Which Constitution for What Kind of Europe?

Richard Bellamy
University of Essex

rbellamy@essex.ac.uk

January 2003

Which Constitution for What Kind of Europe? Three Models of European Constitutionalism

Richard Bellamy
(University of Essex)

Notes made on presentation EU Governance 16 July

The Convention on the Future of Europe is widely expected to result in a proposal for a written EU constitution. Discussion of the pros and cons of this development tend to focus upon two issues. On the one hand, proponents and opponents of reform seek to legitimate the EU as a 'regime' or form of governance. For example, strengthening the powers of the European Parliament is hoped to improve democratic accountability, while incorporating the Charter of Fundamental Rights of the EU is suggested as a way of enhancing legal integrity and the rule of law. On the other hand, the debate centres on the EU's status as a 'polity' and the degree to which a Constitution might allow a clear demarcation of what is the EU's area of competence and what remains the domain of domestic governments and legal systems. These two issues are inter-related. Yet, neither politicians nor many academics explicitly address the connections between them. Some focus on 'regime' considerations and seek, almost as an afterthought, to tailor them to their preferred view of the EU 'polity'. Others, especially Eurosceptics, treat the very discussion of the EU as having a 'regime' as an undesirable move in the direction of acknowledging it as a 'polity'. In this piece I wish to suggest that both approaches are misguided. Regime and polity interact, with the latter constraining (without determining) the former. I shall explore the three dominant models of constitutionalism to be found within European political discourse. Whilst the first two are the most frequently employed by proponents of constitutional reform, I shall suggest that it is the third that best represents the actually existing EU constitution. Moreover, it has been the key to the successful integration of Europe hitherto precisely because it has allowed both the 'regime' and 'polity' dimensions of the EU to develop in tandem.

Three models of constitutionalism

The three models can be briefly (and somewhat schematically) outlined as follows:

1) The first model can be loosely identified with the French republican tradition of Rousseau and Sieyes. It assumes a sovereign constituent people who are the source of legitimacy and rights. In this account, a sovereign parliament can act as a constituent power, and so is not bound by any constitution. Judges are simply the voice of the law and there is no room for any independent authority, such as a central bank or a supreme court.

2) The second model can be loosely identified with the German tradition of Kelsen. This model assumes a sovereign 'basic norm' consisting of fundamental human rights. This account claims to replace the rule of men with the rule of law. In this model, a Supreme Court is the guardian of the constitution of a relatively inflexible kind.

3) Finally, the third model can be loosely identified with the English 'common law' tradition of the nineteenth and early twentieth century. This model identifies different competencies for the legislature, judiciary and executive. However, it leaves the resolution of conflict between these bodies to negotiation between them. No one of them is sovereign over the others. Nor is there any third party that decides who possesses competence. For example, at least until Mrs Thatcher's period of office and the recent passing of the Human Rights Act, in England the courts as guardians of the common law could challenge the legislative power of parliament by choosing not to apply a law. In these cases, a stand-off exists between the judiciary and the legislature that has to be overcome through negotiation between the two bodies. Likewise, whereas the German and Italian Constitutional Courts follow model 2 and can rule on the constitutionality of the law, the US Supreme Court operates in a common law environment and simply rules on the constitutionality of a given case, thereby leaving the legislature free to interpret the legislative impact of its decision.

'Polity' and 'Regime'

In different ways, models 1 and 2 both treat the EU's 'polity' dimension as settled. The first assumes a culturally homogenous demos, similar to that which the French republican tradition of education has historically endeavoured to create. France notoriously lags behind other member states in the recognition of national minorities, and also adopts more pronouncedly assimilationist policies towards ethnic minorities, even if it has often been more open with regard to immigration. It is perhaps no accident that Giscard d'Estaing should have expressed opposition to Turkey's membership of the EU. For unless a coherent 'people' exist, who share a common identity, it is meaningless to talk of them as a single, sovereign entity. Even with its current membership, though, the EU consists of a Union of the people*s* of Europe. As Eurobarometer polls have consistently shown, a very small percentage of European citizens identify themselves as Europeans. Most view themselves as nationals first and foremost, with their allegiance to the EU being linked to (and to some degree conditional upon) its perceived positive benefits to them as citizens of a member state. In this situation, strengthening a sovereign legislature that aspires to act as a pan-European body could be deeply de-legitimising. It raises a very real danger of majority tyranny and the suppression of minorities.

Perhaps for this reason, most recent efforts have been directed to model 2. Yet, it suffers from similar problems. Much is made of the member states sharing a common liberal democratic set of values. However, this heritage is shared by many non-European countries, such as Canada and the United States, as well as European countries outside the EU, such as Norway and Switzerland. In itself, it cannot resolve the 'polity' aspect of

the EU's constitution. Does this matter? Surely a just regime is a just regime whatever the polity. The problem is that although at a very abstract level a consensus may obtain regarding the desirability of, say, the rights in the European Convention of Human Rights or those in the new Charter of Fundamental Rights, considerable dissent exists over how these rights apply to particular circumstances, should be balanced against each other, or how and by whom they should be implemented. As I noted in presenting the three models, the member states possess different constitutional and political cultures that lead them to view the source, subjects and scope of rights differently. For example, some traditions give protection to cultural and especially language rights, others do not. Some include a reference to a right to privacy that restricts freedom of speech more than in other countries. These sorts of difference have figured in a number of clashes between the European Court of Justice and the constitutional courts of the member states. Thus, the German and Italian constitutional courts in particular have wanted to reserve their right to adjudicate on both questions of conflict between community measures and fundamental rights of their respective constitutional orders. They have also reserved the right, albeit with qualifications, to decide on the question of the competence between national and community law (for their latest pronouncements on this issue see Bananas Decision of 7 June 2000 and *Fragd* respectively). In these cases, they have wanted to prevent the EU's regime going beyond what they deem to be its polity competence. It is not that the Member States do not share the general aspirations of a liberal democratic regime, but they interpret them slightly differently and most crucially believe the legitimate polity within which the task of interpretation should occur is the national level. It is sometimes objected that one can have a clear demarcation between the European and national level. But this belief is naïve in the extreme. European law has been shown time and again to have knock on effects for huge amounts of domestic legislation – often rightly so. What has not been accepted, is the ECJ's claims to supremacy. Indeed, from the perspective of the third model – which has *de facto* operated with the EU thus far, such claims are viewed as illegitimate and at times even a threat to rights.

The key to the third model is a 'mixed' regime that not only separates power by dividing functions but also balances power between different groups of people and constituencies. Within the EU, for example, there is not only a separation of decision-making powers between the council of ministers, the commission and the European parliament, these bodies also represent different perspectives on the EU – namely, intergovernmental, supranational and an emerging transnational view (although national perspectives also prevail in the EP). This division is similarly present in the legal dialogue between the European Court of Justice and national constitutional courts. Despite the monist view of its supremacy asserted by the ECJ in *Simmenthal* and *International Handelsgesellschaft* cases, EU law is to a large degree multi-dimensional, with most member state courts locating EU law within the domestic legal order. Tacitly, the ECJ has often had to accept this state of affairs. As a result, both national legal orders and the EU legal order have engaged in a process of mutual understanding and accommodation. As with EU decision-making more generally, this process has not led to agreement only being possible on a lowest common denominator. On the contrary, it has legitimated a general

raising of common standards and a deepening of integration. It was, for example, challenges by the German and Italian courts which obliged the ECJ explicitly to incorporate human rights considerations into its jurisprudence. Moreover, it did so by reference to a wide range of documents – from the European convention and other international charters, to the bills of rights found in many of the member states. The result has been a deep and nuanced jurisprudence that has obliged both the ECJ and national courts to have a fuller appreciation of the concerns of different traditions. Thus, the EU regime and polity have both reflected and to some degree developed through the interaction with and between the polities and regimes of the member states. The 'mixed' character of the EU's polity as national, supranational and transnational, is echoed in the mixed character of its regime.

Conclusion

The Convention on the Future of Europe, like the convention of the Charter of Fundamental Rights, is often justified on the grounds that current arrangements are too mixed to either produce coherent policies or be comprehensible to ordinary citizens. Against this charge, one has to put the extraordinarily dynamic character of the EU, which has shown no let up over the past few years. Moreover, this enhanced integration has gone together with a wide acceptance of the rule of European law. There is a danger that the adoption of either model 1 or 2, or some mix between them, will at best fix the EU at its current stage of development and at worst delegitimise some of the gains already made and many that might be achieved in the future. The reason rests on their being in each case forms of regime that demand far greater advances in the EU 'polity' than is desired by either the vast majority of citizens or politicians. In the particular, the general favouring of model 2 by the latter is in large part because they believe – I think misguidedly – that this will be the best way to entrench the prerogatives of the member states within the EU constitution. In sum, the convention is unnecessary and premature, it will entrench many of the worst aspects of the EU while undermining many of the best – not least its capacity for the flexible development of an EU polity and regime that respects the diversity of its constituent parts and enables each deepening and widening of the Union to advance with the consent of the peoples of Europe.