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INSTITUTIONAL DIMENSION OF CONSTITUTIONAL PLURALISM

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Abstract

Constitutional pluralism, through its contestation of finality and conclusiveness, highlights the role of particular institutions which take decisions of constitutional significance. This paper argues that this institutional dimension is one of constitutional pluralism's principal virtues. Most theories of European constitutionalism do not recognize this and leave important questions unexplored. Those that do so focus too much on conflict and choice. The paper proposes the reorientation of institutional analysis toward communication and involvement.

Keywords

constitutional pluralism – institutional analysis – institutional choice

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Institutional Dimension of Constitutional Pluralism

Jan Komárek*

I. Constitutional Pluralism and its Institutional Dimension

A. *Constitutional Pluralism*

The concept of constitutional pluralism seems to be in fashion today; so much so that it was labelled a 'movement' by one of its critics.¹ But, as recently noted, it 'has paid a price for its popularity [since it] has gained so many meanings that often the participants in the debate talk past each other, each endorsing a different understanding of what constitutional pluralism actually means.'² As I understand it, constitutional pluralism obtains when various constitutional authorities compete over the same territory and the same legal relationships. It differs from a mere plurality of constitutional sources in that these authorities have plausible claims to legitimacy and authority as perceived by those who are subject to them. Understood in this way constitutional pluralism seems to provide an accurate description of what we have in the European Union today, the *Maastricht Decision* of the German Federal Constitutional Court³ being the 'paradigmatic piece of [its] dogmatics,'⁴ now well internalized by the constitutional courts of other member states.⁵

But is constitutional pluralism tenable and normatively attractive for the European Union? It does not fit well with constitutionalism, since it denies order and organisation, while

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¹ See J Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', (2008) 14 *European Law Journal* 389. The notion of legal pluralism is much broader and legal sociologists had been using it long before it became the common parlance of European lawyers. See M Avbelj, 'The EU and the Many Faces of Legal Pluralism. Toward a Coherent or Uniform EU Legal Order?', (2006) 2 *Croatian Yearbook of European Law & Policy* 377.

² Introductory notes in M Avbelj and J Komárek (eds), 'Four Visions of Constitutional Pluralism – Symposium Transcript', (2008) 2 *European Journal of Legal Studies* 325, 325 (a transcript of a symposium organised by the editors with contributions by Julio Baquero Cruz, Mattias Kumm, Miguel Poiaras Maduro and Neil Walker, which also provides an accessible starting point for constitutional pluralism).

³ *Manfred Brunner and Others v. The European Union Treaty, Bundesverfassungsgericht (2. Senat)* 12 October 1993, [1994] 1 C.M.L.R. 57.

⁴ See Baquero Cruz in Avbelj and Komárek, n. 2 at 335.

⁵ See Baquero Cruz, n. 1 at 397-403. Baquero Cruz however also questions the descriptive accuracy of constitutional pluralism. See also chapter by Davies, 'Constitutional Disagreement in Europe and the search for Pluralism' and chapter by Somek, 'Monism: A Tale of the Undead', both forthcoming in *Constitutional Pluralism in Europe and Beyond* (n *).

constitutionalism imposes them.⁶ Some pluralist theories impose important limitations on it – so much so that one can question their pluralist nature.⁷ Neil MacCormick did this most explicitly when he departed from his initial praise of pluralism expressed by the *Maastricht Decision*,⁸ which he later labelled as ‘radical,’ and suggested ‘pluralism under international law’ instead,⁹ plainly admitting that it was ‘a kind of “monism” in Kelsen’s sense.’¹⁰

In this chapter I do not intend to defend constitutional pluralism as an attractive theory underlying European integration. What I want to do, however, is to suggest some virtues that constitutional pluralism brings through its institutional dimension.

B. Institutional Dimension

Constitutional pluralism, which challenge 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. The decision of the Polish Constitutional Tribunal¹¹ concerning implementation of the European Arrest Warrant Framework Decision¹² is an example of this.

The Tribunal examined whether the implementing laws breached the constitutional prohibition on the extradition of Polish citizens¹³ which was required, under certain circumstances, by the EU Framework Decision. It is important to know that the Polish Government sought to amend the Constitution when implementing laws were being adopted; the proposal was however rejected by the Polish Sejm.¹⁴

Under the ‘simple’ EU primacy rule the Tribunal could never have reviewed the legislation which reflected requirements of EU law since, as the Court of Justice ruled in *Internationale Handelsgesellschaft*, ‘the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed’, meaning by that ‘either fundamental rights as formulated by the constitution of that State

⁶ See chapter by Walker, ‘Constitutionalism and Pluralism in Global Context’ and chapter by Avbelj, ‘Can European Integration Be Constitutional and Pluralist - Both at the Same Time?’, both forthcoming in *Constitutional Pluralism in Europe and Beyond* (n *).

⁷ See Avbelj and Komárek, n. 2 at 343-345.

⁸ See Neil MacCormick, ‘The Maastricht-Urteil: Sovereignty Now’, (1995) 1 *European Law Journal* 259.

⁹ See N MacCormick, *Questioning Sovereignty* (Oxford University Press, Oxford, 1999) at 97-121 (chapter ‘Juridical Pluralism and the Risk of Constitutional Conflict’).

¹⁰ *Ibid.* at 121.

¹¹ Polish Constitutional Tribunal, judgment of 27 April 2005, P 1/05, available in English at www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf.

¹² Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

¹³ Article 55 (1); English translation available at www.trybunal.gov.pl/eng/Legal_Basis/constitution.htm.

¹⁴ For a detailed discussion of the process of implementing the Framework Decision and the accompanying constitutional amendment in Poland see A Nußberger, ‘Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant’, (2008) 6 *International Journal of Constitutional Law* 162, 162-164.

or the principles of a national constitutional structure'.¹⁵ The Tribunal, however, did not follow this logic.¹⁶ The Tribunal found the legislation contrary to the Constitution, but at the same time sought to avoid open conflict with the EU by postponing the effects of its decision for 18 months, urging the legislator to adopt a corresponding constitutional amendment. In this way it both avoided a breach by Poland of its obligations stemming from the EU Treaty and brought the constitutional legislator back into the process.

Whether or not we praise the Tribunal's decision depends on how much we want courts to change the meaning of constitutions they are called to interpret; as is obvious, I favour a more restricted approach, which would require a much longer argument.¹⁷ Here I want to point out only the possibility of courts involving constitutional legislators in constitutional conflicts occasionally arising in the European Union. In other words, constitutional pluralism makes the institutions behind particular decisions 'visible'. As I discuss below, institutions are very much overlooked by many theorists studying European integration.

Consider Eric Stein, a pioneer of the constitutional reading of European integration, who focused entirely on the Court of Justice and the doctrines which have formed the basis of the EU constitution. It was the Court which 'fashioned a constitutional framework for a federal-type structure in Europe.'¹⁸ Similarly Koen Lenaerts – himself a judge at the Court – tells the story of the constitutionalisation of the Union in terms of the Court's judgments and takes its pronouncements as conclusive evidence for that. In 1990, for example, he observed:

At present, the constitutional character of the European Community Treaties stands beyond doubt. In 1986, the Court of Justice even ruled that "the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".¹⁹

Both Stein and Lenaerts emphasise legality and the rule of law values. The EU Treaties are binding on the member states (because they are, after all, *legal* documents). Regardless of the depth and scope of the Treaties' claims, for this sole reason they are enforceable even against the member states' constitutions. The EC Treaty contains Article 220, which states that it is the Court's task to ensure that in the interpretation and application of the Treaty 'the law is observed.' To Lenaerts, this 'in turn implies the tasks of "umpiring the federal

¹⁵ Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, paragraph 3.

¹⁶ It must be noted, however, that the Framework Decision was adopted within the EU third pillar, where primacy of EU law was not clearly established by the Court of Justice.

¹⁷ See A Albi, 'Supremacy of EC Law in the New Member States Bringing Parliaments into the Equation of "Co-operative Constitutionalism"', (2007) 3 European Constitutional Law Review 25.

¹⁸ E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', (1981) 75 American Journal of International Law 1, 1.

¹⁹ Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism', (1990) 38 American Journal of Comparative Law 205, 210, quoting Case 294/83 Les Verts [1986] ECR 1339, paragraph 23.

system” and “drawing lines.”²⁰ The EU Constitution is therefore what the Court of Justice says it is. It implies not only the absolute supremacy of EU law; it also means judicial supremacy.²¹

Mattias Kumm offers a competing vision, which transcends the Court of Justice’s self-understanding. The European Union’s constitutional authority is based on the ‘principles of common European constitutionalism.’ These principles ‘are a common heritage of the European constitutional tradition as it has emerged in the second half of the 20th century,’²² and comprise liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. These principles are to be balanced by courts so that they can be realised to the greatest extent possible.²³ According to Kumm ‘citizens in Europe ... are governed by national and European officials whose practices are ultimately guided by principles of republican constitutionalism that are shared by the European Union and its Member States.’²⁴ By ‘officials’ Kumm means primarily courts, while the principles are to be defined (or specified) in the process of adjudication.

Kumm does not single out the Court of Justice. Member states’ courts also have (at least sometimes) the “last” word if their interpretation can satisfy the principles of common European constitutionalism to a greater extent than that offered by the Court of Justice. So in this way Kumm’s theory can be read as ‘pluralist,’ in the sense that it presupposes competition between different constitutional authorities, one represented by the Court of Justice, the other by member states’ (constitutional) courts. Nevertheless, it is single-institutional judicial supremacy, albeit of a different kind from that of Lenaerts.²⁵ It is for courts to give content to the ‘principles of common European constitutionalism.’

Many influential theories of European constitutionalism leave its institutional dimension unexplored, although they do not place courts (or any other institution) at the centre. Joseph Weiler, for example, argues that the principle of constitutional tolerance – whereby

²⁰ Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution - The Case of the European Union’, (1998) 21 *Fordham International Law Journal* 746, 797 (footnotes omitted).

²¹ The term refers to the U.S. debate. For an introduction see L Alexander and F Schauer, ‘Defending Judicial Supremacy: A Reply’, (2000) 17 *Constitutional Commentary* 455 with further references.

²² M Kumm, ‘Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called’, (2006) 54 *American Journal of Comparative Law* 505, 517.

²³ Kumm develops this idea in his previous article, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’, (2005) 11 *European Law Journal* 262, 286-288.

²⁴ Kumm, n. 22 at 507. Kumm uses various terms for these principles, but if I understand him correctly, ‘principles of Common European constitutionalism’ and ‘principles of republican constitutionalism’ are synonymous.

²⁵ Kumm provides a justification for such a strong role for the courts in ‘Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review’, 1 *European Journal of Legal Studies*, December 2007.

the Union's member states are *invited to comply* with the Union's constitutional authority instead of being *obliged* to do so²⁶ – must embrace a wide set of actors, like

immigration officials overturning practices of decades and centuries and learning to examine the passport of Community nationals in the same form, the same line, with the same scrutiny of their own nationals[;] ... a similar discipline will be practised by customs officials, housing officers, educational officials and many more subject to the disciplines of the European constitutional order.²⁷

In most of his writings, however, Weiler either remains on a rather abstract level or focuses on a particular institution, most often courts and their role in European integration.²⁸

This is not an accusation of 'institutional blindness,' in the sense that Weiler would either construct a grand theory without any concern for its institutional context or unilaterally favour one institution (as the theories based on judicial supremacy do).²⁹ However, the complex relationships between constitutional authorities also involve different institutions which make claims to legitimacy of a different kind, and this fact does deeply influence the more abstract questions. It is not just the Union on the one side, and its member states on the other. It is also the Court of Justice (sometimes together with domestic courts) versus domestic legislators,³⁰ the Commission versus domestic courts,³¹ or courts versus the market³² – to mention just some of the possible relationships.

To illustrate the importance of the institutional dimension of European constitutionalism, take the following example. Some people suggest that the Court of Justice does not face 'the countermajoritarian problem,' since there is 'less democracy at the European level.'³³ However, the Court often deals with decisions adopted in the domestic democratic process and the conflict between the EU and its member states can be read as a kind of

²⁶ This, of course, is just too short a summary of Weiler's approach to European constitutionalism and the principle of constitutional tolerance, which is being present in most of his writings. See particularly JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*', in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge 2003).

²⁷ Weiler n. 26 at 21.

²⁸ See JHH Weiler, *The Constitution of Europe. "Do the New Clothes Have An Emperor?" and Other Essays on European Integration* (Cambridge University Press, Cambridge 1999).

²⁹ See A Vermeule, *Judging under Uncertainty. An Institutional Theory of Legal Interpretation* (Harvard University Press, Cambridge, Mass; London 2006) at 16-18.

³⁰ On this see the text accompanying n. 33-36.

³¹ Consider, e.g., the duty of member states' courts to defer to the Commission's determinations concerning violations of the competition rules. On this see particularly AP Komninos, 'Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight', (2007) 44 *Common Market Law Review* 1387. Courts' deference to administrative agencies' interpretation of law is subject to a continuous debate in the U.S. (see e.g. Vermeule, n. 29 at 207-208), which seems to be entirely missing in the EU.

³² See e.g. a rather rare instance of institutional analysis in the Opinion of A.G. Poirares Maduro in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779 ("Viking Line"), paragraph 41 and 42.

³³ M Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court', (2006) 4 *International Journal of Constitutional Law* 618, 631.

countermajoritarian difficulty too. In its *Maastricht Decision*³⁴ the German Federal Constitutional Court asserted that the final source of legitimacy of EU law must be found in domestic democratic procedures, because there is not sufficient democracy to satisfy the German standard at the European level. According to Joseph Weiler, 'the German Court presents itself as a guarantor of the universal values of democracy rather than as a guarantor of German particularism.'³⁵ On the other hand, however, Weiler alerts us to who the guarantor of "true" democracy is: courts. '[D]efending the constitutional identity of the state and its core values turns out in many cases to be a defence of some hermeneutic foible adopted by five judges voting against four.'³⁶

Miguel Poiares Maduro takes institutions and the institutional limitations of courts most seriously, taking his cue expressly from Neil Komesar.³⁷ *Institutional choice* is one of Poiares Maduro's contrapuntal principles, designed 'to guide the ordinary state of affairs' in the relationships between the EU and its member states.³⁸ It requires that 'each legal order and its respective institutions must be fully aware of the institutional choices involved in any request for action in a pluralist legal community.'³⁹

In relation to courts, Poiares Maduro highlights that they

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.⁴⁰

Taking a more critical perspective, however, one can ask whether Poiares Maduro truly goes beyond the single-institutionalism of the theories based on judicial supremacy and, if so, whether he takes the institutional dimension of constitutionalism more seriously than "institutionally indifferent" theories.

³⁴ N. 3.

³⁵ JHH Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', (1995) 1 *European Law Journal*, 222.

³⁶ Weiler, n. 26 at 17.

³⁷ *Imperfect Alternatives. Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, Chicago, 1994).

³⁸ See M Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N Walker (ed), *Sovereignty in Transition* (Hart, Oxford 2003) at 532. I am aware that I am contributing to the terminological confusion which so often blurs much of European (constitutional) scholarship. However, Poiares Maduro refers to a musicological concept, a counterpoint. The correct adjective, then, is 'contrapuntal', and not 'contrapunctual'.

³⁹ *Ibid.* at 530.

⁴⁰ M Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies*, December 2007.

As regards the first question, I have already examined whether the principle of universalisability does not in fact prevent institutional choice and deny pluralism (another contrapuntal principle), at least in some instances.⁴¹ According to the universalisability principle courts should use reasoning, which may be adopted by other courts within the Union.⁴² Consequently, under this principle courts are not allowed to rely as justification on specific provisions of their constitutions aimed at nationals of a particular state because that could lead to 'evasion and free-riding'. However, this forces the courts to solve most conflicts by themselves and leaves no space for other institutions to step in. While I would praise the Polish Constitutional Tribunal for leaving the decision on a conflict between a clearly formulated constitutional prohibition to extradite Polish nationals on the one hand and the requirement to do so imposed by the European Arrest Warrant Framework Decision on the other to the constitutional legislator,⁴³ Pórigues Maduro would most probably condemn the Tribunal for taking a decision which cannot be universalised by other Union courts (since the constitutional prohibition protected Polish nationals only).

As regards the second question - whether Pórigues Maduro takes institutions (sufficiently) seriously - it can be unjust to answer it now, since Pórigues Maduro has certainly not had his last word on the matter and his theory is still very much in the making.⁴⁴ However, his conception of the EU constitution as a remedy for member states' constitutions' failures is dependent on a proper institutional analysis, which he still needs to do. For example, if Article 28 EC is to be read as a political right, giving traders a means to question the regulatory policies of a state to which they export [this has got to be 'export'] their goods, forcing that state to justify its regulatory choices,⁴⁵ one must seriously ask whether the judicial process in the Union is open enough not systematically to favour just some types of litigants.⁴⁶ Similarly, when Pórigues Maduro argues that moving decisions to the Union level can open deliberation on decisions 'otherwise embedded with certain values and assumptions that are no longer subject to deliberation,'⁴⁷ one must examine whether the

⁴¹ See Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of Contrapuntal Principles', (2007) 44 *Common Market Law Review* 9, 33.

⁴² Pórigues Maduro, n. 38 at 529-530.

⁴³ Komárek, n. 41; also Albi, n. 17.

⁴⁴ See Pórigues Maduro, n. 40 at 4.

⁴⁵ See M Pórigues Maduro, *We the Court. The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, Oxford, 1998) at 156-159.

⁴⁶ See e.g. D Chalmers, 'The Dynamics of Judicial Authority and the Constitutional Treaty', (2005) 3 *European Journal of Constitutional Law* 448, 472. This argument concerning the very ability of the judicial process to make such participation possible must be distinguished from a rather convincing argument made by A Somek, 'The Argument From Transnational Effects I: Representing Outsiders Through Freedom of Movement', University of Iowa Legal Studies Research Paper Number 09-23, available at ssrn.com/abstract=1394480, at 27, dealing with the question of what kind of interests are in fact promoted by the free movement rules: '[s]ubstantive economic due process, by contrast, is about protecting the economically active and enterprising vis-à-vis a caring state. It avails of a comparative dimension only inasmuch as it privileges the interest in the generation of wealth. This is not, arguably, a democracy-reinforcing concern, for it shuts down the voices and fades out the interests of those who benefit from more restrictions that have been adopted by democratic means. Hence, substantive economic due process is non-democratic in its orientation'.

⁴⁷ M Pórigues Maduro, 'How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union', in JHH Weiler and CL Eisgruber (eds),

Brussels institutions are truly so far away from (at least some) member states' capitals. And so on.

But even if Poiares Maduro ultimately fails to provide answers to these questions, he has certainly opened the door to a very different kind of analysis of European constitutionalism. The following is an attempt to move Poiares Maduro's framework further, and also shift its focus somewhere else, where I believe it can yield some useful results.

I would also want to make clear, however, that the institutional dimension of constitutionalism in the European Union reaches beyond the sphere of 'traditional' constitutional pluralism which is concerned with constitutional conflicts in the European Union.⁴⁸ Taking the institutional dimension seriously, one can for example ask whether the 'Constanzo mandate,'⁴⁹ which requires member states' administrative authorities to decide not to apply domestic legislative rules if they conflict with Community law, can be maintained.

In *Fratelli Costanzo* the Court stated that it would

be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them.⁵⁰

The Court finds support for this conclusion in the fact that obligations arising under the provisions of a directive are binding upon *all* the authorities of the Member States.⁵¹ The Court does not distinguish between the various institutions of the State – all are equally bound to give primacy to the provisions of the directive over conflicting domestic legislative rules. Now imagining any tax law authority to be empowered to disregard domestic legislation which it believes to be incompatible with Community law does not seem to be a very attractive idea, especially as he can escape all judicial control. If the administrative decision grants rights to an individual, there is often nobody to challenge the legality of that decision in the courts. This problem was recently noted by Advocate General Colomer, who

Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper No 5/04, <http://www.jeanmonnetprogram.org/papers/04/040501-18.html>.

⁴⁸ According to M Poiares Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism', in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge University Press, New York, 2009), 356-357 and fn. 1, 'the core and starting point of traditional constitutional pluralism analysis in the context of the European Union' consisted of an examination of 'the acceptance of the supremacy of EU rules over national constitutional rules [which] has not been unconditional and has been even, at times, resisted by national constitutional courts [conferring] to EU law a kind of contested or negotiated normative authority.'

⁴⁹ Case 103/88 *Fratelli Costanzo* [1989] ECR 1839. See M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing, Oxford, 2006) at 266-278.

⁵⁰ *Fratelli Costanzo*, n. 49, paragraph 31.

⁵¹ *Ibid.*, paragraph 30.

seemed to agree with one commentator that ‘there is something “deeply disturbing” underlying the Fratelli Costanzo case-law.’⁵²

Another example of the Court of Justice’s disregard for the institutional dimension of its rulings can be found in its member state liability case law, especially that concerning breaches of Community law committed by member states’ courts of final appeal. There the Court also emphasises that ‘[i]n international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive.’⁵³ According to the Court, ‘[t]hat principle must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals.’⁵⁴ When the member states pointed out the difficulties posed in their judicial systems (since the same court which committed the breach may adjudicate on a subsequent liability claim),⁵⁵ the Court responded that ‘[i]t is not for [it] to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system.’⁵⁶

This of course does not require member states’ courts to start to disregard the Court of Justice’s rulings in *Fratelli Costanzo* or *Köbler*. It is also for the Court of Justice to take the institutional dimension seriously. In this respect the importance of constitutional pluralism (in its narrow meaning) is only marginal, since problems concerning institutional choice are far more pervasive. They have been observed primarily in relation to member states’ courts and their empowerment, for example by giving them the power of judicial review over national legislation.⁵⁷ But the problem of institutional choice is a much wider phenomenon which should be reflected by the Court of Justice and other actors too.

II. Institutions: From Conflict and Choice to Communication and Involvement

A. Institutional Analysis

The institutional dimension of constitutionalism has received more attention in the United States.⁵⁸ Although Cass Sunstein and Adrian Vermeule called for an ‘institutional turn’ as

⁵² Opinion in Case C-205/08 *Alpe Adria Energia*, n.y.r., fn. 38, referring to M Bobek, ‘Thou Shalt Have Two Masters; The Application of European Law by Administrative Authorities in the New Member Status’, (2008) 1 *Revue of European Administrative Law* 51, 63.

⁵³ Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 32.

⁵⁴ *Ibid.*

⁵⁵ See J Komárek, ‘Federal Elements in the Community Judicial System – Building Coherence in the Community Legal Order’, (2005) 42 *Common Market Law Review* 9, 29-30.

⁵⁶ *Köbler*, n. 53, paragraph 47.

⁵⁷ See B de Witte, ‘Direct Effect, Supremacy, and the Nature of the Legal Order’, in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford, 1999) at 207-208.

⁵⁸ Although it is on the rise in Europe as well; see particularly JA King, ‘Institutional Approaches to Judicial Restraint’, (2008) 28 *Oxford Journal of Legal Studies* 409.

late as in 2003,⁵⁹ Richard Posner pointed out that their claims were not as novel as the authors suggested.⁶⁰ William Eskridge even asserted that '[t]he institutional turn started almost a century ago, with the recognition that judges should consider relative institutional competence when interpreting statutes or even the common law'⁶¹ and identified several institutional turns in the history of U.S. legal thought.⁶² The problem does not seem to lie in the 'institutional blindness' of various theorists.⁶³

The paradigmatic example of the scholarship studying institutions and their relative competences is Henry Hart and Albert Sack's *The Legal Process*, a set of teaching materials prepared by the authors already in 1958 (although actually published only posthumously in 1994).⁶⁴ It 'was a part of a larger collective effort to synthesize the lessons of pre-war American law – the realist legacy of law as function and policy, the institutional competence idea central to the regulatory state, and the rationalist view of law as reasonable and coherent.'⁶⁵

The civil rights revolution of the 1960s revealed limitations on the traditional legal process analysis, and was perhaps among the reasons why *The Legal Process* was never published by its authors (despite its wide influence on U.S. legal academia).⁶⁶ The main weaknesses consisted in 'its polarized categorisations (e.g., substance/procedure), its undue optimism about the competence and public-spiritedness of state institutions, and its failure to recognize the ideological and non-neutral nature of its own positions.'⁶⁷ But the legal process's influence endured, and both critical legal studies and law and economics 'defined themselves, in part, by attacking legal process.'⁶⁸ Moreover, another iconic casebook of that period, *The Federal Courts and the Federal System*, authored in its first edition by Henry

⁵⁹ 'Interpretation and Institutions', (2003) 101 Michigan Law Review 885. Significant parts of this article appear in Vermeule, n. 29, which I use as my primary source.

⁶⁰ 'Reply: The Institutional Dimension of Statutory and Constitutional Interpretation', (2003) 101 Michigan Law Review 952. See also Sunstein and Vermeule's response, 'Interpretive Theory in Its Infancy: A Reply to Posner', (2003) 101 Michigan Law Review 972.

⁶¹ See 'No Frills Textualism', (2006) 119 Harvard Law Review 2041, 2045 (a review of Vermeule, n. 29).

⁶² See Eskridge, n. 61 at 2044-2051. I believe that it does not make much sense to talk about "turns," since institutional analysis (in different forms) has been present in much of the scholarship throughout the 20th century. On the legal process school (and related approaches) see also N Duxbury, *The Patterns of American Jurisprudence* (Clarendon Press, Oxford 1995) at 205-299 (making the same point at 206-207).

⁶³ There are, of course, theorists who do not pay attention to the institutional dimension, a view which is not justified once they start making practical pronouncements on what e.g. courts should do. See Posner, n. 60 at 955, who defends Ronald Dworkin against some of the charges raised by Sunstein and Vermeule, n. 29 at 902-904, since 'scholars are permitted to discuss one question at a time,' but then admits that Dworkin can be faulted 'in using his partial analysis as the basis for confident evaluations of particular interpretive issues, such as the assisted-suicide issue that Sunstein and Vermeule discuss.'

⁶⁴ See HM Hart and AM Sacks (WN Eskridge and PP Frickey eds), *The Legal Process. Basic Problems in the Making and Application of Law* (Foundation Press, Westbury N.Y. 1994).

⁶⁵ See WN Eskridge and PP Frickey, 'An Historical and Critical Introduction to *The Legal Process*', in Hart and Sack, n. 64 at c.

⁶⁶ See Eskridge and Frickey, n. 65 at xcvi.

⁶⁷ *Ibid.* at civ.

⁶⁸ EL Rubin, 'The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions', (1996) 109 Harvard Law Review 1393, 1398.

Hart with Herbert Wechsler,⁶⁹ has remained hitherto the primary teaching material in the field.⁷⁰

Neil Komesar's *Imperfect Alternatives*,⁷¹ already mentioned in relation to Miguel Poiares Maduro's work in the context of the EU, and Adrian Vermeule's *Judging under Uncertainty*⁷² both distance themselves from the traditional legal process school. For Komesar, 'Hart and Sacks presented a largely idealized image of institutions. Each institution was assumed to be a contemplative, deliberative, rational decision-maker,'⁷³ while in Vermeule's opinion, 'Hart and Sacks's elaborate talk about institutional competence is undercut by their stylized, nonempirical treatment of actual institutions and their capacities, and by their crude treatment of the systemic effects of competing interpretive approaches.'⁷⁴

Both Komesar and Vermeule emphasise the need for comparative dimension of institutional analysis: '[w]hether, in the abstract, [any of the institutions] is good or bad at something is irrelevant.' 'The correct question is,' according to Komesar, 'whether, in any given setting, [a particular institution] is better or worse than its available alternatives.'⁷⁵ Moreover, the comparison must be 'symmetrical'; it is a mistake 'to take a cynical or pessimistic view of some institutions and an unjustifiably rosy view of others.'⁷⁶ A related requirement on a sound institutional analysis is therefore that it must be 'evenhandedly empirical' – 'realistic about the capacities of all relevant actors.'⁷⁷

B. Problems of Institutional Choice

The following is not intended as a sweeping critique of institutional choice. I want only to show the problems it has (both theoretical and practical), which leads me to try to find other ways in which the institutional dimension can usefully be explored. The lack of consensus on how to evaluate institutional competence, resulting in different authors' preference for different institutions, is most troubling. Two (somewhat related) problems concern, first, the practical feasibility of institutional choice and, second, its orientation on the decision-makers who are often supposed to limit their actions because of their relative institutional weakness.

⁶⁹ (Foundation Press, Brooklyn 1953). Eskridge and Frickey, n. 65 at cii place this book among 'the central works of what is now recognized as a legal process tradition.'

⁷⁰ See RH Fallon, 'Reflections on the Hart and Wechsler Paradigm', (1994) 47 Vand. L. Rev. 953. The book is now in its 6th edition (RH Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System*, 6th edn (Foundation Press, New York 2009).

⁷¹ N. 37.

⁷² N. 59.

⁷³ Komesar, n. 37 at 12.

⁷⁴ Vermeule, n. 29 at 27. See also Sunstein and Vermeule, n. 59 at 900-902.

⁷⁵ All quotations from Komesar, n. 37 at 6 (I generalised the point made by Komesar in relation to two concrete institutions: the market and political process).

⁷⁶ Vermeule, n. 29 at 17.

⁷⁷ *Ibid.* at 18.

Adrian Vermeule does not present any clear criteria for institutional choice. When he discusses interpretive choice,⁷⁸ which implies institutional choice, he mentions only some relevant considerations. They are ‘information and superior competence to translate information into sound legal policy,’⁷⁹ ‘trustworthiness of agents and delegate’ (will agents ‘act to promote the principal’s interest or their own?’)⁸⁰ and ‘the likely reaction of other institutions to the rules or standards chosen by a decisionmaker engaged in interpretive choice.’⁸¹ After having chosen a formalist interpretation (which should limit the scope of discretion on the part of courts),⁸² Vermeule presents ‘institutional variables.’⁸³ He asks whether ‘a formalist or nonformalist judiciary, in one or another domain, produce more mistakes and injustices.’⁸⁴ ‘Cognition and motivation of interpreters,’⁸⁵ the possibility of error correction by another institution,⁸⁶ and, finally, decision costs and costs of uncertainty⁸⁷ are other institutional variables. They all sound relevant, but how is one to measure them? Vermeule does not say. For example, how do we know whether or not the Supreme Court’s decision is ‘correct’ and ‘just’? We ask courts such questions, and the court of final appeal gives the final and “correct” *legal* answer.⁸⁸ Of course people can disagree on whether the decision was “right,” but they would have to agree on some *non-legal* criteria according to which to do this – in other words, on some substantive theory. And that is something Vermeule (and Sunstein too) wants to avoid.⁸⁹

Similarly, what are decision costs? They are among the central concepts of the theory of judicial minimalism, proposed by Vermeule’s intellectual fellow-traveller, Cass Sunstein.⁹⁰ Yet, neither of them gives a useful answer to this question.

Finally, Vermeule’s institutional choice can be as ‘institutionally blind’ (to use Vermeule’s own label) as other theories of interpretation. To ask real-life decision-makers, particularly

⁷⁸ See Vermeule, n. 29 at 67-70.

⁷⁹ Ibid. at 69.

⁸⁰ Ibid.

⁸¹ Ibid. at 70.

⁸² Vermeule’s book can equally be read as a defence of interpretive formalism and preference for administrative agencies. See C Nelson, ‘Statutory Interpretation and Decision Theory’, (2007) 74 *University of Chicago Law Review* 329 (a review of Vermeule, n. 29). But Vermeule seems not to remain faithful to his own pronouncements and the choice he makes is not based on any empirical evidence (see Eskridge, n. 61 at 2046).

⁸³ See Vermeule, n. 29 at 76-79.

⁸⁴ Ibid. at 77.

⁸⁵ Ibid. at 77-78.

⁸⁶ Ibid. at 78.

⁸⁷ Ibid. at 79.

⁸⁸ Thus *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring): ‘We are not final because we are infallible, but we are infallible only because we are final.’ It is one of the peculiar features of EU law and its judicial system that this does not quite apply there, since the Court of Justice constantly undermines hierarchical features of member states’ judicial systems. See J Komárek, ‘“In the Court(S) We Trust?” On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure’, (2007) 32 *European Law Review* 467 at 486-489.

⁸⁹ Vermeule, n. 29 at 79-85 and Sunstein and Vermeule, n. 29 at 914-919.

⁹⁰ See CR Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, Cambridge, Mass., 1999) at 47-50.

the courts, to make such complex empirical assessments (which moreover Vermeule himself fails to do) can simply be to ask them to exceed their actual competences. In his reply to Sunstein and Vermeule's article (which applies with equal force to Vermeule's book), Richard Posner noted:

Casual empiricism is often unavoidable in law. Sunstein and Vermeule deny this. They say the fact that 'relevant empirical and institutional variables are costly to measure' (they are speaking of the variables relevant to the choice between loose and strict construction) is 'hardly an argument for nonempirical interpretive theory.' It is, in fact, a compelling argument. Unavailability of empirical data does not excuse the judge from having to interpret statutes in the cases that come before him for decision; and to decide how to interpret them he will perforce have to decide whether he is a loose or a strict constructionist. He may not be articulate about the choice, but he will make it nonetheless.⁹¹

Neil Komesar differs from Vermeule in several ways, yet I do not think he escapes the problem of the lack of some feasible criteria for evaluating institutions. Komesar presents a 'participation-centered approach,' which 'identifies the actions of the mass of participants as the fact that in general best accounts for the variation in how institutions function.'⁹² The participants comprise consumers, producers, voters, lobbyists and litigants. In Komesar's opinion, '[a]t least initially, official actors in the political process and the judiciary [the two of the institutions Komesar examines, together with the market] – legislators and judges – play a secondary role.'⁹³ '[T]he interaction of these many actors rather than the will of a few officials receives central attention in [Komesar's] analysis.'⁹⁴

Komesar honestly acknowledges the difficulties his approach meets when applied to concrete problems; difficulties facing not only the real decision-makers, but also theorists.⁹⁵ Apart from the practical feasibility of his analytical framework, one can further ask whether participation should be the only criterion for institutional comparison.⁹⁶ In this respect I would like to pray in aid Daniel Halberstam's idea of constitutional heterarchy.

Halberstam suggests that pluralism in the European Union, with its contestation of the final authority, is in some respects similar to that in the United States, where different institutions (the President, the Congress, the Supreme Court, and ultimately, the 'People themselves') compete for the final authority to interpret the U.S. Constitution.

⁹¹ Posner, n. 60 at 969, quoting Sunstein and Vermeule, n. 59 at 907.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ See N Komesar, 'The Perils of Pandora: Further Reflections on Institutional Choice', (1997) 22 Law & Social Inquiry 999, a response to a book review of *Imperfect Alternatives*, HS Erlanger and TW Merrill, 'Institutional Choice and Political Faith', (1997) 22 Law & Social Inquiry 959.

⁹⁶ In this respect one can also link this question to the critique by JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, Mass., 1980). Ely's central argument is that judicial review should be primarily democratic-participation (re)enforcing. Despite Komesar's critique of Ely's single-institutionalism (see Komesar, n. 37 at 198-215), they share the same basic commitment to participation.

Constitutional conflict is central to both systems.⁹⁷ Now as is crucial for my argument against Komesar's participation-centered approach, each actor makes different claims based on three values, essential to constitutionalism: voice (representation of the relevant political will), expertise (knowledge or the instrumental capacity to decide a particular issue) and protection of rights.⁹⁸ These values of constitutionalism to a great extent resemble Bruce Ackerman's 'three great principles that motivate the modern doctrine of separation of powers - democracy, professionalism, and the protection of fundamental rights.'⁹⁹ According to Halberstam,

none of these values is exclusively or even reliably associated with one or another of the contending actors. At different times, different actors can lay claim to be vindicating any one or more of these values. If an actor can maximize all three values in any given case, that actor's claim to authority within the system becomes paramount. If, as is more frequently the case, different actors can lay only partial claim to one or the other of these values, the stage is set for constitutional confrontation.¹⁰⁰

The participation-centered approach does not use this value-laden language. This has a great advantage since it avoids questions which it cannot (and does not want) to answer – for example, what the “correct” level of protection of rights is. But at the same time it seems to me that it overlooks something which is important about the role of institutions in constitutionalism and which goes beyond the value of participation. Perhaps it shows the limitations of the institutional analysis, which can never give complete answers to questions which arise.

The impossibility of answering some questions, once we do not agree on any substantive theory, is well illustrated by Halberstam's discussion of the protection of rights. Using the example of the Supreme Court's decision in *Dred Scott v. Sandford*¹⁰¹ and also the Court's obstruction of Congress' implementation of the Reconstruction Plan after the War, most famously by its 'separate but equal doctrine,'¹⁰² Halberstam shows how the Court 'declined to provide much meaningful rights protection'.¹⁰³ The problem however arises when one is to assess whether individual rights are “better protected” when there is a deep (and perhaps irreconcilable) disagreement over their content. If courts favour the right to the personal autonomy (or human dignity, or equality) of women over the right to life of an unborn child, are we really sure that they have a claim to rights-protection superior to that

⁹⁷ See Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge University Press, New York, 2009).

⁹⁸ *Ibid.* at 328.

⁹⁹ 'The New Separation of Powers', (2000) 113 *Harvard Law Review* 633, 634.

¹⁰⁰ Halberstam, n. 97 at 337-338. On the link between pluralism in the U.S. Constitution and institutional competence see CL Eisgruber, 'The Most Competent Branches: A Response to Professor Paulsen', (1994) 83 *Georgetown Law Journal* 347.

¹⁰¹ 60 U.S. 393 (1857) (ruling that Congress could not forbid slavery in the federal territories).

¹⁰² *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁰³ See Halberstam, n. 97 at 349.

of a legislator which prohibits abortion?¹⁰⁴ The only way to ‘evaluate’ rights protection seems to be institutional analysis. As Christopher Peters notes,

Whether the Court or Congress has been more successful at protecting rights depends upon entirely subjective, and not at all empirical, conclusions about which rights are worth protecting. A satisfying assessment of comparative institutional advantages in the protection of rights must, it seems to me, be divorced from particular subjective evaluations of rights, and thus from subjective evaluations of “success” or “failure” in particular cases.¹⁰⁵

That, however, meets similar problems of insufficient criteria, as I suggest above.

Apart from the absence of criteria for institutional choice, the second kind of problem concerns its orientation on the decision-making institution, which is supposed to make the comparative calculus about its competence and possibly restrain itself from taking the decision or at least limit its scope. I can illustrate the difficulty with the thus conceived institutional analysis on the already mentioned example of the Polish Constitutional Tribunal and its review of the European Arrest Warrant.¹⁰⁶ Was it an honest choice the Tribunal had made, or was it only an easy, “buck-passing” way of avoiding adjudication on an issue which was to be duly decided by the constitutional adjudicator?¹⁰⁷

Finally: can the decision-making institution ever be persuaded that its own competence is limited and therefore that it must duly defer to another institution? In his (rather severe) critique of Vermeule, Richard Posner observes that ‘[a]cademics who are not seriously engaged with the judiciary urge judges to change by adopting this or that approach, and usually it is an approach designed to clip judges’ wings.’¹⁰⁸ That is what Vermeule’s institutional analysis suggests by proposing a more formalist approach to interpretation. But, as Posner argues, ‘[j]udges are not interested in having their wings clipped, but will happily adopt restraintist approaches as rhetorical tools to persuade others that what looks like judicial assertiveness is obedience.’¹⁰⁹ I think that here Posner questions institutional choice as a meaningful interpretive strategy for constraining the courts’ discretion, the very aim which Vermeule wants to pursue.

C. Towards Involvement and Communication

Approaching the institutional dimension in terms of choice is connected to emphasising the finality and irreversibility of the decisions taken by particular institutions. But very often (not always, of course), it only seems that a particular institution is making a momentous decision which cannot be overturned. In many instances that is not the case. The process of norm creation is not linear, from one institution to another, e.g. from the legislator which

¹⁰⁴ See J Habermas, ‘On Law and Disagreement. Some Comments on “Interpretative Pluralism”’, (2003) 16 *Ratio Juris* 187.

¹⁰⁵ ‘Assessing the New Judicial Minimalism’, (2000) 100 *Columbia Law Review* 1454, 1492, fn. 180.

¹⁰⁶ See the text accompanying n. 11.

¹⁰⁷ See Komárek, n. 41 at 38.

¹⁰⁸ RA Posner, *How Judges Think* (Harvard University Press, Cambridge, Mass., 2008) at 215.

¹⁰⁹ *Ibid.* at 215-216.

adopts a piece of legislation to courts which only apply it. Nor is judicial review; by striking down a piece of legislation the court only starts a process in which other actors of the constitutional system react.¹¹⁰ As Mark van Hoecke observes, law is to a very great extent *circular*.¹¹¹ Constitutional pluralism, with its contestation of finality only reinforces this circular exchange among various actors.¹¹²

Theories of constitutional dialogue (or communication) within a constitutional order are now widespread on both sides of Atlantic – in the U.S., Canada and Europe.¹¹³ Although few of them identify themselves with constitutional pluralism, they share with it the belief that no institution has a superior claim to define or protect a particular constitutional value. The theories can differ in their concrete institutional arrangements and the weight they give to each of the actors – some e.g. favour courts, some favour legislators, but they all emphasise communication among different constitutional actors and their mutual involvement.

This turn to dialogue responds to the lack of clear answers and the lack of consensus among those who are concerned by them. It is nicely illustrated by Barry Friedman's response to some reactions to his article concerning congressional control over the jurisdiction of federal courts – an ever recurrent topic of doctrinal debate since the very founding of the United States. Friedman says:

I am presenting an argument of a different genre than the traditional advocacy over the “correct” or even “best” interpretation of article III [which establishes jurisdiction of federal courts]. I am arguing that what I observe “just is” and that our explorations might be more useful if we began from this jumping-off point, instead of from insisting that the answer can be found in the Constitution's text, and the Original Plan.¹¹⁴

Institutional involvement and communication allow each of the actors' competence to be combined so that a better and more legitimate decision (in comparison to a decision taken by a single actor) can be taken. “Better” because institutions can combine their varied competences and legitimacy claims when arriving at it.¹¹⁵ “More legitimate” since

¹¹⁰ See in particular B Friedman, ‘Dialogue and Judicial Review’, (1993) 91 Michigan Law Review 577 (in the context of the U.S.) and M Van Hoecke, *Law as Communication* (Hart, Oxford, 2002) at 172-178.

¹¹¹ See Van Hoecke, n. 110 at 37-39.

¹¹² Ibid. at 209. See also Friedman, n. 110 at 653-680 (discussing mechanisms of dialogue in the context of the U.S. Constitution – and at 658-668 giving a concrete example of a dialogue on abortion initiated by the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973)) and MC Dorf, ‘Foreword: The Limits of Socratic Deliberation’, (1998) 112 Harvard Law Review 4.

¹¹³ See C Bateup, ‘The Dialogic Promise. Assessing the Normative Potential of Theories of Constitutional Dialogue’, (2006) 71 Brooklyn Law Review 1109 for an overview and evaluation of such theories.

¹¹⁴ Barry Friedman, ‘Federal Jurisdiction and Legal Scholarship: A (Dialogic) Reply’, (1991) 85 Northwestern University Law Review 478, 479-480 (containing references to the previous article and the reactions to it).

¹¹⁵ This is essentially based on a “many-minds argument,” which has many variants which I cannot explore here. See A Vermeule, ‘Many-Minds Arguments in Legal Theory’, (2009) 1 Journal of Legal Analysis 1 and CR Sunstein, *A Constitution of Many Minds* (Princeton University Press, Princeton 2009) (who takes a more positive approach to “many minds” than Vermeule).

communication itself can have such effects.¹¹⁶ An important point is, of course, that these vitally depend on concrete institutional settings existing in a particular constitutional system.¹¹⁷

III. Conclusion

Closely related to emphasising institutional involvement and communication over institutional choice and conflict is shifting the focus from an institution which takes the decision (and should ideally, but in my opinion unrealistically, take its institutional competence into account when making it) to other institutions. How can they react? How can they claim a space for their own decisions? In other words, this means moving from a single-institutional perspective, combined with the illusion of finality, to a multi-institutional and circular perspective. Then, it is important not only how the decision-making institution constrains itself, but also how other institutions can react to its decision and possibly claim space for their own decisions. Institutional choice then appears less important than involvement. It is less important to choose the right institution (if only because such a choice is difficult to make in practice in the absence of clear criteria) than to achieve the involvement of more institutions and find ways of involving them. A promising line of inquiry into the institutional dimension of constitutional pluralism therefore lies in examining how this can be achieved.

¹¹⁶ See particularly Van Hoecke, n. 111 at 203-215 who in this respect builds very much on J Habermas, *Between Facts and Norms* (Polity Press, Cambridge 1997).

¹¹⁷ See A Vermeule, *Law and the Limits of Reason* (Oxford University Press, New York, 2009), 41-55.