "but re-presented over and over again, and therefore never identical with itself but always already projected towards the future" (Fichera 2021, p. 157). Similarly, one cannot consider a 'photographic' temporality limited to a present tense, because it would be reduced to the single moment of opposition between democracy and constitutionalism (as described by the paradox of performance). On the contrary, a long-term temporal perspective does allow for the easing of tension and the realization of what Fichera calls a "mutual interpenetration of rule of law and democracy" (2020, p. 441) and we have analyzed here in deliberative constitutionalist terms as co-originality between public and private autonomy. This is because it prevents both constitutionalism and democracy from having exclusive control over the past, present, and future of the community. Moreover, it is also indicated here that for the purposes of the same co-originality there is a heterarchical configuration, a pluralistic environment rather than a monistic self-referentiality of the EU. The resolution of the paradoxes of authority and performance would therefore converge normatively in what has been called a "bootstrapping process" (cf. 1.2.3), i.e. in a continuous reflexive process of renegotiation that would push European constitutionalism to "feed" on the conflicts between the national and the supranational *over time*.[91] This process appears epistemically open not just horizontally to a plurality of claims, but even vertically to a constitutional future. It appears to be a dynamic constituent process, based as said on an impartial core of legitimacy that is renegotiated, contrary to a static incommensurability. Nevertheless, an important question remains open, namely the 'spirit' or political morality that drives this renegotiation - or what is defined as meta-interpretation a little further on - and that reworks the very principle of existence of a new transnational community, where

[90] Although deliberation is said to have a "time limit" (Nino, 1996, p. 118, cf. Ch 1 p. 28), this does not apply to constituent process in the terms of deliberative constitutionalism.

[91] In other words, these two paradoxes flatten one on the other through a continuous process that is present but tending to the future.

precisely the paradoxes that defined the national one are now exhausted. Fichera speaks of "security" (2018):

> Security, interpreted in its broadest meaning, is not mere stability. It possesses an existential connotation, and is never guaranteed once and for all. It rather oscillates and is shaped by its own opposite, insecurity, in a constant interplay. Whenever the foundational values of any polity are questioned by an excessively high number of opponents, the very existence of the polity is at stake. Founding a polity means thus also attempting to secure its long-term survival. (p. 41)

Whether one chooses a principle of security, subsidiarity, autonomy, or civic solidarity as in Habermas, this remains a question of fundamental importance, to which, however, DC cannot provide an answer solely on the basis of the evaluation of its normative force.[92] It is true that such a principle should be sought, as does the political morality of security, so as to be functional to the temporality described above, but at the same time to the question of legitimacy as a common bridge between constitutionalism and democracy, between the destinies of national constitutionalisms and the European one. In this sense it must be functional, essentially, to the procedure of a constituent process that reunites in itself the destinies of the two sovereigns of Habermas.

4.2.2 An intermediate answer

It is now clear, in this final concluding section of the thesis, that a functional model of constitutionalism is sought to reconfigure constituent power across state boundaries. This model was defined based on the differences of European constitutionalism from national constitutionalism, on the basis of both a dimension and a normative relationship (par. 4.1.1). Thus, a theory of European constitutionalism has been defined as an epistemic constructivism that translates into a meta-impartial interpretive theory: it does indeed contemplate institutional pluralism, to which nevertheless it cannot be reduced. Its epistemic conditions[93] are defined in fact at a 'deeper' level that addresses the common

[92] That is the primary aim of this thesis.

[93] Those differences related to the pluralism of transnational constitutionalism and constitutional space-time.

root of legitimacy between constitutionalism and politics, which in turn is common to all constitutionalisms and rooted in both institutions and civil societies. This stretching of the idea of constitutionalism, or reciprocal spill-over, translates as mentioned above into witnessing constitution-building as both trace and catalyst of the community. Thus, it remains to be clarified in the last instance what kind of constituent process can realize in practice the expectations of such epistemic theory, comparing it with previously analyzed strands of contemporary theories of constituent power.

The starting point is certainly the solution to the paradox of authority proposed by Habermas, through the concession of the legitimacy deficit to European constitutionalisation. The shift from paradox to circular process (cf. Habermas 1998, 774) allows us not to identify, at the transnational level, a founding moment that holds 'eternal legitimacy' for all generations to come. On the contrary, any moment can be right to *kickstart a bootstrapping process*, which must be maintained over time:

> I propose that we understand the regress itself as the understandable expression of the future-oriented character, or openness, of the democratic constitution […] According to this dynamic understanding of the constitution, ongoing legislation carries on the system of rights by interpreting and adapting rights for current circumstances (and, to this extent, levels off the threshold between constitutional norms and ordinary law). To be sure, this fallible continuation of the founding event can break out of the circle of a polity's groundless discursive self-constitution only if this process – which is not immune to contingent interruptions and historical regressions – can be understood in the long run as a self-correcting learning process. (Habermas 2001, p. 774)

Once started, this self-learning process can retroactively reconstruct its own 'kickstart', even though at the initial moment the community was not aware of it and its constitution even underwent a regression phase[94]. This[95] is made possible at the European level, where in theory several self-learning processes would collide/integrate, by the so-called dual sovereign whose heterarchical relationship between European peoples and citizens structures the bootstrapping process (cf. par. 2.2.2). This process possesses both a

[94] This is how Habermas justifies after the failure of the Laeken process (2005): although the constitutional debate did not continue following the referendums, he remains faithful to the principle that the first conversation is fundamental for one to be able to speak of constitutionalisation.

[95] In Habermas' terms, through the reconstruction of dialogical rationality.

procedural, a substantive, and a motivational component (Chambers 2018). The fragility of a pure proceduralism has already been discussed, especially considering a condition of constitutional pluralism, but it still remains a fundamental component both from the point of view of democratic procedures and norms of debate, and the institutional 'forms' that contain the latter.[96] On the other hand, the substantive component of political morality that constitutes the epistemic core of this debate goes hand in hand with the motivational one, as evidenced by the normative weight of constructivism considered in this thesis.[97]

The most important aspect, however, of a constituent process conceived in this way is that it represents an intermediate DC response between democratic and constitutionalist positions on constituent power (cf. par. 2.1.2). In fact, it is positioned in the debate between the extremes: on the one hand, authors such as Cólon-Ríos (2012) who promote democratic acts of reconstitution and participatory mechanisms that could overwhelm constitutionalism itself; on the other hand, Ackerman and Arato who instead preserve the relevant position of constituted power to allow in turn the 'awakening' of the constituent. But it is Arato who emphasized the post-sovereign dimension of constituent power, its manifestations beyond the boundaries of the state: he therefore found in constitutionalism a plurality of institutional voices that would lead to the negotiation of a mult-track, open amendment review. The dilemma that had arisen, also recalled recently (cf. par. 4.1.1), was the problematic rooting of the theory in an ontology of institutions, causing a normative deficit that could not justify the attribution of constituent power, even to all the peoples subject to a transnational constitutionalism.

Therefore, the thesis advanced the need for an *epistemic step beyond*, on the part of a theory of transnational constituent power, which must not be reduced to a sociological observation of institutional plurality. From this point of view, can the post-constituent constitutionalism of Walker (2007, cf. par. 3.2.3), which responds to the original fallacy by framing the constituent people in what is effectively a "legal institutionalization of citizens' communication" (Habermas 1998, p. 161), be an exhaustive answer? What is certainly missing, from the perspective of a deliberative constituent process, is *circularity*. In this sense, it may be useful to recall two characterizations that stand as intermediate answers to complete the framework in which

[96] With particular reference to those that make up civil society and the public sphere.

[97] These components also reflect well the type of change in the EU that carries with it a presumed constituent power, as authors such as Ackerman and Fichera have noted. The latter names, in fact, “formal and informal changes” (2021a), recalling also Ackerman's (1993) “unconventional changes”.

DC would fit. Gargarella (2020) advances a proposal for the revision of constituent power whose discussion should not be exclusively limited to sovereign nor post-sovereign constitution-making. Keeping in mind the lesson of the Democrats, the concept of the constituent must instead be recovered in the key of an "ongoing, unfinished conversation":

> Constitutionalism needs to recover its democratic character if it wants to keep its egalitarian promise intact. The bad news is that recent decades of “democratic erosion” cast doubts on the possibility of re-igniting the democratic engines of constitutionalism. The good news is that, in part as a response to that “democratic erosion”, in recent years we have seen the emergence of significant and successful deliberative assemblies. It is still not clear, however, which one of these counter-acting forces will finally prevail. (Gargarella 2020, p. 13)

This people presents itself as a community of equals in which it is possible the institutionalization of deliberative mechanisms as popular intervention in politics. The realization of an inclusive, collective, reflective and egalitarian dialogue reconstructs, through theory, the possibility and the rational capacity of the citizens themselves to participate. A circularity that allows to include in this process also the 'negative' form of protest of destituent power (cf. par. 2.2.3). In the same way, the discursive constituent power identified by Fichera (2021a) also comes to our aid. Repoliticization, in response to the democratic deficit, is only possible by taking into account a thicker conception of constitutionalism, which in turn recalls a basic political morality. Consequently, constitutionalism and politics, constituent power and constituted power remain in a necessary and inescapable relationship, since the validity of the legal system is not autonomous but dependent on a discussed and participated legitimacy. Hence:

> […] this is a form of constituent power that goes beyond a clear-cut distinction between constituent and constituted powers and relies upon a deliberative process, characterised by an intense interaction between the EU judiciary and other organs and actors — including not only European institutions, but also national authorities and the civil society at large. In this configuration, constituent power operates within the framework of the polity, not outside or prior to it. It does not lie dormant after the creation of the polity, but contributes to its ongoing formation. (Fichera 2021a, p. 177)

CONCLUSIONS

At the end of this work, it is worth recalling the question posed in the introduction: in order to reboot the constitutional debate, which kind of constitutionalism does Europe need in order to engage the citizenry in a rethinking process of their community within an open and inter-institutional dialogue? If deliberative constitutionalism is considered to answer this question, what has been recounted so far is the theoretical framework it would construct in a transnational, post-sovereign, pluralist context. The configuration of an intermediate answer, found in epistemically 'enlarged' bootstrapping processes both at the level of actors and temporality, is a mechanism intended to show not only the opportunities of EU constitutionalism per se - from a particularist perspective - but of the evolution of all European constitutionalisms. As we have seen, DC behind this process translates into a meta-impartial interpretive theory: once the self-learning process has started - connecting private and public autonomy -, on the one hand, it leads communities to confront themselves on the legitimacy of multiple conceptions of the common good; on the other hand, it also allows to retroactively reconstruct its very beginning, developments, potentialities.

The aim of this research was to test the normativity of DC applied to the European case: its main device has been identified in what has been variously called co-originality, spill-over, constitutional stretching, comprehensive vision. This, however, has been derived by leveraging mainly on the 'constituted' aspect of constitutionalism. Regarding instead to the 'constituent' aspect of deliberation, the thesis invoked a systemic view, whose complexity and multi-trackness identifies the institutionalization of deliberation and the connections between it and the wider public sphere. Moreover, it has highlighted the splitting of the constituent power and the coexistence of its two souls, as well as the 'negative' counterpart of protest that more easily spread at transnational level. According to these perspectives, the research has come to excavate the theoretical potentialities that

the dialogue between constitutionalism and deliberative democracy conceal in the European transnational field.

However, there are limitations to the research, issues that could not be explored here. Several reasons contribute to this: coherence of the text and not digression, maturity of the reference literature (often very recent), difficulty in dealing with the pandemic crisis that involved the doctoral period. Nevertheless, all that is potentially unexplored from the thesis text remains as a natural intent for the development of my future research. European constitutionalism, which both in terms of its actual evolution and the academic literature commenting/guiding it, still is an open question. From this point of view, some aspects remain interesting to examine in the future: the comparison between a deliberative and a populist model of constitutionalism (cf. Chambers 2019); further fine-tuning the theme of constituent power, understood as a constant force that in the bootstrapping process pushes civil society into creation in multiple directions (and not only that of a written foundation); the dialogue that is established, as it was for Habermas, between the deliberative model and contemporary republican and communitarian inspirations.

That said, the idea of constitutional future as identified by Jed Rubenfeld (2001) and taken up by Fichera (2021) deserves special attention. Thus, a temporal circularity in community reflexivity can also be generated, a conversation in the repoliticized public sphere that can 'free itself' from the exclusive circumstances of constitutional foundations. However, the question remains open as to what kind of constitutional pact is created from time to time, if we can still speak of a pact-related dimension. How can the community make a pact with the future - or, more classically, a social contract, with generations that do not yet exist? Although we have not been able to explore this theme in depth, which is of some importance, it remains central to the research that will continue from the basis laid by this thesis.

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