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PASSION AND REASON IN EUROPEAN INTEGRATION

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- ES GILT DAS GESPROCHENE WORT -

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Dear Ladies and Gentlemen,

let me start by explaining the, perhaps mysterious, title of this lecture. The title is derived from a metaphor, inspired by Dante's Divine Comedy, that I will use to explain the characteristics of a successful democracy. At the start of the Divine Comedy Dante presents himself at an existential moment of his life just the same as the European Union is today. He is then guided by Virgil (the roman poet, representative of reason) through the different levels of hell and purgatory up to the doors of paradise. But we are told that Virgil, being only endowed with reason, cannot enter into paradise. So, who welcomes Dante into paradise? Beatrice, the love of his life, which had died in her youth. In this metaphor, Dante offers us a lesson about life, which however we can also use for analyzing democracies: All successful democracies need the right mix of passion and reason.

By passion, in the context of a democratic political community, I understand the individual preferences that feed the political space that is, in turn, supportive of democracy.

By reason I refer to the rules and processes which govern, define and constrain the democratic process, so that its decisions take into account all costs and benefits.

I cannot get into much more detail of this relationship between passion and reason in democratic constitutionalism in general. For the purposes of this lecture I will limit myself to the following assumption: One of the main functions of constitutionalism is that of installing reason into a democracy. I will briefly highlight some examples of how this works.

As said, I conceive constitutionalism as an instrument of rationalization of democracy. In my view, it shapes democratic reason in at least three ways. First, constitutionalism defines the scope of democratic participation and, in reality, one of its original purposes was that of a more inclusive democracy. Constitutionalism determines whose (and what) costs and benefits should be taken into account in democratic decisions. In other words, constitutionalism determines who must have a voice and who's interests are taken into account in the course of democratic deliberations. It defines the jurisdiction for measuring democracy. Second, constitutionalism requires democracy to balance the scope of participation with the intensity of impacts of democratic decisions. Democracy is not simply about counting heads. It has also to take into account the respective impact that different decisions may have on different people. Constitutionalism requires balancing the scope of participation (the degree of inclusion) in democratic decisions with the intensity of participation and the respective costs and benefits imposed by different decisions on different groups and people. Thirdly, constitutionalism is also an instrument of rationalization of democracy in that it helps to create the conditions for a free, informed and intersubjective democratic discourse.

As stated before, this is not, however, a lecture about the general relationship between democracy and constitutionalism. My purpose today is to highlight how the project of

European integration is, to a large extent, a project of further rationalization of national democracies and the benefits as well as the risks that this entails.

European integration was shaped by the Second World War and the subsequent conscience, about the risks involved in excessive national political passions. Gradually, a project of interdependence would also become an instrument of mutual inclusion. Associated to this development, there emerged a new form of discipline on the politics of the states. This aspect, concerning the rationalization of national politics has become part of the genetic code of European integration and has been embodied in the systemic identity of the European Union and its legal order. EU law is an instrument of further constitutionalization of national democracies. It is shaping national democratic reason.

Let me identify three ways in which EU law exercises this function of rationalizing national democracies and, in doing so, can be seen as improving national democracies.

First, EU law redefines the scope of participation in national democracies so as to correct outbounded democratic externalities. Let me explain what I mean by this concept. National democracies often – and I would argue increasingly, – take decisions that impact on interests outside their borders. There is, in these cases, an asymmetry between the scope of participation in certain national democratic decisions and the communities that are affected by those national democratic decisions. The European Union can be understood as creating a political link between the different national political communities by mutually bound them to open their democracies to the affected interests of each other citizens.

European constitutionalism promotes the inclusion of the interests of all European citizens in the process of democratic decision-making on the national level .In so doing, it helps correcting outbounded democratic externalities.

In other words, EU law forces national political processes to internalize, in their decision-making affected out of state interests. This requires more than equal treatment under the national law. It requires equal consideration of those interests by national political processes.

There are many examples, yet I will limit myself to give you one of the most traditional of all: The case law of European Court of Justice on the free movement of goods regarding national product requirements. Rules such as the German beer purity law or the Italian vinegar or pasta requirements reflected national traditions on the production and consumption of those goods. In all these cases the Court of Justice rejected the claim that such national traditions could justify restricting the sale of goods from other Member States produced according to different standards. Member states can no longer regulate the market by simply looking at their domestic traditions of production and consumption. They must take into account different traditions and forms of production because their national regulations are now impacting on a broader European market and affect a larger scope of interests that EU law deems worthy of representation.

The previous example shows clearly that what EU law does is to expand the scope of the interests to be taken into account in national democracies. But EU law also redefines the

scope of national democracy in a rather different way: By extending its reach and authority. In the first case, EU law expands the scope of representation in national democracies. In the second case, it expands the scope of application of national democracies. It does so to correct inbounded democratic externalities.

The latter are another side of the growing democratic asymmetry that I mentioned before: In this case, national democracies see their policy choices being put into question by transnational processes that they can't control.

The most obvious examples are those were EU law helps correcting collective action problems or cross-border externalities between the Member States, such as those increasingly involved in tackling many of the most pressing environmental, immigration, financial, fiscal and criminal problems. But it is broader than this. It also regards the emergent transnational forms of power that evade the control of national democracies but impact on their policy choices.

In several instances, EU law can be perceived in a role of reinstating the authority of national democracies over those transnational forms of power. Consider, for example, the role played by financial agencies rating national debts or the market power of big multinational companies and the extent to which, in some instances, states may depend more on them than they do depend ontheir interaction with other states. But the example I want to give is, again taken from a classic area of EU law, and linked to one of the most popular of human activities: football...

It involves what may well be the most popularly known case ever to be litigated before the European Court of Justice – the Bosman case. As you may remember, this was a case where the European Court of Justice stated, among other things, that the imposition of transfer fees in the case of football players that had ended their contract with another football team amounted to a violation of the free movement of workers. Those rules were rules of national football associations that implemented rules of UEFA and FIFA. What is interesting to note is that many lawyers, in different member states, had argued that such rules were incompatible with their domestic rules on the right to work and the freedom of contract. Yet all challenges under national law were destined to fail. UEFA and FIFA consistently refuse to be submitted to any state jurisdiction arguing that the autonomy of their sports legal regime excluded their rules from control under state laws. Moreover, whenever confronted with such possibility by a state legal order, they often threatened the respective state with exclusion from international competitions. This explains why national challenges to UEFA and FIFA rules are rarely, if ever, successful: no legislator or judge wants to be responsible for the exclusion of his or her country and its clubs from international competitions….

In the Bosman case, even if UEFA and FIFA tried to claim before the European Court of Justice that this issue was outside the jurisdiction of the court, not only did they accept that jurisdiction but complied with the outcome. The reason is simple: UEFA and FIFA could not threaten the EU with the exclusion of all its States and clubs from international

competitions… How would European competitions or even the world cup have looked like without Germany, England, France, Italy, Spain, Portugal, the Netherlands and so on. The balance of power between the transnational associations of football and public authority shifted once the issue was moved from the national level to the European Union. In this instance, such a move reinstated the sovereignty of the States (albeit collectively), instead of eroding it. EU law allows the values of our national legal orders to be reinstated into transnational processes of power. It re-empowers national democracies and therefore corrects what I defined as inbounded democratic externalities.

In the previous two examples EU law reshapes national democratic reason by correcting two different types of democratic asymmetries. In the first, national democracy is the creator of democratic externalities. In the second, it is the victim of such democratic externalities. There is a third dimension of EU law's role in shaping national democratic reason. EU law also operates, in many instances, as an instrument of self-discipline that states can be said to have imposed upon themselves. In this case, EU law improves national democracies even from a purely domestic perspective. Since national constitutions are not always fully successful in their project of rationalization of national democracy, external rules and processes may be necessary as an additional layer of constitutionalisation for the internal benefit of national democratic processes. In the same way that we often need external commitments in order to effectively pursue our own preferences (such as enrolling in gym classes in order to guarantee that we actually go to the gym…) so do States. EU law helps correcting democratic malfunctions that cannot be corrected with purely domestic instruments.

An example, regards instances of capture of national political processes by concentrated interests. There is a well known area of EU law that can be seen as challenging and controlling risks of capture of the political process by concentrated interests. I am thinking of the state aids regime. As it is well known, the Treaty prohibits state aids, subject to several possible exceptions to be assessed and authorized by the Commission. Such a prohibition is often justified by the aim of preventing distortions of competition in the internal market between undertakings established in different Member States. But, in reality, the prohibition of state aids does not prevent at all such distortions of competition and arguably not even the most serious of such distortions. Sometimes, the prohibition of State aids can even operate so as to prevent a distortion of competition from being corrected. Consider the following example. State A imposes on all its companies a 20% tax, while state B imposes a 15% tax. This does not amount to a state aid, under EU rules, since it is not a benefit granted to a specific undertaking or a particular economic sector but a general tax measure. However, if state A offers to give a tax rebate of 5% to a certain category of undertakings that constitutes the case of state aid. That is even so if, de facto, such tax rebate would actually serve to equalize the tax burdens of that group of undertakings of state A with those of state B. What explains this? The prima facie explanation is that the fact that states have different taxation rates cannot be considered a distortion of competition since it is a simple consequence of the

different exercises by states of the tax powers retained by them. Different general taxation regimes between states affect competition but are not considered a distortion of competition (at least for the legal purposes of the state aids regime). But the important question is why should we then consider that there is a distortion of competition when the exercise of a state's tax power takes the form of a selective tax measure that actually put its companies in equal conditions of competition with those of another state? Why can a state use its financial resources to support its companies through general measures but not through selective ones? Why can it give a competitive advantage to all its companies but not to only some of them? Why is selectivity a key element for determining the existence of a state aid? In other words, why should a State be able to provide lower taxes in general or use its money, in many different ways, to provide general competitive advantages to its companies (such as better infrastructures, a more qualified workforce etc.) but is not being authorized to provide selective state aids? In fact, it is the idea that states can and do provide a variety of advantages to companies established in their territories that has led the US Supreme Court to traditionally authorize state aids under the so called market participant doctrine (which has recently, however, come under challenge). States interfere with market competition in a large variety of ways, many of which by using state resources. Why to prohibit some of them?

The reason, in my view, is to be found in the fact that selective measures correspond to instances where the political process is much more susceptible to capture by concentrated interests. When the benefit of the state intervention is highly concentrated on a company or group of companies and the costs are dispersed among the rest of the people, the latter have little interest and knowledge of the measure as well as its costs while the former have a strong incentive to act so as to obtain the benefit. Instead, that is not the case with general taxation and other measures of a general type. In these instances, both the costs and benefits of the measures tend to be disseminated more equally allowing a higher degree of trust in the capacity of the political process to balance all affected interests.

The control that EU law imposes on state aids can, therefore, be seen as an instrument of external discipline self-imposed by the states to thwart instances of likely malfunction in their political processes that cannot be domestically prevented. EU law on state aids is in fact aiding the states.

Another example of self-discipline, and one that has been the subject of increased attention in recent months, is linked to the constraints imposed by EU law on national budget deficits and public debt. I am not going to discuss here if the system currently enshrined in the Treaties and the stability and growth pact is effective and how it could be improved. My purpose is simply to highlight how budget deficits and high levels of public debt can correspond to instances of democratic malfunction in national political processes, thereby justifying an active EU role. Instances where the pressing needs of today's electoral cycles may lead the political actors to make short-term decisions without fully considering future consequences. Notably, the control exercised by EU law on national public debt and budget deficits can be

seen, among other things, as correcting a problem of intergenerational democracy. The freedom to do things that the current members of the political community acquire by incurring on large budget deficits may limit the democratic freedom of deliberation for future generations. I say may, because, in effect, budget deficits may also bring benefits for future generations depending on how productively the money is employed. The democratic problem remains however: one current generation decides for another (particularly, because we cannot be certain that the current members of a political community will base their decisions on the interests of the future members of that political community instead of their own immediate needs). This can be presented as a democratic malfunction, a democratic externality in generational terms. Also, in this case, EU law can be presented as an instrument of external constitutional control on national democratic processes.

EU law exercises many other such forms of external constitutional discipline and reform over national democratic processes. It questions, for example, what we could refer to as national legislative path-dependencies. It is not uncommon for national legislation to remain in place, even when the original reasons justifying its adoption no longer apply, because it has created a community of vested interests and a set of social practices resistant to change. When EU law, either by virtue of legal challenges to those rules or by virtue of a shift in the level of decision-making, requires a renewed justification for those policies it often reawakes national democratic deliberation on those issues. It requires national political processes to rationalize again those policies and, in so doing, it frequently becomes clear that they are, in fact, no longer worthy of support. It has even happen for certain national policies to have been challenged under EU law and uphold by the Court but still lead to policy changes.

The simple fact that they were challenged and the debate that thereby was promoted at the national level has frequently led to renewed democratic deliberations.

To conclude all what has been said so far: EU law reinforces, but also reshapes, national democratic reason. Having, however, presented a rather positive perspective of the role of EU law and European integration on democracy, you might wonder what explains the traditional claims of a democratic deficit and the crisis of European constitutionalism that many see reflected in the failure of the Constitutional Treaty. To a certain extent, European constitutionalism has become a victim of its own success. The extent to which this project of reason has granted political and legal authority in the European Union is such that it has increasingly limited the space for politics at the national level without offering an appropriate alternative at the European level. It is increasingly perceived, no longer as a form of constitutional discipline or reason on the politics of national passions but as a form of politics without passion. Or, in the view of others, as the instrument of a particular passion: A structurally ideologically biased project.

I want to be clear. The problem is politics and not what is more often discussed under the label of the traditional democratic deficit. Both the classical account of the European Union democratic deficit, which has focused, for example, on the lower role of the European

Parliament and the non sufficiently majoritarian character of the European Union, and the usual democratic defense of the European Union, which has focused on the many democratic inputs from which the European Union benefits (from national governments, and their supervision by national parliaments, to the European Parliament; from increased majoritarian decision-making to the technical quality of the deliberative process or output legitimacy) miss the point. The problem is not so much the institutional mechanisms for democratic input coming from the states and EU levels. The problem resides in the way in which the European Union affects the political space without having yet managed to reconfigurate that political space either at the national or the European level. There is an asymmetry between the political impact of the Union and the nature of its politics.

This tension, which is often expressed as a tension with national democracy, has increased with the enlargement in two rather different ways. Firstly, new member states tend to be among those who are more resistant to European Union intrusion. This is perhaps a natural consequence of being recent democracies, perceiving the Union has restricting their newly conquered space for self governance and democratic deliberation. At the same time, for older member states, the enlargement has changed the balance of power in the internal market regime of competition among legal orders. It has led to increased claims of challenges to their social and economic models. This explains why the democratic deficit rhetoric, which existed for several years but was to a large extent restricted to an elite, which was different from the elite that it claimed led the process of European integration, has finally spilled over to the public opinion and is expressed in clear opposition to some EU policies.

It has conquered the public opinion because it is capable of being represented to this public opinion in terms of possible policy outcomes with which national constituencies disagree or are afraid of.

Perhaps it are these different fears that, more than anything else, explain the failed ratifications of the Constitutional Treaty. It is difficult, if not impossible, to identify exactly what led to the failure of the Constitutional Treaty. Was it a challenge to the idea of a formal constitution or to the content of that specific constitutional treaty? Or was it a challenge to the constitutional developments already undertaken by the Union? Likely, it was the consequence of a coincidence of opposing wills. But if many possible variables explain the current constitutional crisis the consequences of enlargement appear clear in this context. Enlargement interacts with this constitutional crisis by creating a paradox. Enlargement increases the polity asymmetry of the Union because it increases its economic, social and political diversity. This reduces the empirical conditions supporting the process of integration (notably in terms of cohesion and mutual-trust). But, at the same time, enlargement requires enhanced integration so that the Union can continue to be effective in a context of an expanded number of Member States. This feeds some of the constitutional challenges faced by the Union but also presents an opportunity to redefine the European project so as to meet those challenges. I will highlight four of those challenges.

The first challenge arises from the increased tension between the policy impact of the European Union and the expectations that it creates in its citizens and, its existing policies and politics on the other side. There are two ways in which this manifests itself.

The first one is that citizens have expectations with regard to the Union that the Union cannot, in light of its current competences and means of action, fulfill. If one looks at the Eurobarometer surveys we discover, perhaps surprisingly perhaps not, that among the preferential goals and policies indicated by citizens as those from which they expect more from the Union are matters such as economic growth, social solidarity, promotion of peace and democracy in the world and fighting crime and unemployment, all areas in which the European Union either has no competences or only limited instruments to intervene. It is this disparity between what the Union can do and what citizens expect it to do that leads them to develop an almost schizophrenic perspective of the European Union that always reminds me of an anecdote told at the end of Woody Allen's movie Annie Hall. There is this couple that goes out for diner in New York and spends the entire meal complaining of how bad the food is. "It is terrible, the worst food we ever had." "Yes, it is uneatable but, more importantly, the portions are so small…" When I hear some people talking about the European Union I'm often reminded of this anecdote.

The second way in which we can see this tension between the existing policies and politics of the European Union on the one hand and its policy impact as well as the expectations that it generates on the other hand has to do with the fact that the European Union is perceived by its citizens as shaping the economic and social model of Europe without the corresponding policy instruments or political debate. This is a consequence, for example, of the well known gap between negative integration (economic integration through national markets deregulation: elimination of national measures restrictive of free movement) and positive integration (economic integration through Community wide re-regulation: adoption of harmonized legislative measures by the EU political process). The limits imposed by European integration on the pursuit of traditional functions of governance at the national level are not compensated by the potential for EU intervention to perform those functions. The Union has not yet the capacity to perform those functions of governance neither does it has the political discourse that could support the emergence of those functions. The consequence is that the process of European integration is not simply seen as challenging the capacity of States to perform those functions of governance but, more broadly, as challenging those functions of governance themselves. For some, the process of European integration challenges the conception of the welfare state that has been at the core of our national political communities. Others, notably Jürgen Habermas, perceive that challenge as resulting from broader global processes and, instead, conceive the European Union as an opportunity to respond to that challenge and protect the values of the welfare state required for the subsistence of political communities and civic solidarity. In this case what would be required is a promotion of a political discourse at the European Union on those issues and,

furthermore, a broader discussion on the nature of the European Union social contract, clarifying the forms of civic solidarity on which the European polity ought to be based.

In order for the European Union to answer this first challenge it needs to redefine its policies and upgrade its politics. I have been arguing for some time now that this, less than institutional reform per se, should be the priority in the Union constitutional debates.

The second challenge comes from the increased majoritarian character of the European Union, both with regard to the expansion of majority voting as well as with regard to the expansion of proportional representation to the population. Using Hirschman categories of exit and voice, Joseph Weiler has famously described how States accepted the supremacy involved in the supranational character of EU law in exchange for a high degree of relative power in the decision making process. It was a system of allegiance based on voice. The increased majoritarian character of the Union decreases the relative voices of States (or, at least, some States). As Hirschman had noticed, albeit in a different context, when exit is no longer possible and voice is low what assures allegiance to a particular system is loyalty. This is the case with traditional national political communities where citizens feel bound even by decisions of the majority with which they don't agree. One of the first priorities of the current constitutional reform should therefore be that of establishing the conditions for political loyalty of the all European citizens towards the majoritarian decisions of the Union. This requires, first of all, a majoritarian system that is, at the same time, capable of guaranteeing the protection of minorities and, above all, the prevention of permanent and insulated minorities (net loosers). This requires mobility between majority and minorities (that those who are in the minority on one day may be part of the majority on the other day) and a deliberative system that tends to disseminate voting power and prevents the aggregation of individuals in rigid majorities or the creation pivotal players. This limits, at the same time, zero-sum decisions (since those which compose a majority know that they can, in the next deliberation, be part of the minority and have, therefore, an incentive to internalize some of the interests of the loosing minority).

Furthermore, political loyalty also requires instruments of civic solidarity, to be promoted by some forms of redistribution and clearer criteria of distributive justice (to be conceived on the basis European citizenship more than along national lines). This must be linked, in turn, to a reform of the Union's own resources so as to link those resources to the wealth generated by the Union and no longer to State transfers to the Union.

Again, I have been arguing for a long time that, more than institutional reform, this may be the most important discussion the Union needs to have. It does not necessarily need to be linked to a larger budget but to a different way of funding it and making use of it. Therein, more than in the institutional reforms undertaken in the Constitutional and Lisbon Treaties, resides the real opportunity to improve the role and legitimacy of the Union in its relationship with its citizens.

The third challenge hast to do with what I call the tension between normative constitutionalism and political intergovernmentalism in the European Union. Law in the European Union is constitutional. It is now commonly accepted that the European Union has as its foundation a constitutional system of law. It is ruled by constitutional rules and principles. But politics remains intergovernmental. Policy decisions continue to be, in spite of the enhanced role of the European Parliament, a product of intergovernmental bargaining. More importantly, they continue to be often framed in intergovernmental terms. National governments aggregate the preferences of their citizens and EU policies strike a balance between those aggregated preferences. But EU rules are then applied as such to EU citizens. This is in tension with many aspects of constitutionalism. First of all, it interferes with the mechanisms for political accountability of both national governments and the European Union. National governments sometimes simply transfer unpopular decisions from the national to the European level as a way of transferring the political costs for those decisions.

More importantly, it raises deep questions as to the extent of constitutionalism in the European Union. When States negotiate national quotas for certain products, often trading the interests of some of their producers for the interests of others (as in any international negotiation), can the producers from a particular state claim that they are being discriminated against because they are less well treated than those in another Member State? We have several other examples of this tension outside national quotas regimes too. Think of the famous litigation by German importers on the banana CAP regime or a case, where I was Advocate General, involving subsidies for sugar production based on a notion of deficit production areas that had been negotiated in such a way as to, de facto, exclude Italian producers without a reasonable justification. In all these cases, EU institutions have claimed the necessity to concede a broad margin of appreciation to the EU legislator precisely because of the nature of its process of deliberation that often, as common in intergovernmental negotiations, involves trade-offs between States. In reality, we are asked to derogate from the true standards of constitutionalism in order to respect the intergovernmental nature of EU decision-making. Whether or not cases such as those I mentioned involve discrimination is a question that requires a broader answer on the character of European constitutionalism.

The question, for example, if one ought to defer to a unanimous decision of the Member States in the Council balancing the different national interests but challenged by a particular individual depends on whether we conceive the legitimacy of the deliberative process in that case as ultimately intergovernmental (in which case it is for each State to balance the interests of all its nationals and a unanimous decision appropriately balancing the national interests has a particularly legitimating force) or constitutional (in which case the direct political link between the Union and its citizens takes precedence over that of the State and what counts is how the decision impacts on European citizens independently of the agreement of their respective States even if the measure appropriately balances all national interests).

The adoption of constitutionalism as the form of power for the European Union would entail a clear preference for constitutionalism as the appropriate hermeneutic framework for addressing the legal and political conflicts of the Union. But this would require a profound change of the character of its policies. They might still be the product of intergovernmental decision-making but they would need to be framed in truly genuine general and abstract terms, taking the European citizen as their point of reference. They should not balance between national interests but between European citizens interests.

The fourth and concluding challenge that I want to address is that of the borders of the European Union. Enlargement is the best example of the philosophy of inclusion that defines, to a great extent, the process of European integration. But the paradox is that over-inclusion may also become a threat to the process of integration.

St. Tomas of Aquinas once said that if all are my friends then no one is my friend. Having friends entails differentiating. A successful political community is also found on preferring our own. It requires, on one hand, the internal identity that is linked to an epistemic community among the citizens. A political space, an Agora. But it also requires external identity: a certain degree of closure so as to guarantee the stability and differentiation of that epistemic community. Let me make something clear however. I do not think that differentiation and closure should be a function of either cultural or religious borders. But I do think that the Union needs to define what is the degree of closure necessary for the success of its project (or projects) of integration. It needs to determine the empirical bases necessary to support its different economic and political ambitions. This does not imply a preference for or against current candidates to accession. On the contrary, it requires that whatever choices need to be made they must depart from such an analysis, be them on the accession candidate countries, the institutional and policy changes necessary to cope with accession or the different possible levels of integration. Enlargement appears, at times, to be more dominated by EU foreign policy objectives than by a genuine debate on what the EU should be.

The current challenges faced by the Union puts it, as Dante, in an existential crisis. It has to either readjust its policies or the expectations it creates. It must depart by redefining its policies and politics. These must guarantee the conditions for proper political accountability at national and European level and create the conditions for substantive communication between the Union and its citizens. Such policies and politics must also be capable of promoting an epistemic community among European citizens. Only this will feed some passion into the reason of European integration.

Thank you very much.