

THE EMERGENCE OF POSTNATIONAL CONSTITUTIONALISM IN THE EUROPEAN UNION

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[G]iven the propensity of [politicians and academics] to fall back on law, with its seemingly vast regulatory potential, as a mechanism of social engineering, it would be surprising if many were not tempted to invoke the spirit of constitutionalism and the substance of constitutional doctrine in their efforts to foster the legitimacy of the new order (Walker, 1996: 272).

1 Introduction: constructivism and EU legal studies

Constitutions, constitutionalism and constitutional politics have become common currency of debate and discussion in European Union studies.¹ In this article, I want to develop an argument in relation to these issues which draws upon emerging interdisciplinary and constructivist lines of thinking within European Union legal studies. The specific task is to re-examine the challenges of and to the concepts of constitution and constitutionalism when they are used as terms of analysis in the postnational setting of the European Union. Working within the framework of a set of assumptions about legal and political categories as socially constructed and about the need for legal ideas to be understood both sociologically (Cotterrell, 1998a) and in relation to concepts of political power, the article seeks to identify a frame of reference which links ideas about integration as a process (and in particular the legal dimensions of that process), with constitutionalism as a process of accommodation of diverse interests within society.²

As the article shows more specifically in relation to the articulation and understanding of issues of European Union constitutionalism, methods of legal study overly focused on the authoritative legal text, seen in isolation from its (social, economic, political or cultural) context or studied without the interpretative aid of other types of social scientific knowledge, in general encounter many difficulties.³ It may be unfair and indeed excessively schematical, but nonetheless legal positivism, as an approach to law, 'has come to be identified with empty formalism, theorizing by definition, morally detached linguistic analysis, and the unreflective science of calculable observations' (Campbell, 1998: 65). Similarly, the 'doctrinal' or 'black letter' approach to law, one based on the assumption that in the words of the judges and the text of the law a set of meanings are to be found and can in turn be explicated by the academic commentator, has been increasingly criticised as providing too limited a set of intellectual tools or insights. Perhaps the most celebrated and certainly most oft-quoted exposition of the core problems of these approaches as they apply to European Community law comes from Martin Shapiro. He sharply criticised a work which was

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¹ See Moravcsik and Nicolaides (1998) for an example of the mainstreaming of these debates.

² This is preparatory work for a broader project, tentatively entitled *Constitutionalism and Integration in the 'New European Polity'*.

³ This section draws upon earlier expositions of the necessity of an interdisciplinary approach to the study of European Community law, notably: Shaw, 1995, 1996, 1997; Armstrong and Shaw, 1998.

‘a careful and systematic exposition of the judicial provisions of the ‘constitution’ of the [EEC]... But it represents a stage of constitutional scholarship which American constitutional law must have passed about seventy years ago... It is constitutional law without politics. [The work] presents the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology... [S]uch an approach has proved fundamentally arid in the study of individual constitutions...’ (Shapiro, 1980: 538).⁴

The academic scene has changed since that time. By the end of the 1990s, the field of European Union legal studies had come to be characterised by a notable pluralism of approaches and intellectual influences. It now draws upon both the ever greater eclecticism of the discipline of legal studies itself, in which debates about the relationship between the legal, social, human and even natural and physical sciences have never been more intense, and upon the very clear imperative within European (Union) studies to develop interdisciplinary approaches to the multifaceted and sometimes contradictory phenomena of the integration and disintegration of European nation states and the emergence of a ‘European polity’ (Mayes, 1994). Some might regret the passing of some of the old certainties evident when EC law scholarship was court-centred but allegedly more rigorous in its adherence to the demands of legal texts and the possibilities of legal interpretation. Criticisms of the so-called ‘new approaches’ could, perhaps, more justly be aimed at a continuing willingness simply to define the ‘new’ negatively by reference to the ‘old’ (in other words, as work which *does not* accept the assumptions of doctrinal and positivist scholarship on legal rules and institutions, and in particular rejects an essentialist view of legal categories and definitions). There has been a consequent failure to map out the ‘new’ terrain more self-consciously or consistently by reference to well-established or newly emerging currents of theory. In other words, European Union legal studies would be a stronger discipline if it encompassed more constructive efforts towards theory building.

If it were to undertake this task, European Union legal studies would be following the lead of (UK national) public lawyers in confronting the challenge of theory to ask the question ‘what is [public] law for?’ and ‘how do we escape the trap between a conception of law as normative which loses sight of the social significance of law and a functionalist view of law as the handmaiden of politics which omits a normative perspective?’ (Loughlin, 1992: 243-244; see also Prosser, 1982, 1993; Harvey, 1997; Harden and Lewis, 1986; Morison and Livingstone, 1995). A greater degree of intellectual self-awareness in relation to parallel questions is now gradually emerging amongst those looking outwards from the discipline of European Union legal studies towards the challenges of theory, notably sociological theory, but also economic and political theory,⁵ following the lead of scholars such as Christian Joerges, Francis

⁴ The statement was directed principally at Barav, 1980 but is applicable also to a wider range of scholarship.

⁵ A partial list (limited, for example, to work in English) would include the work of Kenneth Armstrong (1998a, 1998b), Damian Chalmers (1997, 1999), Deidre Curtin (1997, forthcoming), Michelle Everson (1998a, 1998b), Imelda Maher (1998), Miguel Poiars Maduro (1998), Inge-Johanne Sand (1998a, 1998b), Harm Schepel (1998), and Joanne Scott (1998). See also Neil Walker (e.g. 1996 and 1998), whose theoretical work on

Snyder, Joseph Weiler and Bruno de Witte, pioneers in very different ways of a more reflective conception of the discipline. Furthermore, legal and social theorists coming from a wide variety of well-established positions have examined segments of the field of enquiry constituted by European Community law, including Zenon Bańkowski, Peter Fitzpatrick, Jürgen Habermas, Karl-Heinz Ladeur, Neil MacCormick, Bert van Roermond and Gunther Teubner. These interventions have notably broadened the terrain and parameters of the debate.

These comments are not intended to set out a contemporary canon for interdisciplinary legal work on the European Union, but merely to highlight some newly emerging patterns where intersections may be evident with constructivist traditions in liberal and critical theories of law, democracy and constitutionalism (Rawls, 1993, esp. Lecture III; Habermas, 1996, esp. Ch. 6; Teubner, 1989) as well as in other disciplines. These are intellectual patterns where neither the shapes nor the colours are yet fixed or even wholly clear. For the purposes of this article, they suggest at a minimum the need for a critical perspective when applying apparently well-established concepts such as 'constitution' or 'democracy' to unfamiliar circumstances such as the newly emerging 'postnational European polity', and in the particular institutional context of the EU legal order which privileges the role of the Court of Justice as 'constitutional court'. Such concepts and adjudicatory roles may need to be reconsidered and reconstructed when applied away from the national context. Beyond a conceptual critique, this article makes greatest use of the general 'procedural turn' visible in many recent studies of law and the exercise of public power (including work on the EU, such as Scott, 1998), in which it is acknowledged that conventional 'parliamentary' approaches to democracy represent inappropriate attempts to offer legitimate anchorage to the activities of non-state entities such as the EU. This shift in turn leads to enquiries into alternative forms of participation and representation which examine the roles of the states and sub-state entities such as regions, the 'people' themselves, as well as intermediate and representative associations such as NGOs, trade unions and firms.

Accordingly, in Section II of the article I shall set constitutional approaches to the European Union against the backdrop of the central strands of thinking on constitutionalism more generally, identifying some of the principal weaknesses in current approaches. In Section III, I broaden the debate by interrogating briefly the nature of 'postnationalism', highlighting how this concept throws open many established categories and schemes of thinking. In Section IV I bring constitutionalism and postnationalism together by examining approaches to constitutionalism as process and as the accommodation of diversity in contested and divided communities including the European Union. Finally, in Section V I bring the argument to a conclusion highlighting the possibilities and limitations of a procedural approach to constitutionalism.

II Constitution and constitutionalism in the European Union

Joseph Weiler is celebrated for noting that 'Europe' has developed 'a constitution without constitutionalism' (Weiler, 1995: 220). Building on this comment, Michelle

constitutionalism within a tradition of (reformed) legal positivism has emerged in a context specifically informed by the multilevel and pluralist challenge of European Union governance and Cathy Richmond, whose work on the EU legal order as system begins with, but goes beyond, the jurisprudential challenge of Hans Kelsen (Richmond, 1997).

Everson (1998b: 408) critiques traditional approaches to the task of constitutionalising the European Union legal order which rely too heavily upon the

‘traditional comparative tools of constitutional analysis, trawling through existing ‘black-letter’ constitutions in an endeavour to identify the formal constitutional mechanisms which might aid them in overcoming the immediate apparent problems of European integration...’

Constitutionalism, then, is troubling to the EU.

But for many scholars of the EU the trouble with many standard versions of the concept of constitutionalism is that they often beg as many questions as they answer. For example, from a normative perspective, constitutionalism is said to about ‘the political/philosophical theories of social and private ordering underlying the law of the constitution’ (Everson, 1998b: 389). In similar terms, constitutionalism is termed ‘the set of beliefs associated with constitutional government’ (Walker, 1996: 267) or ‘the set of ideas and principles which form the common basis of the rich variety of constitutions which we find in many countries of the world’ (Preuß, 1996: 12). More precisely, it has been defined as

‘the creed according to which political power ought only to be exercised under constitutional provisions and subject to constitutional restrictions, where such restrictions include a separation of powers and its corollaries, effective checks and controls among the branches of government, security at least of the rights allowed for by the theory of constitutionally derivative rights’ (MacCormick, 1993b: 135).

A similar definition comes from Rosenfeld (1994: 3:

‘in the broadest terms, modern constitutionalism requires imposing limits on the power of government, adherence to the rule of law, and the protection of fundamental rights.’

Constitutionalism is, of course, as contested as it is closely studied. So, like the concept of citizenship, it can be imbued with quite different meanings and functions depending upon the underlying world view of the commentator. Thus, for example, constitutions can be seen through liberal lenses as the expression of individual freedom and, implicitly, the degree of order necessary to achieve and protect that freedom. In contrast, communitarian lenses render the constitution the instrument of societal organisation for the common good. Yet a third set of lenses, often donned in conjunction with one or other of the first two sets, those of the nationalist, sees the constitution as the expression of a national ideal or consciousness.

However, there are other ways to ‘cut’ the concept of constitutionalism. Especially when understood in a legal sense, constitutions also have an institutional dimension. They are the basic rules of design of a society; according to Ivo Duchaeck they constitute the ‘power map’ (Duchaeck, 1973: 3 quoted in Banting and Simeon, 1985a: 3), including the framework for government and a body of rights operating according to the rule of law. The constitution may be seen as the means for protecting rights against the possibilities of unjust majoritarianism. Ronald Dworkin (1995: 1) aptly

suggests that constitutionalism is less about majoritarianism as such than about *legitimate* majority rule. Alternatively, constitutionalism may be driven primarily by a republican concern for the form of society and the form of politics and government. Constitutionalism is not, however, just about institutions and structures, but also about ideas and values – ‘the basic ideas, principles and values of a polity which aspires to give its members a share in government’ (Preuß, 1996: 12). In other words, to use the example of democracy, if a constitution provides for a structure of popular participation, for example through elections, then it does so for a particular reason because of the value which a given society ascribes to democracy (i.e. government by the people). It does so because this is linked to the need for social legitimacy and the acceptance of a given order by ‘the people’.

Political and legal science offer yet other ways of understanding constitutions and constitutionalism. There is, for example, the ‘rationalist’ notion of the link between constitutionalism and societal bargains. This is perhaps most classically expressed by Robert Dahl, who argued that ‘constitutional rules are not crucial, independent factors in maintaining democracy’. Nor are they from this perspective important as ‘guarantors of either government by majorities or of the liberty from majority tyranny’ (Dahl, 1956: 137). Instead ‘constitutional rules are important in determining the bargaining advantages of groups within the political process’ (Cohen and Fung, 1996: xlv). Similarly functional is the view of written constitutions emerging from the theory of autopoietic social systems; it sees constitutions as mechanisms of structural couplings of the legal and political systems, which lead to increased autonomy within the legal system through the internal control of legal change (e.g. judicial review) and more limited autonomy in political systems by restricting political choices (Luhmann, 1990, 1993: 468-481).

Yet when scholarship on the EU begins to engage with constitutionalism, it is evident that the literature frequently slips between three distinct levels of analysis influenced by different strands of constitutional thinking:⁶ the discussion of aspects of the ‘European Union Constitution’ as empirical fact; the articulation, within a normative project, of the *desiderata* of a constitution for the European Union as legal, political and economic integration project; and the use of political theories of constitutionalism (particularly in their liberal and communitarian guises, and less often in the guise of (neo-)republicanism) to analyse the politics, practices and institutions of the European Union especially in comparison to nation states. Each of these three levels of discussion poses distinct challenges, but represents an inadequate starting or ending point for the discussion.

Unlike the study of constitutionalism in the United States, there is no firm empirical base such as a European Union equivalent to the American constitution which would serve as point of departure for any analysis. The Court of Justice might call the EC treaties the Communities’ ‘constitutional charter’,⁷ and indeed the EU legal order as a whole may operate in many respects in a manner which is recognisably ‘constitutional’ (e.g. acceptance of the rule of law; a discourse and practice of legal

⁶ For examples of work on EU constitutionalism from the fields of law and political theory see: Weiler, 1995, 1996, 1997; Walker, 1996; Weale and Nentwich, 1998; Bellamy and Castiglione, 1996; Eleftheriadis, 1996, 1998; Snyder, 1998.

⁷ See Case 294/83 *Parti Ecologiste ‘Les Verts’ v. European Parliament* [1986] ECR 1339; Opinion 1/91 *Re the Draft Agreement on a European Economic Area* [1991] ECR I-6079.

rights; allocation of competences to different institutions and different levels; emergent conceptions of citizenship rights and relations, etc.). In fact, what constitutional framework does exist actually comprises a wider variety of sources than those posited by the Court, including not only the founding treaties and the Court's own case law, but also other forms of institutional practice including legislation and measures akin to constitutional conventions which govern the conduct of the Member States and the Union institutions themselves. Moreover, clear aspects of an economic constitution, through the creation and regulation of the single market and the recent arrival of economic and monetary union based on the institutional core of an independent central bank are visible (Sauter, 1997). Finally, at the level of political capacity and accountability, the Union's treaties are now peppered with references – some of a more or less rhetorical nature – to rights, democracy, liberty, citizenship, and so on.

Yet despite these features, I would argue that overall this conception of the EU legal system as constitution lacks the degree of clarity in relation to its external or internal contours as well as the degree of coherence, consistency or completeness which one would normally associate with 'a' constitution in the classic sense. The framework is looser and much less clear than the Court has (for rhetorical purposes?) suggested. The Court does not consistently track either an integrationist or a disintegrationist *telos*, but is subject to a number of varying political influences from within and without the Union (de Búrca, 1998; Shaw, 1996). For example, it has not always adopted an expansionist vision of the European Community's external powers, and in the field of internal market law it has, in the 1990s, adopted a more nuanced approach to the balance between liberalisation promoted through uniform regulation at EU level and local diversity of regulatory conditions.

In addition, there is a deeply ambiguous relationship between the European Union and notions of 'stateness' (*Staatlichkeit*) and related questions of nation, *demos*, and *ethnos*. In formal terms, the first level at which the EU operates is between the (Member) States as an entity based on international treaties; moreover, it is not, and is probably never likely to be, a state – at least in the conventional sense. Yet that statement underestimates the extent to which the Member States have – internally as well as in their external relationships – been 'europeanised' at all levels through membership and its legal, political and socio-economic consequences. However, these governance processes, under which the Member States are tied in so many ways, to adopting a 'European' *modus operandi* and participating in a radically new practice of polity-formation, are not anchored in any of the conventional forms or symbols of legitimacy, through notions of political or pre-political community. At the political level, this lack of anchorage often manifests itself in forms of Euro-scepticism, sometimes also coupled by a strong reaction against the allegedly expansionist tendencies of the Court of Justice (Hartley, 1999).

It is the combination of the lack of an empirical base and the uncertainty generated by the European Union's relationship with the paradigm of stateness which often make it difficult to establish a clear and secure terrain in which discussion framed in terms of constitutionalism can be seen as a useful part of political and legal theorising on the EU; on the contrary, much work slips too easily from the descriptive to the normative register of 'Europe needs (or does not need) a constitution'.

Alongside the three levels of analysis, there are also three distinctive substantive concerns which have dominated much writing and thinking about the EU and its 'constitution': issues of sovereignty, and the authority of Community law; the questions of government and governance; and the debate about rights in the EU. In many instances, the scholarly debate – especially but not solely in the field of legal studies – has been led by discussions of the way in which the Court of Justice has developed the legal order of the EU as the cornerstone of constitutional development, in relation to both the Treaties as 'constitution' and the evolving competence structure of the EU. So for example, the constitutionalism debate has been led at many junctures by the debate entitled 'the constitutionalisation of the treaties.' In reality, this is the sovereignty debate: the Court of Justice's creation of a 'supreme' EU legal order, taking effect within the national legal orders and empowering national courts as 'Community courts'. In other words, the first conceptualisation of constitutionalism in the European Communities came through the prism of sovereignty and legal power. Likewise, much of the debate over governance has been dominated – from many scholars' perspectives – by the debate over the Court of Justice's policing of interinstitutional relationships, rather than by constructive consideration of the link between governance and forms of (postnational) democracy. And finally, what 'rights debate' has existed in the EU context has been dominated by the concern that EC law almost by definition creates individual rights in the national context, which national courts must protect. In other words, it is another version of the story of EC law dominated by the constitutionalisation of the Treaties. It has been less concerned to identify and critique the precise content of those rights which have, hitherto, been predominantly market-oriented, or to allow a sceptical perspective on the very notion of rights in a postnational legal order.

Thus each of these three substantive concerns regarding EU constitutionalism has been notably undertheorised by reference even to standard accounts of constitutionalism, still less by reference to a reworked notion of constitutionalism which takes into account the *sui generis* nature of the Union. Yet where attempts have been made to link constitutional reality and constitutional theory, the point has been well made by writers such as Richard Bellamy and Dario Castiglione (1996b: 2) that:

'[t]he European Union has highlighted the inadequacies of certain key concepts of constitutional and democratic thought outside the context of relatively homogeneous nation states, such as the sovereignty of the people and the link between citizenship and rights.'

Such attempts to match theory and reality have quickly demonstrated that constitutionalist ideas and thinking are not capable of simple transmission to the supranational level, without a full consideration of how many of the conditions underpinning them at national level are changed by the shift in register. These are important difficulties which go beyond the question of finding the right version of the standard theory, and these difficulties have so far been insufficiently addressed in the literature on constitutionalism. This article also seeks to demonstrate that, however important, the difficulties revealed by Bellamy and Castiglione's comment are only the beginning of the challenge posed in relation to the development of postnational constitutionalism. In making the argument, I hold that, despite the difficulties already encountered and likely to be encountered in the future with the normative position which speaks in favour of some form of European Union constitutionalism, it is

possible to derive from the languages and ideas of constitutionalism tentative responses to some of the enduring conundrums posed by the European Union. This admittedly normative argument is strongest when constitutionalism is articulated by reference to certain conceptions of 'common constitutionalism' and constitutionalism as intercultural dialogue (Tully, 1995). This allows us to confront the question: if the EU is indeed more than an international organisation but less than a state, how is it to proceed in terms of political organisation? It simply begs the question to describe the EU as an emergent postnational non-state polity. That does not solve any of the crucial questions of political power and responsibility, or indeed settle conflicts of legal hierarchy. Constitutionalism in its modern guise cannot on its own provide the answers, and leaves untouched the key questions because it is impossible to make in the EU context many of the assumptions about notions of political community which implicitly drive much liberal or communitarian political theory. The challenge for the EU is that of capturing the essence of postnationalism, and combining it with understanding the process of building a new kind of polity which is based on the existing diversity of the Member States. This is the challenge of building a link between integration and constitutionalism.

The particular focus on constitutionalism in this article is thus not with reworking and applying standard liberal or communitarian accounts. Rather it is with the essential preliminary question of considering the relevance for the EU of the dialogic character of constitutionalism and constitutions as process, and as a framework within which differences and similarities between social groups are uncovered, negotiated and resolved. This is vital in a polity such as the EU where the very social basis of the polity remains highly contested and very fluid (and the geographical boundaries themselves likewise remain unresolved as enlargement negotiations continue). Thus closest attention will be paid to 'the proper role of constitutions and constitutionalism in forging a fruitful interplay between the reinforcement of identity and the preservation of diversity' (Rosenfeld, 1994: 3). The argument constructed in this article builds upon earlier work in related fields by constitutional scholars and legal theorists, in particular James Tully, Zenon Bańkowski and Emiliios Christodoulidis. However, there are also clear links to arguments developed by scholars of discourse and deliberative theories of democracy and ethics such as Jürgen Habermas and Seyla Benhabib, communitarians such as Charles Taylor, cosmopolitans such as Andrew Linklater, liberals such as Rawls and those whose work sits at the cusp of liberalism and republicanism, and of communitarianism and cosmopolitanism, notably Richard Bellamy and Dario Castiglione.

III The postnational dimension

Before engaging with the task of recovering the discourse and practices constitutionalism for the European Union, it is essential to enquire more closely into the 'postnational' setting of the EU, in order that we can begin to see what a concept of postnational constitutionalism might involve.

To speak of *postnationalism* would be to pose, it appears, first and foremost a direct challenge to nationalism. Postnationalism may be seen as the denial of nationalism, or, perhaps more appropriately, as the attempt to recover and rethink some of the core values of nationalism as lending meaning to a particular community with shared practices and institutions, without the necessary institutional baggage or ideological

weight of the modern (nation) state or a negative sense of nationalism as exclusion.⁸ For Deidre Curtin (1997: 51), for example, the term 'postnational' 'expresses the idea that the link implied by nationalism between cultural integration and political integration can be prised open'. Postnationalism articulates an idea of change and transformation in relation to the nation state (change *of* or *to* the nation state; change at the supra- or sub-state level *because of* changes in the nation state), and not merely an alternative use of its political forms and cultural signifiers such as identities or legal orders in another *international*, *transnational* or even *subnational* context.

It seems useful, however, to distinguish a number of different elements or dimensions of postnationalism. The first concerns the institutional dimension of handling and managing power in a world where states are highly interdependent and are not the only *loci* and *foci* of political activity and processes. In particular, there exists an increasingly global economy, which demands institutional innovation in response to novel problems of control. In the context of the EU, part of that institutional dimension (which in itself also has a substantial market management dimension) may be reflected by a shift – perhaps semantic only or perhaps reflecting a deeper change in the conceptualisation of political and legal forms – from presenting what is studied by scholars as concerned with the 'integration of states', towards an emphasis on studying the governance of an 'emerging non-state polity'. Increasingly, ideas such as Philippe Schmitter's (1996) *condominio* as a future form for the 'Euro-polity' or the suggestions based on consociationalism and related ideas put forward by writers such as Dimitris Chrysochoou (1997; also Gabel, 1998) represent the basis for creative thinking about the institutional demands of and possibilities for such a 'postnational' polity.

However, the institutional dimension – while essential when thinking constructively about the uses of postnationalism – is not alone. There exists also a dimension to postnationalism which relates to the nature and structure of communities and the reflection that, in respect to questions of attribution, identity and affinity, issues of political community should more accurately be described in plural rather than singular terms, with the increasing emergence or re-emergence of local, linguistic or cultural, regional, national and even supra-state identities, in each case outside the formal framework of the state (Breton, 1995). Furthermore, one should not neglect the geographical dimension of postnationalism, where writers have argued that the conceptualisation of space needs to be described in terms of shifting non-state territorialities (Anderson, 1996). A closely related turn can be discerned in some international relations scholarship (Ferguson and Mansbach, 1996).

Law has a complex relationship with postnationalism, which goes beyond the conventional link drawn between legal authority and nation states. For example, some would argue that there are strict *limits* to legal postnationalism. There remains an unresolved debate between conceptions of the EU and national legal orders as binary opposites in which one but not both can be sovereign (which in turn are linked to acute challenges to European Union constitutionalism – or more precisely the authority of European Community law – such as that of the German Federal

⁸ In that sense it is close to the concept of 'supranationalism' developed extensively by Joseph Weiler, which paradoxically sees the development of the EU as an integral part of the 'national project' within Europe; for a summary, see Weiler, 1998.

Constitutional Court in its decision on the Treaty of Maastricht⁹) and more pluralist conceptions of law. A pluralist idea of law sees it as a 'complex of overlapping, interpenetrating or intersecting normative systems or regimes, *amongst which relations of authority are unstable, unclear, contested, or in the course of negotiation*' (Cotterrell, 1998b: 381; emphasis in the original). Under the latter conception, the possibilities of non-state law admitting of flexible architectures which express the nature of sovereignty in different and non-binary ways have been explored by writers including Neil MacCormick and Zenon Bańkowski (MacCormick, 1997, Bańkowski, 1994; Bańkowski and Scott, 1996; see also Walker, 1998, Richmond, 1997 and Maher, 1998). If legal orders can be overlapping and do not stand in a hierarchy or an arrangement which is either strict or fixed, then it is possible to see the EU as an entity of 'interlocking normative spheres'; what is significant is that no particular sphere is seen as privileged or predominant.

Even more radically, the European Union can be seen as one element of what Gunther Teubner calls 'global Bukowina', a conception of 'legal pluralism within emerging world society' (Teubner, 1997a; Maher, 1998). Teubner dubs the central thesis of this trend of work the argument that 'globalization of law creates a multitude of decentred law-making processes in various sectors of civil society, independently of nation-states' (Teubner, 1997c: xiii). What is termed *lex mercatoria* – the law of international commercial transactions – is the most advanced manifestation of this phenomenon of *global* rather than *international* law. However, aspects of the phenomenon can be found in relation to the regulation of multinational enterprises, aspects of legal and other professional practice, labour law and the protection of human rights with the increasing role of non-state actors. Since Teubner specifically distinguishes this phenomenon from (official) international politics and international law (*between* states rather than within the emerging world society), this version of postnationalism should be distinguished from a version of liberal internationalism, theorised by international lawyers such as Anne-Marie Slaughter (Slaughter, 1995; Helfer and Slaughter, 1997) and based on an argument about 'civil' behaviour of nation states accepting the international rule of law. This is strongest in relation to international trade law (the emergence of the World Trade Organisation and the pre-eminence of GATT (Petersmann, 1995)) and to a certain extent in relation to international human rights law (the war crimes endeavours of the United Nations and national reactions such as the House of Lords (initial) judgment in the *Pinochet* case¹⁰). However, as Teubner (1997a: 3) suggests, it is easy to be cynical and to view this form of legal postnationalism as another version of American (political, military and moral) hegemony.

It is possible that some of the difficulties in resolving all these opposing views on law and postnationalism may stem from the ambiguities attendant in much thinking which invokes the concepts of sovereignty (Walker, 1998). There is also an unfortunate bifurcation (Himsworth, 1996) between legal scholarship which observes the transformation of the state from a sovereignty-based perspective (MacCormick, 1993a) and scholarship in political science, international relations, and political

⁹ *Brunner* [1994] 1 CMLR 57. For an extended treatment largely accepting these premises as the starting point for analysis, see Eleftheriadis, 1998.

¹⁰ *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ungarte* [1998] 4 All ER 897.

economy which observes the 'decline' of the nation state in the face of economic and cultural globalisation (Tsoukalis and Rhodes, 1997; Axtmann, 1998).

In sum, it must be concluded that postnationalism is neither a fixed or defined concept within academic writing and thinking, nor a certain and empirically observable phenomenon of law or politics. For the purposes of this essay, therefore, it will be defined dispositively as an open-textured concept used to express many of the dynamic and *sui generis* elements of the European Union as *integration* project involving the *process* of polity formation and in particular constitutional processes. It is precisely these elements which reinforce that, as a political and legal entity, it does not merely replicate the states out of which it first emerged and to which it remains indissolubly linked, but is sustained by a separate logic. Indeed, the institutional and constitutional processes of polity-formation demand to be understood on their own terms, but in a way which respects the diversity of the Member States themselves. It suggests the need for a perspective which captures precisely the indeterminacy of the political community which is implicated by the constitutional settlement in the EU and the complexity of its institutional arrangements. We need a perspective which allows for the definition and redefinition of community as the process of constitutional settlement continues. We turn now to seek such a perspective.

IV Constitutionalism, postnationalism and the accommodation of diversity

There is a well-established inclination in EU studies to assert that issues of process are the key to understanding EU constitutionalism. That point has been well made by a number of writers, such as Dario Castiglione (1995: 74), who argues that

'if the European polity suffers from a 'constitutional deficit', this needs to be addressed not simply by discussing the contents of a constitution for Europe, but also the political process through which such a constitution must be put in place. The forms of such a process do not just depend on expediency and particular circumstances, they can be the subject of principled discussion and of imaginative political psychology.'

Similarly, Luigi Ferrajoli (1996: 157) brings the question of process to the fore, using the concept of constitutional patriotism developed in the German context originally by Jürgen Habermas (Habermas, 1996: 491-515) and subsequently applied to the EU:

'The sole democratic foundation of the unity and cohesion of a political system is its constitution, and the type of allegiance it alone can generate – the so-called 'constitutional patriotism'. For this very reason, it seems to me that the future of Europe as a political entity depends to a great extent on developing a constituent process open to public debate, aimed at framing a *European constitution*' (emphasis in original).

These are examples of pragmatic criticisms of the absence of a sustained debate on constitutionalism within the EU, doubtless because of the lack of a 'European' public space, sphere, opinion, *polis*, *demos*, or whatever, pointing along the way to all manner of gaps and deficits. That observation has been widely made – and could perhaps be restated as the mathematical perspective of seeing the 'European

constitution' as a vector, rather than as a point.¹¹ It is a different matter entirely to link this observation to a theorization of constitutional politics or to develop from this a perspective upon the role of law. In what follows, I shall examine some work which has, in my view, uncovered the key problems and suggested some useful avenues for further enquiry.

We begin with James Tully's frontal assault on modern constitutionalism and underlying positions of liberal political philosophy (Tully, 1995). The essence of Tully's challenge is a rejection of many of the premises of modern constitutionalism which focus essentially on the importance of the separation of powers, legitimate government, the protection of rights, and the operation of institutions under the rule of law. In stark contrast, Tully asserts that argument must begin by positing constitutionalism as a discursive process. For him (1995: 30):

'A constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with three conventions of mutual recognition, consent and cultural continuity.'

Tully's argument concentrates for the most part on presenting how the traditions of 'modern' constitutionalism have undermined the position of indigenous peoples, and ignored the voices of intercultural minorities and women. However, the frame within which it is developed includes the challenges of supranational association as just one of the six sets of claims for cultural recognition 'which gather together the broad and various political activities which jointly call cultural diversity into question as a characteristic constitutional problem of our time' (Tully, 1995: 1-2).¹² He argues that these challenges demand an alternative mode of understanding and doing constitutional politics and it is my contention that the type of analysis employed by Tully is relevant and useful in the European Union context.

Tully's argument is based on a very strong critique of modern constitutionalism as fostering imperialistic cultural practices. In societies composed of diverse groups, dominant groups engaging with the traditions of modern constitutionalism seek to 'assimilate, integrate or transcend' differences, rather than to 'recognise and affirm' cultural diversity (1995: 44). This is because the practice is driven by the unexamined conventions and traditions of modern constitutionalism, which crucially include an assumption that there is a single comprehensive form of constitutional dialogue, and by theories of 'progress' which associate the ancient with the irregular and the modern with the uniform. Such practices, conventions and traditions quickly lose sight of many historical and cultural continuities or the meaning of real 'consent'. Constitutional moments thus occur which constitute – typically – nations out of a

¹¹ I owe this point to Daniel Farber.

¹² The six examples of the politics of cultural recognition are: claims of nationalist movements to be constitutionally recognised as independent nation states or as autonomous political associations within federal systems; pressures to recognise and accommodate supranational associations such as NAFTA and the EU; the claims of longstanding linguistic and ethnic minorities to constitutional recognition; the claims of 'intercultural' minorities, such as immigrants, refugees and exiles; the demands of feminist movements for recognition and women's struggles for autonomy within politics; the demands of Aboriginal or Indigenous peoples for recognition and accommodation of their diverse cultures, governments and environmental practices.

society of individuals presumed to be both equal and in a state of nature, yet bound together by some implicit common good (1995: 62-70). These types of dialogues are in truth more monological in character. For as Tully argues (1995: 131):

‘The presupposition of shared, implicit norms is manifestly false...in any case of a culturally diverse society. Also, the aim of negotiations over cultural recognition is not to reach agreement on universal principles and institutions, but to bring negotiators to recognise their differences and similarities, so that they can reach agreement on a form of association that accommodates their differences in appropriate institutions and their similarities in shared institutions.’

In his detailed case studies – which are both historical and contemporary in nature – Tully finds examples of practices predicated on these principles of what he calls ‘common constitutionalism’ (mutual recognition, consent and cultural continuity). Equally, he observes how badly ‘modern constitutionalism’, based on the foundational paradigms of liberal and communitarian political theory, spiced by a heady dose of nationalism, has served the indigenous inhabitants of North America during the longrunning periods of constitutionalisation of the nation states of the United States and Canada. In many cases, such constitutional practices have been used to legitimate wholesale genocide.

The vehemence of Tully’s argument has, naturally, attracted comment and criticism. William Scheuerman (1997), in a review essay, rejects his characterisation of liberalism particularly in regard to the (mis)reading of classic sources. There are, in addition, accounts of the accommodation of difference and multiculturalism within liberalism to which Tully could, perhaps, lend greater credence (e.g. Kymlicka, 1991). Kymlicka’s approach specifically endorses a developed notion of community within liberalism which means that his practical approaches (and, indeed, his refusal to make outright prescriptions) find him not so distant from Tully (Kymlicka, 1996). Hence, for these purposes, the interest of Tully’s work lies less in his attacks upon modern constitutionalism or liberalism, but more in the urgency with which he seeks to prise upon the very notion of constitutionalism, and the methods he applies to this end.

The details of Tully’s alternative mode of constitution-building (common constitutionalism) are derived from critical concepts of understanding, definition and description drawn from the philosophy and philosophical practices of Ludwig Wittgenstein. He summarises it thus (1995: 111):

‘Wittgenstein’s philosophy is an alternative worldview to the one that informs modern constitutionalism. First, contrary to the imperial concept of understanding in modern constitutionalism...it provides a way of understanding others that does not entail comprehending what they say within one’s own language of redescription, for this is now seen for what it is: one heuristic description of examples among others; one interlocution among others in the dialogue of humankind. Second it furnishes a philosophical account of the way in which exchanges of views in intercultural dialogues nurture the attitude of ‘diversity awareness’ by enabling the interlocutors to regard cases differently and change their way of looking at things.

Finally, it is a view of how understanding occurs in the real world of overlapping, interacting and negotiated cultural diversity in which we speak, act and associate together.'

Crucially, Wittgenstein's *Philosophical Investigations*, from which Tully draws the strength of his argument, are themselves dialogic in character. There is more than one voice, since any use of a general term – such as those which permeate the language of contemporary constitutionalism, including rights, citizenship, culture, institutions, justice and so on – is no more, on Wittgenstein's view, than 'one heuristic way of characterising the case in question among others, not a 'preconceived idea to which reality *must* correspond.'" (1995: 110).¹³ As many have observed, the interest and provocation of Wittgenstein lie as much in his way of putting things, its essentially dialogical character, and in his reconfiguration of philosophical method as in what he actually says (Stern, 1996). As Hacker puts it, 'his bequest is a vision of philosophy as the pursuit not of knowledge but of understanding' (Hacker, 1996: 272-3).

Returning to the European Union's constitutional and politico-legal evolution, we can blend these insights with the intellectual framework developed by Bańkowski and Christodoulidis (1998) in a recent article, where they argue for the EU to be understood as an 'essentially contested project'. In an argument which derives its starting point from the investigation of the limits of legal postnationalism using the prisms of sovereignty and legal pluralism, they argue that 'the whole point of trying to describe the EU in terms of 'interlocking normative spheres' is to be able to see the whole system as a continuous process of negotiation and renegotiation; one that does not have to have a single reference point to make it either a stable state system or one that is approaching that end' (1998: 2). It is the archetypal contrast to the strongly teleological 'integration through law' movement, which saw the development of law as self-consciously tracking substantive integrationist outcomes. Rather it is 'essentially contested', both in terms of its end point (it does not have one, or at least not one which is fixed), and in terms of the dialogic processes which underpin its evolution.¹⁴ In focusing upon essential contestability as – to use their example – European identity understood in the process of the renegotiation of different identities which they call the process through which 'we get what we can call Europe' (1998: 348) Bańkowski and Christodoulidis are departing from W.B. Gallie's original notion of the essentially contested concept (see Gallie, 1996; Hurley, 1989: 46). Distinguishing their approach from that of Gallie, they remind us that his notion was intended to demonstrate how two people could disagree substantively about a certain concept and yet agree that some example could be a paradigm for the concept (e.g. democracy, perhaps subsidiarity in the EU context). In the conception worked through by Bańkowski and Christodoulidis, the crucial element is 'doing', not 'being'. In other words, it is *contestation* not *contestability* which is the key. Moreover, it is not achieving some fixed notion of what 'Europe' is to become. Consequently, it is not doing something with a predetermined end, but acknowledging that the end, if there is one at all, is continuously renegotiated through the doing.

¹³ The quotation is from L. Wittgenstein, *Philosophical investigations*, tr. G.E.M. Anscombe, Oxford: Basic Blackwell, 1967, s. 131.

¹⁴ Compare, in conception, Ian Ward's notion of the EU as a 'post-modern polity': Ward, 1996: 173-179.

Bańkowski and Christodoulidis elaborate their ideas by drawing on the theory of autopoietic social systems, reminding us that the concept of a 'European community' (in the sense of a 'people') is a functional term for the purposes of integration. The concept of a people underlying the possibilities of a European Union is used by a system of meaning to effect the structural coupling of different legal and political systems, even though in reality, because there are no shared meanings across the systems (legal and political systems having, for example, fundamentally different views of the 'the people' in a constitution), at most there are 'constructive' mis-readings which allow continuous re-adaptations of systems over time. They conclude that 'the European *demos* is forever caught up in the definition of systems that articulate around it by simultaneously defining and undercutting the privilege of its naming' (1998: 349). However, their approach is not a systems theoretical explanation of the European Union, but a use of systems theory in order to make 'more precise the kind of reflexive and eschatological view' they wish to propound (1998: 354).

Combining these two insights, we begin to see that constitutionalism is not about – in its core – the design of 'good' institutions for a European society or new Euro-polity or the placing of potentially arbitrary power under reasonable restraint. In fact, it is not about 'an' end, or 'the' end, at all. Pragmatically, of course, many people would broadly accept that it is important to ensure that what power is wielded at the EU level is subjected to principles which the Western liberal heritage of democratic constitutionalism would recognise and acknowledge. Thus, a system of judicial review is in place, along with formal acknowledgements of the rule of law, the importance of justice, the separation of powers amongst institutions, and respect for human rights and democracy. The reality of representative democracy is, in fact, much more keenly in question. But little more than 'paper' progress can be made on any of these fronts until the reality of EU-based constitutionalism is fully recognised. Indeed, these reflections may be part of an intellectual enquiry which carries us away from the accepted conventions of liberal democracy as the basis for constitutionalism, perhaps towards the republican notion of democratic liberalism suggested by Bellamy and Castiglione (forthcoming). Their reasoning bears strong parallels to that of Tully, and Bańkowski and Christodoulidis. It is wrong to assume that the body politic can necessarily bring different social groups into balance with each other. Rather, it may be necessary to acknowledge that this equilibrium cannot occur or can only occur after very sustained dialogue. It is important to avoid perceiving or positing a fixed desirable outcome for that dialogue, but rather it should be left 'free form'. They distinguish, significantly, between bargaining on the one hand, and negotiation and argument on the other, with a focus in the latter case on compromise (1998: 20).

These reflections carry us back to Tully's refutation of the assumption of shared values and goals. The accommodation of the diversity which underlies the social, political, economic and legal framework of the EU must not be the attempt to persuade the Member States to adopt a predefined template of 'integration'. Similarly, the pursuit of constitutionalism must not be driven by a set of assumptions about the 'good' constitution. So, Tully reminds us that (1995: 131):

'The presumption of an implicit consensus or a universal goal mis-identifies the *telos* of this type of constitutional dialogue, filtering out the diverse similarities and differences the speakers try to voice. Universality is a

misleading representation of the aims of constitutional dialogue because, as we have repeatedly seen, the world of constitutionalism is not a universe, but a multiverse: it cannot be represented in universal principles or its citizens in universal institutions.’

Constitutionalism, on Tully’s view, is precisely the intercultural dialogue and the process of negotiation and renegotiation (and even contestation), and the only values it should be underpinned by are those of mutual recognition, consent and cultural continuity, Tully’s three conventions of common constitutionalism. This is different to the traditions of modern constitutionalism, which Tully criticises as ‘laying down simplistic concepts of popular sovereignty and constitutional association as premises’ for constitutional dialogue (1995: 131). He also criticises them for their concepts of dialogue in which (1995: 131):

‘the participants aim to reach agreement either on universal principles or on norms implicit in practice and, in both cases, to fashion a constitutional association accordingly.’

Once these misconceptions about the nature of constitutional dialogue are cleared out of the way, it becomes possible to make some preliminary suggestions about what these conventions might signify in the European Union context. Thus, if mutual recognition is more than assimilation and implies a responsibility to listen to others speaking in their own language and not in a dominant language, this brings the unresolved problems of language and translation to the fore in the expanding, multilingual European Union. If consent is indeed very different to coercion, then that raises the question of ‘whose consent’, and demands a review of the nature of participation in EU constitutional processes recognising that the EU implicates not only states but also ‘their’ peoples. And, finally, the notion of cultural continuity recognises that EU constitutionalism is not built in a political, legal or intellectual vacuum, even if the European constitutional ship has to be constantly rebuilt at sea because of the realities of the context in which constitution-building actually occurs.¹⁵ There are the constitutional practices of the Member States, of the EU itself and of other European/international political entities all to be taken into consideration. Each national constitution creates a different ‘gateway’ for the EU legal order. In that sense, EC law has a different constitutional meaning in each legal order, despite the attempts of the Court of Justice to preach the gospel of uniform interpretation and application. Yet disintegration (or non-integration) can be as valuable as integration itself (Shaw, 1996) in the formulation of a constitutional settlement which is more than a simple statement of constitutional principles, but incorporates also subjective elements of values and legitimacy (Snyder, 1998).

V Conclusion

Section IV has dwelt upon the creative and positive dimensions of understanding constitutionalism in process-oriented terms informed by the types of intellectual frameworks used by Tully, Bańkowski and Christodoulidis, as well by Bellamy and Castiglione. Moreover, I argued at the outset for constitutionalism in the European Union to be understood explicitly within its postnational context and that context has been drawn into the analysis throughout. I have attempted to suggest that there are

¹⁵ A useful metaphor which I owe to Neil Walker, in a comment upon an earlier draft.

some useful intellectual avenues of enquiry which avoid the pitfalls of simply assimilating EU constitutionalism to the 'mainstream' of modern constitutionalism – whatever its inspiration. These avenues of enquiry emerge from one reading of constitutionalism, which reflects the need to ensure mutual recognition, consent and the continuity of constitutional practices. In the EU context, a necessary element is the rejection of a fixed teleology of integration – whether towards a federal or intergovernmental goal – in favour of a fluid understanding of postnationalism, coupled with a critical focus on processes of polity formation emerging from the constant negotiation and contestation of interests. Accordingly, approaches to constitutionalism in this spirit may appear strongly attached – perhaps even too strongly – to the spirit of proceduralism (Habermas, 1996) in their focus upon deliberation, discourse and communication. They concentrate less upon formulating answers and more upon opening up 'spaces' of deliberation (Curtin, forthcoming).

This article does not try to suggest either that the procedural approach is free from pitfalls or that it represents the end of the story as far as constitution-building is concerned in either the European Union or any other political space (Scott, 1998). The 'space' for deliberation may be opened up, and that space may in due course be occupied by an emergent civil society, as postulated by Curtin (forthcoming). But a procedural approach alone gives no simple solutions to enduring problems such as ensuring 'inclusiveness' and civility in divided societies. A procedural approach based on the types of principles advanced by Tully may, as I have implied, make it possible to distinguish 'good' debate from 'bad', and legal rules are essential in order to make this a reality. Such rules can, for example, confer legal rights to be heard or rights to information which go beyond the veneer of transparency which currently characterises the EU's approach to this question and gives rise to relationship of clientelism which so often links the EU's institutions with many associations and non-governmental organisations. Likewise, there is civic republicanism's strong attachment to the role of judicial review with the courts embodying a version of public reason. The courts can be employed in the context of a procedural approach to constitution-building to deal with issues as diverse as accession and secession, conflicts between individual and group rights whenever participation within the intercultural dialogue becomes contested, and perhaps most controversially to manage the structures of flexibility and differentiation which are probably both an inevitable and even desirable feature of a large and diverse European Union.

We can pragmatically observe how far the current institutions and procedural frameworks of the European Union diverge from the ideals of participation and representation postulated by writers such as Tully for constitution-building. We can suggest piecemeal improvements, or alternatively adopt a position inimical to any claim on behalf of the EU to be on a constitutional road, insisting instead that its pathway continues to be that of diplomacy not politics, based on an ethics of integration and not (yet) an ethics of participation (Bellamy and Warleigh, 1998). For so long as that is the case, the argument can run, the language of constitutionalism should be eschewed as misleading and unhelpful. The argument sketched in this paper, and the frameworks which the argument implies, are not intended to be an alternative normative and utopian vista for the evolution of the Union. Rather the argument is developed because it is an essential preliminary step, in a constructive analysis of constitutionalism in the postnational forum of the Union, to uncover the

reality of constitutionalism as intercultural dialogue and as contestation between interests.

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