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Post-National Constitutionalism and  
the Problem of Translation

Neil Walker  
European University Institute

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**Program in the History and Theory of International Law**

**Directors:** Benedict Kingsbury and Martti Koskenniemi

**Institute for International Law and Justice**

New York University School of Law

40 Washington Square South, VH 314

New York, NY 10012

Website: [www.iilj.org](http://www.iilj.org)

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## Postnational Constitutionalism and the Problem of Translation

Neil Walker

A few years ago Joseph Weiler spoke of the deep-seated "problems of translation"<sup>i</sup> of the core normative concepts of constitutionalism from the state to the European Union setting and by inference to other settings beyond the state. As we shall see in due course, the problems of translation are profound indeed, but before we can begin to address them we must pose a prior question. Is it at all legitimate even to attempt to translate the language and normative concerns of constitutionalism from the state to the non-state domain? If it is not, there is no problem that merits, still less requires, our attention. Let us begin, then, with that prior question before proceeding to a substantive examination of issues of constitutional translation. Throughout the discussion the main focus is on the European Union as the most developed site of postnational constitutionalism, but it will hopefully become apparent that the arguments brought forward also apply to non-state sites of 'constitutional' discourse more generally.<sup>ii</sup>

### 1. Why Translation is a Problem Worth Addressing

#### (a) *Talking about Constitutional Talk*

In the diplomatic world of national or transnational ethnic conflict resolution, we have become increasingly familiar with the vocabulary of 'talks about talks'. In South Africa, in the former Yugoslavia, in Israel, in Northern Ireland and in many other places, the development of terms of reference on which polarized parties can agree to engage in substantive talks is increasingly identified -even institutionalized- as a necessary initial stage<sup>iii</sup> in addressing the resolution of conflict. In the domain of postnational constitutionalism, on the other hand, and most evidently in the context of the European Union, we see a strange inversion of this logic. As we shall see, there is much explicit constitutional debate in the European Union context, and now in the post-Laeken Convention on the Future of Europe an institutional framework which facilitates and legitimates that debate.<sup>iv</sup> However beneath the surface of the constitutional debate, as part of its

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<sup>i</sup> J. H. H. Weiler *The Constitution of Europe* (Cambridge, 1999) 270

<sup>ii</sup> Elsewhere, I have begun to try to develop arguments about the relevance of postnational constitutionalism to the WTO. See N. Walker, "The EU and the WTO: Constitutionalism in a New Key" in G de Burca and J. Scott (Des) *The EU and the WTO: Legal and Constitutional Issues* (Oxford: hart, 2001) 31.

<sup>iii</sup> One which, moreover, is always protracted and sometimes insurmountable. See e.g. C. Bell *Peace Agreements and Human Rights* (Oxford: OUP, 2000).

<sup>iv</sup> The possibility of a Convention was anticipated in the Treaty of Nice, Annex IV, Declaration on the Future of the European Union. The Convention was set up by the Laeken Declaration on the Future of the European Union, Annex I to the Conclusions of the Laeken European Council, 14-15 December 2001, SN 300/101 REV 1. It is made up of a chair and two Vice-Chairs, one representative of the government of each Member (15) and Candidate (13) State, two representatives of the national Parliaments of each Member and Candidate State, 16 members of the

often unacknowledged or under-articulated political and intellectual substratum, lies continuing uncertainty and disagreement as to whether and on what terms we should be having the debate at all. In turn, this “first order”<sup>v</sup> debate - may be framed in terms of the general problem of translation.

Those who see constitutionalism as a state-centered idea in terms of its historical elaboration, preconditions of settled political community and symbolic associations (i.e. where there is a Constitution, there should also be a state) would reject the transposition of constitutionalism to non-state contexts as illegitimate, and perhaps impossible. Such a belief,, with its deep roots in the modern Westphalian scheme which sees states as the major or perhaps only co-ordinates on the global political map, has a resilient political and ideological currency, and it is also inscribed in and supported by the traditional division of labour within the study of law. In some parts of the academy, one continues to find an obdurately "defensive internationalism".<sup>vi</sup> This tendency, which seeks to grasp and contain all the transformations of authoritative structures and processes beyond the state within the traditional paradigm of international law,<sup>vii</sup> is premised on the continuing integrity of state sovereignty, and is the external complement and counterpart to internal state constitutionalism. As regards the debate about the proper legal character of the EU, for example, there is a school of thought which emphasizes the continuing role of the states as ‘masters of the treaties’ and which, on that basis, continues to depict the new legal order in terms of a very old international law pedigree.<sup>viii</sup>

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European Parliament and two members of the Commission. In addition, a number of other agencies may attend as observers, and a separate (Civic) Forum may receive information from the Convention and contribute to its debates. Although under Valéry Giscard D'Estaing's forceful leadership, the Convention seized the constitutional baton from the outset, it is worth recalling that its specifically constitutional mandate is slim, restricted to asking whether the tasks of simplification and reorganization with which it was charged "might not lead in the long run to the adoption of a Constitutional text in the Union." It remains to be seen what the Intergovernmental Conference to be convened in 2004 will make of its conclusions, as the IGC's role will be decisive in the authorization of any constitutional document that the Convention might propose.

<sup>v</sup> See N. Walker *European Constitutionalism and the Finalite of Integration* forthcoming in B De Witte (ed) *An Emerging Constitution for Europe?*(Oxford:OUP, 2003).

<sup>vi</sup> N. Walker "The Idea of Constitutional Pluralism" (2002) 65 *Modern Law Review* 317 at 322.

<sup>vii</sup> Although by no means all international lawyers work within this paradigm and reject the idea of terming some of the forms of postnational regulation which may encroach upon the traditional domain of international law as constitutional', any more than all constitutional lawyers work within their traditional paradigm of state constitutional law and refuse the label 'constitutional' to these same forms of postnational regulation because they may stray beyond the state domain.

<sup>viii</sup> See, e.g. A. Pellet, "Les Fondements Juridiques Internationaux du Droit Communautaire," *Collected Courses of the Academy of European Law*, Volume V (1994) , Book 2, 211. See also T. Schilling, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations,"(1996) 17 *Harvard International Law Journal* , 389, together with his "Rejoinder: The Autonomy of the Community Legal Order," (1996)*Harvard Jean Monnet Working Paper Series*; responding to Joseph Weiler's reply to Schilling's earlier article; Weiler, *op. cit.*, n.1, ch.9. This argument is developed in N. Walker *op. cit.* n.6.

For their part, some of those who see constitutionalism as a mobile set of ideas, equally at home in non-state settings as state settings, believe implicitly, and – less commonly explicitly - that there is *no problem* of translation. This assumption manifests itself in both critical and constructive perspectives. In critical vein, as Shaw and Wiener report, the “often invisible touch of stateness”<sup>ix</sup> is apt to compromise understanding of non-state or post-state entities or processes. There is an enduring tendency, as they have observed, to measure many of the supposed normative shortcomings of post-state entities such as “deficits of democracy, legitimacy, accountability, equality and security”<sup>x</sup> in terms of a statist template and against the benchmark of a (real or imagined) statist standard. In constructive vein, too, as the present post-Laeken 'Constitutional' Convention on the Future of Europe demonstrates, many of the background assumption of constitution-building in non-state contexts are drawn from the state tradition. This is as true of the very 'Philadelphian' form of the debate - that it takes place in a Convention, and that the preferred option of that Convention is to write a documentary Constitution<sup>xi</sup> - as it is of its *content* -from Charters of Rights to Madisonian conceptions of the horizontal division and vertical separation of powers. All of this is unsurprising. After all, the vocabulary with which we seek to make normative sense of political entities, including all the key values listed above, even if it does not originate with the modern state, has nonetheless undergone centuries of development and refinement within the context of the state. Unsurprising, but, for reasons developed below, just as unsatisfactory as the attitude that refuses even to contemplate the possibility of translation.

Paradoxically, these opposite attitudes can be mutually reinforcing. The attitude which sees constitutional translation to non-state contexts as illegitimate is in some measure in reaction or response to the claims of those who believe that the form, content and, perhaps status associated with state constitutionalism can be translated literally and without remainder to the non-state setting. If the state constitutional template is suggested, or more frequently, simply assumed as the only available template for postnational settings by those who advocate the constitutionalization of post-state entities, then this may present itself either as a genuine danger or a convenient dystopia to those who continue to see constitutionalism as an exclusive affair of

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<sup>ix</sup> J. Shaw and A. Wiener, “The Paradox of the European Polity” in M. Green Cowles and M. Smith (Des) *State of the European Union 5: Risks, Reform, Resistance and Revival*(Oxford: OUP, 2000).

<sup>x</sup> *ibid.*

<sup>xi</sup> In line with his consistent preference from the outset of the Convention's deliberations to take the constitutional route, Valery Giscard D'Estaing announced on 6th October 2002 that an outline Constitution would be presented to the plenary Convention on 28th October, so seeking to lock any subsequent discussion into an explicitly constitutional frame. See <http://www.EUobserver.com> 7th October 2002.

states. We may also observe a more subtle causal connection running in the opposite direction, between the suspicious disengagement of many skeptics of postnational constitutionalism on the one hand and the insouciant assumptions of those who assume the viability and legitimacy of direct transcription on the other. If, as has been the case in the European debate at least until recently when the momentum behind the constitutional approach has begun to force a strategic rethink on the part of some state constitutionalists,<sup>xii</sup> the skeptics simply fail to participate in the postnational constitutional debate for fear of so dignifying that debate as to legitimate the postnational constitutional process, then the perspective of uncritical transcription may flourish more easily than it would if subject to the detailed interrogation of a critical perspective.

What the mutually reinforcing positions of the postnational constitutional ‘refuseniks’ and the literal translators have in common is a failure fully to *engage* with problems of translation. EU constitutional ‘talk’ may now be *de rigueur* in and around the post- Laeken Convention and, indeed, increasingly in other public, institutional and academic fora,<sup>xiii</sup> but the absence of a sufficiently reflective preliminary phase of ‘talk about constitutional talk’ entails that the legitimacy and coherence of official constitutional discourse rests on insecure foundations.

*(b) The Resilient Value of the Constitutional Frame*

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<sup>xii</sup> The skeptics have begun to come on board with a view to using the European constitution as a way of *limiting* power at the European level. This was the theme of *The Economist* magazine's (4 November 2000), and also of many of the 'Euro-skeptics' present in the Laeken Convention. However, two points should be noted. (1) The attitude of the skeptics remains highly ambivalent, vacillating between general antipathy to a Constitution and acknowledgement that one, and only one, particular type of Constitution may be acceptable. (2) A number of distancing tactics are used, often with the consequence of minimizing active engagement in the debate over the full implications of a Constitutional settlement. So, for example, the attitude of the British Government, *inter alios*, has been one of symbolic trivialization, marked by the frequent interventions of the Foreign Secretary Jack Straw to the effect that since many entities, including golf clubs, have Constitutions, there is nothing of general political significance in the European Union adopting one (see, for example, *The Economist*, 12 October 2002) This attitude fails to acknowledge that the European Union, unlike any golf club with which I am acquainted, is an active geo-political player, implicated like all such active players in the competition for scarce symbolic resources.

<sup>xiii</sup> This is not the place to attempt a detailed history of the development of a specifically European constitutional discourse in the ECJ, the European Parliament and other public and institutional settings, or indeed in the academy. It suffices to say that while many would agree that the secular tendency of the European Union to develop ever more intensive and extensive authoritative claims, powers and institutional structures without developing an adequate normative language to keep pace with these developments meant that, in Weiler's words, by the late 1990s the EU had become “a constitutional order the constitutional theory of which has not been worked out” (*op. cit.* n.1, 8), many would also conclude that the development of a political project of constitutionalization in the post-Laeken Convention has at last allowed the constitutional theory to ‘catch up’. Yet the failure to resolve background questions about the translatability of constitutional thinking to the postnational setting suggests that the constitutional fanfare may be premature. As Maduro says, “[T]he claim by Europe to independent political authority...has never been fully legitimised. Instead we have moved directly into discussing how to legitimate the processes and institutional system through which the power derived from that claim is exercised.” “Where to Look for Legitimacy?” in E.O. Eriksen, J.E. Fossum and A.J. Menendez (eds.) *Constitution Making and Democratic Legitimacy* (Oslo: Arena) ARENA Report No.5/2002. 81; see also N. Walker *op. cit.* n4.

Of course to point to the limitations of exclusive state constitutionalism, or of literal translation, or to the dialogue-chilling consequences of the opposition of these two approaches, does not prove that, even if it is possible, anything of value can be achieved by developing a more general conception of constitutional translation from the state to the post-state context. Many may talk of wanting it, but what, if anything, is the point of translation? A positive answer to this question requires us to demonstrate that there is something of value in our statist constitutional heritage that is worth preserving and applying to the non-state context of political organization. We must show that there is something which flows from the ethic of responsible self-government which lies at the heart of all publicly defensible constitutional discourse which, if transferred to the nonstate setting, is helpful in solving problems of responsible self-government in these settings too, and indeed, in legitimating the solutions it provides. In so doing, we must overcome two objections. One is to the effect that constitutionalism is not just about history of legitimate self-government, but also about the history of *illegitimate* domination –of cloaking illegitimate regimes and the illegitimate acts of sometimes legitimate regimes with the inauthentic robes and mystifying aura of legitimate authority – and that if a positive constitutional legacy is to be retained we have to be able to differentiate between the virtuous promise of constitutionalism and much of what it has delivered. A second objection is to the effect that, as developed below, even if we assume that at least some constitutional discourse consist of good faith attempts to solve problems of responsible self- government, the particular solutions offered are so disparate and so much in mutual tension that it is difficult to find any common heritage on which we might usefully draw.

Patently, these are strong objections. If they are not to be insurmountable objections, our claims for the value of constitutional translation have to be suitably modest. We must concede that constitutionalism translated cannot provide us with the definitive answers to puzzles and conflicts of political organization in the post-state setting any more than constitutionalism untranslated can provide us with definitive answers to puzzles and conflicts of political organization in the state setting. Nevertheless, the constitutional frame of reference may be worth retaining for at least<sup>xiv</sup> two related reasons – reasons that in acknowledging these very limitations of constitutionalism also discern its strengths.

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<sup>xiv</sup> In my view, there is a third sense in which constitutionalism provides an important frame for postnational regulation, namely as an *authoritative* frame. This is a complex and controversial claim that cannot easily be defended in a few paragraphs. Moreover, it is not necessary to defend this claim for the purposes of the present argument, as the case for translation can rest adequately enough on the twin pillars of constitutionalism as a *symbolic* and as a *normative* frame.

In the first place, we must consider the significance of constitutionalism as a symbolic frame of reference. Viewed as a general discursive register rather than a specific set of state-puzzle-solutions, constitutionalism is linked in a powerful and resilient chain of signification to a whole series of *substantive* institutional values – such as democracy, accountability, equality, the separation of powers, the rule of law and fundamental rights, with their strong association to the freedom and well-being of the individual within a framework of collective action and protection, as well as, at the *procedural* level, to the idea that the institutional specification, interpretation and balanced application of these values as an exercise in practical reasoning is a matter of contestation and should accordingly be resolved through forms of deliberation and decision (constitutional Conventions, referenda, constitutional courts, etc.) which satisfy those involved or otherwise affected of their legitimacy.<sup>xv</sup> In this regard, we may think of constitutionalism as a “condensing symbol”,<sup>xvi</sup> a general category of thought and affect through which the concerns and commitments of the community with regard to the establishment and operation of just political institutions for that community are traditionally and commonly made sense of and expressed. It

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Accordingly, I make no attempt here to defend this third argument in detail. Synoptically, the case for viewing constitutionalism as an indispensable authoritative frame in the postnational context depends upon two propositions. In the first place, it depends upon the proposition that we miss something of significance if we try to trace all forms of postnational regulation to state authority sources. Secondly, insofar as state authority sources are not sufficient to ground the various forms of postnational regulation, they are instead grounded in other authoritative sites beyond the state. In the European context at least, this argument can be defended empirically, as it tracks the claims to supremacy actually made by the European Court of Justice; on this see G de Burca "Sovereignty and the Supremacy Doctrine of the European Court of Justice" in N. Walker (forthcoming) *Sovereignty in Transition* (Oxford: Hart). More fundamentally, the argument can also be defended as a necessary feature of the ordering power of law in general. Legal norms may claim legitimacy on various grounds, but these invariably include a claim based on the internal authority of a particular legal order, whose initial claim to authority itself is presented as self-authorizing and so independent of any other authoritative claim. Insofar as constitutionalism is concerned with the presentation and representation of the fundamental norms of the legal order, it provides a necessary register in which this claim of self-authorization rather than simply being assumed, can be articulated, justified and refined. That is to say, for all that many constitutional norms are claimed to be universal (for example, in the area of fundamental rights), and for all that this claim is important for us to make sense of the idea of constitutional translation, part of constitutional discourse is also concerned with the representation of the *particular* authority and ordering power of a distinctive polity or authoritative site. However much we recognize and encourage an outward-looking constitutionalism in which different legal orders seek mutual coherence and recognition and claim an authority or influence for some of the constitutional norms which they validate that transcends their particular legal order, we can only begin to make sense of this process if we recognize, as a fundamental feature of legal epistemology, the existence and reflexive development of identifiable legal *orders*. Or in Hartian language, legal norms must always have a pedigree in a particular legal order with its particular complex of secondary rules of recognition, adjudication and change, the adequate articulation of which secondary rules requires a constitutional discourse. See e.g. H Lindahl "Sovereignty and Representation in the European Union"; N. Walker "Late Sovereignty in the European Union" and N. Walker "Late Sovereignty in the European Union" in N. Walker *Sovereignty in Transition*. See also N. Walker "The Idea of Constitutional Pluralism" *op. cit.* n.6.

<sup>xv</sup> For a development of a sociologically sensitive model of the procedural side of constitutional legitimacy within a context of agonistic discursive democracy, see J. Tully e.g. "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy" 2002 65 *Modern Law Review* 203.

<sup>xvi</sup> V. Turner, *Dramas, Fields and Metaphors: Symbolic Action in Human Society* (Ithaca: Cornell University Press, 1974).



follows that those who wish, from whatever motive or combination of motives, to make a plausible claim for their version of constitutionalism, must at least *be seen to* take these substantive values seriously – so addressing the problem of good faith – and also to be taking the procedural imperative of the deliberative negotiation or resolution of difference seriously – so addressing the problem of the marked disparity of substantive preferences. As Jon Elster points out “hypocrisy can have civilizing effects”,<sup>xvii</sup> and the invocation of constitutionalism, just because of the expectations thus aroused and the constituencies and arguments thus mobilized, tends to structure the ensuing debate between those would claim, challenge or counterclaim its associated symbolic power – and in turn, tends to inform the institutional consequences of that debate - in ways which escape the original intentions of the protagonists.<sup>xviii</sup>

It is the very potency of constitutionalism as a condensing symbol for the problems and aspirations associated with the institutional specification of a viable and legitimate framework for political community, moreover, which accounts for its abstraction from its statist domicile and its increasingly insistent invocation at the postnational level. Earlier we pointed to the current momentum behind constitutional talk at the EU level, and indeed it is the very dangers associated with the premature escalation of such talk against a background of continuing fundamental disagreement over the first order question of whether and to what extent constitutionalism is an appropriate discourse at all at this level which lends such urgency to the present inquiry. Yet the heavy mobilization of constitutional language within the EU context remains an undeniable and telling sociological phenomenon.

But our caution about the spread of constitutional language indicates that it is not enough merely to say that constitutionalism can provide a public and so constraining context of debate in which a number of very general substantive and procedural values are loosely coupled. Alongside the sociological constraints associated with constitutionalism as such a public and consequential exercise in practical reasoning within and concerning the polity, constitutionalism must also provide some epistemological dividend. It must do so both as a way of imposing some kind of tangible discipline on the substantive ‘good faith’ and procedural ‘reasonable engagement’ values and as a way of ensuring that even those prepared to act in good faith and to

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<sup>xvii</sup> J. Elster “Introduction: in *Deliberative Democracy*, J. Elster (ed) (Cambridge, CUP 1997) 14.

<sup>xviii</sup> The “civilizing effect” can operate in both a weak and a strong sense. Weakly, it imposes an external discipline upon those who would use the language of constitutionalism for purely strategic motives. More strongly, the requirement to use constitutional discourse and the acquired habit of engagement of debate in a constitutional register may transform the original motives of the strategic protagonist and lead to the internalization of a substantive and procedural constitutional ethic. See, for example, J. Tully, *op. cit.* n.14.

reasonably engage *inter se* in the sketchily mapped world of post-state governance are able so to do. That is to say, constitutionalism should also provide a normative frame of reference to build on its symbolic power, an ideational framework to justify and civilize its ideological power. It must have some value as a form of knowledge production at the postnational level just as it must have some value as a form of knowledge production at the national level, even if the constraint of modesty in such a contested domain entail that this cannot take the form of providing definitive answers and must instead be limited to the framing of the right questions. This, then, brings us back full circle to the problem of translation. The task of translation of constitutionalism into the postnational context is, in acknowledging the strength of constitutionalism as a powerful and mobile symbolic frame, to vindicate the promise of constitutionalism as a normative frame. The test, then, of the adequacy of any attempt at general translation lies precisely in whether or not it succeeds in elucidating the questions which must inform and animate constitutionalism in its search for a viable and legitimate regulatory framework for political community in postnational settings.

## **2. Addressing the Problem of Translation**

### *(a) The Terms of Translation*

Even for those who are prepared to engage in this task, who do not - willingly or otherwise - submit to fatalism about the prospects of constitutionalism beyond the state, nor follow the treacherously easy path of literal translation, the acknowledgement that translation is a problematical yet feasible and vital task does not readily yield insights which will actively advance the task of translation. To be sure, within constitutional thinking there are many, often ingenious, efforts in specific translation; that is to say, translations of particular concepts - in particular those of democracy<sup>xix</sup> and federalism<sup>xx</sup> - to one particular level of non-state governance (EU, WTO, UN etc). But there has been less progress in developing a general methodological framework in this area. The reasons for this clearly have much to do with particular intellectual priorities and perspectives, but in an echo of the more profound skepticism of those who believe constitutionalism to be inextricably tied to the state, may also have to do with a perception that any such general project is doomed to failure.

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<sup>xix</sup> For a recent example, see P. Schmitter *How to Democratise the European Union ... and Why Bother?* (Lanham: Rowman & Littlefield, 2000).

<sup>xx</sup> For a recent example, see K. Nicolaidis and R. Howse (eds.) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: OUP, 2001).

Perhaps translation of constitutional concepts between different levels and sites of governance *can* only be specific. My sense, however, is that this need not be so, and, indeed, that to the extent that analysis is limited to the particular translation, it will be of limited explanatory and normative value, and will do little to assuage the doubts and fears of the postnational skeptics. In its original sense of *linguistic* translation – or indeed in the rather closer sense of the translatability of legal concepts between different state jurisdictions in comparative law,<sup>xxi</sup> the very idea of good translation involves three things. First, it involves a 'thick' conception of what is to be translated, in the sense of a detailed hermeneutic understanding both of the context in which it was originally embedded and of the new context for which it is destined. Secondly, it involves some non-linguistic or meta-linguistic way of comparing these 'thick' contexts – of working out what is commonly or equivalently signified by these different local signifiers.<sup>xxii</sup>

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<sup>xxi</sup> Many of the problems of translation of constitutional discourse between state and non-state sites find parallels in the traditional discipline of comparative law between state sites to the extent that this too is approached as an exercise in practical reasoning – as the identification of common problems across sites and the translation of optimal solutions. The work of Pierre Legrand is especially noteworthy in this regard in that it contains a powerful critique of the tendency within some comparative work to see translation as unproblematical, but does so from a position which in stark contrast sees translation between differently socially embedded legal *mentalities* as quite impossible. The similarity to the polar opposition in attitudes to translation within the European constitutional debate is striking. See, for example, P. Legrand *Fragments on Law-as-Culture* (Deventer: Willink, 1999). For an exchange of views in the particular context of comparative public law, see P. Legrand, "Public Law, Europeanization and Convergence: Can Comparatists Contribute?" and N. Walker, "Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism" both in P. Beaumont, C. Lyons and N. Walker (eds.) *Convergence and Divergence in European Public Law* (Oxford: Hart, 2002) at 225 and 257 respectively.

<sup>xxii</sup> As a number of commentators on the first draft of this paper pointed out, here we run up against the limitations of the translation metaphor. Much of twentieth century philosophy has been concerned with the critique of what Rorty terms "representationalism" – the combination of (1) the Kantian idea that knowledge must be understood in terms of some relation between what the world offers up to the thinker on the one hand, and the cognitive structures through which the thinker processes these offerings on the other; and (2) the Platonic idea that there must be some form of description of these things that the world offers up which through its privileged ability to discern and map these things counts as a true or accurate or otherwise valid description (see R. Rorty *Philosophy and the Mirror of Nature* (Princeton: University of Princeton Press, 1979, ch.4). We can see a strong critique of one or both of these foundationalist premises in various diverse strands and schools of modern philosophy – for example, in Wittgenstein, in Quine, in Davidson, in Rorty himself – and, indeed, the anti-foundationalist conclusions of such a critique are included within the settled premises of much other influential contemporary philosophy. One manifestation of this critique is Quine's well-known thesis concerning the indeterminacy of translation. If there is no privileged access to the object world but only different theory-dependent and language dependent forms of access, the accuracy of any particular translation from one language to another can never be warranted, and we can end up with radically different and mutually inconsistent but equally plausible (or implausible) translations (see e.g. W. V. Quine *Pursuit of Truth* (Harvard, Harvard University Press, 1990). But of course, we are not here concerned with language *tout court*, but with a particular discourse associated with a specific form of practical reasoning. "Translation" here concerns not whether a speech act which is embedded in the totality of ways a community has of speaking about the world can be rendered meaningful in a speech act which is embedded in the totality of ways another and quite distinct community has of speaking about the world, to which no determinate "yes" can be provided in any particular instance in the absence of a correspondence theory of truth – one relying on an objective world which exists independently of perception which can be accessed and described independently of the source and destination language. Rather, "translation" in this specialist context concerns whether a particular type of applied normative reasoning which does not exhaust the linguistic resources of the user, but which is instead concerned with the circumscribed task of articulating a viable and legitimate regulatory framework of political community at the level of the state can be applied to forms and levels of political community other than the state.

Thirdly, the translation must be plausible to those who are competent in both languages. That is to say, those who can claim membership of both linguistic communities must agree that the method and product of the translation is adequate to capture and convey a similar meaning in the two languages.

So what then, do our conditions of adequate translation require when applied to the specialist normative domain of constitutionalism? They entail, first, that we cannot regard particular concepts in isolation, but must look at the overall constitutional scheme and indeed the deeper context of political opportunity, constraint and motivation in which it is embedded. So, for example, we cannot understand the meaning of democracy within a particular state context unless and until we see how it is elaborated and articulated with other constitutional values - fundamental rights, separation of powers, dispersal of powers etc - in an overall constitutional scheme within that local context, and unless and until we understand how that scheme is in turn informed by underlying social and political forces. Similarly, we cannot begin to conceive of a normatively adequate translation of a particular constitutional value to a postnational setting unless we have an equally rich understanding of its situation within the existing or envisaged overall constitutional scheme and relative to underlying political forces within that destination setting. Secondly, and crucially, our translation manual is deficient unless and until we have a conception of the *constitutionally signified* which is independent of but commonly referred to by or implied by our familiar *constitutional signifiers*. Finally, the common set of general references for the various site-specific constitutional discourses which this provides must be one which is capable of commanding broad agreement as a basis on which we may ask pertinent questions as to the appropriate deployment of constitutional reasoning and the appropriate articulation of constitutional design across sites.

*(ii) Some Candidate Solutions*

It seems, therefore, that the process of translation cannot get off the ground unless we have some broadly agreed sense of what constitutionalism is *about* which transcends particular contexts and which thus acts as a benchmark for translations between these particular contexts. Immediately, the criteria of meaningful translation confront us with a number of related problems that rule out various candidate solutions.

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“Translation” in this context does not depend for its determinacy upon an implausible correspondence theory of truth, but rather on the coherence of the discourse, and in particular on the generality and transferability of its theoretical objects, whose articulation can draw on second order linguistic resources distinct from the first order ‘user’ language of constitutionalism. See further, text below.

In the first place, as we have already noted, definitions of constitutionalism are often more or less ideologically loaded. In public discourse constitutionalism, as such a potent condensing symbol, is often seen as code for legitimate government. And just because there is so much at stake symbolically in the acceptance of a position or an argument as constitutional or otherwise, constitutional actors both in the political domain and, if more subtly, in the academic domain invest much, and often without much scruple or at least without full awareness or acknowledgement of the commitments already built into their first premises, in the effort to win such acceptance or deny it to others. The power of legitimate naming, in other words, counts for much within constitutional discourse.<sup>xxiii</sup> So we should not be surprised to find constitutionalism invoked not just in connection with but even as synonymous with preferred normative ends or mechanisms of government, whether this be the general idea of limited government, the idea of fundamental rights based constraints upon or “trumps” over the policy values of a particular regime, the idea of discursive democracy etc.<sup>xxiv</sup> Regardless of the internal coherence or external attractiveness of these various schemes of thought – in which, incidentally, the concept of constitutionalism if used in such a selective fashion often does little work and performs no function other than as a crowning label - their partial quality and their mutual irreconcilability does not mark them out as candidates capable of commanding broad agreement.

A second problem concerns the difficulty of escaping constitutional discourse – the ‘constitutional signifier’ – in developing a framework for translation. For, as noted, we cannot find principles for discovering what is in common between two discourses in either of the discourses themselves. On reflection, this problem divides into two more specific difficulties. The first concerns the dominance of the host or source language of *state* constitutionalism. The “touch of stateness” which Shaw and Wiener refer to takes us to the heart of the problem, and reminds us of the dangers of literal translation. Just because state constitutionalism is the

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<sup>xxiii</sup> As already intimated, this is true not only of ‘regime legitimacy’, - that is the legitimacy of particular systems of government, but also of ‘polity legitimacy’, that is whether a particular system of political organization counts as a polity at all – the accepted and familiar use of constitutional discourse in relation to the polity being an important element in the affirmation of such a status. On the distinction, and overlap, between ‘polity legitimacy’ and ‘regime legitimacy’, see N Walker “The White Paper in Constitutional Context” in C. Joerges, Y. Meny and J.H.H. Weiler (eds.) *Mountain or Molehill? A Critical Appraisal of the Commission White paper on Governance* (2001) Harvard/NYU Jean Monnet Programme.

<sup>xxiv</sup> See, for example, the criticism made by Carlos Closa of Christian Joerges's work as identifying constitutionalism in general with a particular variant of constitutionalism based upon deliberative democracy; C. Closa, "The Implicit Model of Constitution in the EU Constitutional Project" in Eriksen, Fossum and Menendez (eds.) *op. cit.*, n.13, 53 at 55, n.5; see also in the same volume, C. Joerges, "The Law in the Process of Constitutionalizing Europe" 13.

dominant or defining template, and just because the ‘destination language’ of non-state constitutionalism is underdeveloped, there is a danger that, in Schmitter’s words, “both scholars and actors in the integration process presume an isomorphism between the EU [or, by extension, any other post-state site of political capacity] and their respective national polities”<sup>xxv</sup> But the problem of the ‘constitutional signifier’ is not just a problem of state-centeredness. Imagine, if such a thing is possible, that non-state sites had developed their own constitutional discourse significantly and had done so in ways which owed little to the statist heritage, or in ways in which had been as much influential of as influenced by the state heritage.<sup>xxvi</sup> Imagine in other words, a greater autonomy of non-state constitutionalism or a more equal mutual interdependence of state and non-state constitutionalism. Even then, one could not find a basis for translation between the discourses in any of the discourses themselves or arising out of them, for one would still lack the independent mechanism necessary for comparative interpretation and evaluation.

An example may help to make these points. Many constitutional theorists who do not associate constitutionalism with any one particular *eigenwert* instead see the true arena or centerpiece of constitutional debate and development as involving the reconciliation of two values or clusters of constitutional values, those associated with the collective capacity of democratic institutions on the one hand and those associated with the fundamental rights of individuals and, perhaps, other 'non-public' legal personalities on the other.<sup>xxvii</sup> Might this balancing of the scales between these two supposedly fundamental imperatives be seen as the basis for translation between sites? If, on the one hand, the reference point remains that of the state, then the problem of state-centeredness persists, and no translation is possible. If, on the other hand, the reference point is not any particular site of authority, then the difficulty lies in locating a meaningful basis of comparative interpretation and evaluation. If that basis is said to

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<sup>xxv</sup> P. Schmitter “What is there to Legitimize in the European Union ... And How Might This Be Accomplished?” in Joerges, Meny and Weiler (Des) *op. cit.* n.23, 79, 81-82.

<sup>xxvi</sup> Of course, some non-state sites do have a tradition of constitutional discourse, some a very recent tradition, as in the case of the WTO (see n.1 above) and some a more longstanding one, as in the case of the United Nations; see e.g. B. Fassbender "The United Nations Charter as the Constitution of the International Community" (1997) 36 *Columbia Journal of International Law* 529. Yet, unsurprisingly, in all such cases, as in the European Union itself, the statist legacy is strong, in that the point of departure is the discovery of an analogy between institutions and principles at the non-state level and those long embedded in state constitutional discourse, or even, in more active mode, is an argument that particular state-level constitutional institutions or principles should be transplanted to the particular non-state site in question. There is no question, in other words, that the state site remains the dominant site and base point of reference in the process of translation.

<sup>xxvii</sup> The centrality of this point of departure within constitutional theory is discussed at length in is discussed at length in Tully, *op. cit.* n.15.

be the relationship between rights and democracy in constitutional settings *in general*, then we cannot work out what this might mean by looking at any particular site of constitutional authority, for that takes us back to the problem of site-specific bias, and in effect to the problem of state-centeredness. Thus, we cannot escape the conclusion that we have to look beyond constitutional discourse itself to find a basis for meaningful translation of constitutional concerns from one site to another, even where we may have a constitutional *problematique* - the reconciliation of rights and democracy - which involves a less partial prioritization of values and which thus might otherwise appear to provide a more promising candidate to command general agreement as a common feature of constitutionalism across sites.<sup>xxviii</sup>

Yet even if we are sensitive to the problems of selectivity of values, of statecentredness and of the need to move beyond ‘constitutional signifiers’ to find a basis for translation, if we look more closely at our conditions of adequate translation there remain considerable difficulties in discovering such a basis. The identification of that which is commonly ‘constitutionally signified’ must involve a balance between the requirement of *relevance* which demands that the translation is sensitive to a sufficiently ‘thick’ understanding of each local context, the requirement of *generality* which demands that translation is indeed possible between all constitutional sites and so must have some interpretive or explanatory purchase in all constitutional contexts, and the requirement of *normative salience* which recalls that constitutionalism is an exercise in practical reasoning whose value as such depends upon its supplying a lens through which it can draw upon and evaluate a legacy of comparative constitutional thought and experience to propose solutions to the question of providing a viable and legitimate regulatory framework for political community.

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<sup>xxviii</sup> Of course, ideas of ‘rights’ and ‘democracy’ register not only in constitutional discourse, but in the deeper discourse of political theory, and the balance between the two at this deeper level might seem an obvious candidate basis for translation of concerns at the more institutional level of constitutional theory. However, as Jeremy Waldron has pointed out, particularly in respect to the language of rights, there is much slippage between the levels of constitutionalism and political theory in debate (as much by political theorists as constitutional lawyers!) – and often an apparent lack of appreciation that we *are* dealing with quite different registers of debate. So, for instance, when we talk about rights as deep entitlements flowing from a theory of human nature or human society on the one hand and rights as justiciable claims against government (and less frequently, private actors) within an institutional framework of law on the other, then we are not talking about the same thing, but the suspicion remains that the semantic identity of the objects of analysis leads many to use these terms interchangeably. As Waldron shows, moreover, there is, on closer inquiry, no obvious relationship, but only complex and contestable ones, between the same terms within the different registers, and certainly no guarantee, to take the instant case, that the underlying meaning, if any such general meaning exists, of the *constitutional* relationship between rights and democracy is revealed by an examination of their relationship at the level of political theory, and thus little prospect that the latter might in fact provide an agreed basis for translation of the core concerns of constitutionalism between sites. See J Waldron *Law and Disagreement*; see also N. Walker *op. cit.* n.21.

The 'constitutionally signified,' therefore, must not be so general and so abstract, its relationship to the concerns of particular constitutional contexts so attenuated and so varied, that it lacks any meaningful and normatively significant common purchase on these concerns. To take an extreme example, to say that all constitutional sites are concerned with the promotion and stabilization of the 'good society' would meet with few if any objections, yet the common denominator – the 'good society' - is pitched at such a level of abstraction that it provides us with no explanatory or normative basis on which to conduct an evaluative comparison of particular constitutional doctrines and mechanisms operating in particular contexts.

Conversely, in ensuring that its relevance to and relationship to particular constitutional schemes is legible and capable of generating meaningful scheme-specific questions and propositions, the 'constitutionally signified' should not sacrifice on the altar of contextual appropriateness the generality of explanation or the capacity to provide a deep normative underpinning which a legitimate site-transferable constitutionalism implies and requires. That is to say, the value of the 'constitutionally signified' which provides the basis for translation is reduced to the extent that, for the sake of contextual 'fit', it is not of universal explanatory relevance across constitutional sites and does not speak to the deepest justificatory roots of constitutionalism's normative orientation.

Again an example may help to illustrate these points. An instructive instance of the difficulties in finding a 'constitutionally signified' that, while being well honed to the requirements of contextual 'fit', is also of sufficient generality and normative power, can be found in a recent study by Christian Joerges of the Nazi heritage in European legal thought. Though interested in comparisons over time rather than space, and in translation between different postnational contexts rather than between state and postnational, Joerges's methodological concerns mirror those that animate the present inquiry. He is concerned to provide a framework which shows the continuities and discontinuities between the pre-war German legal tradition and other times and places, and – of particular concern for present purposes - with discovering the lessons for the profoundly different type of supranationalism at the centre of the contemporary European constitutional configuration that may be learned from reflecting upon the *Grossraum* – the German imperialist dystopia suggested by the Nazi apologist Carl Schmitt.<sup>xxix</sup> Joerges makes the telling point that for all the pathologies of the

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<sup>xxix</sup> For Joerges's essay and my commentary see *Europe: A Grossraum?* EUI Law Department Working paper 2002/2, incorporating Joerges "Europe: A Grossraum? Rupture, Continuity and Re-Configuration in the Legal Conceptualization of the Integration Project" and Walker "Putting



Third Reich and its schemes for extinguishing other national sovereignties in accordance with the *Fuhrung* principle, "the problems of the order of the economy, of the exposure of society to technological problems and necessities, and of the difficulty of ensuring the political and social accountability of the administration did not resolve themselves with the disappearance of National Socialism."<sup>xxx</sup> That is to say, underlying both transnational models although responded to very differently in each, we can identify the same puzzles of governance. First, as regards the economy, how to ensure the *relative* insulation of an increasingly complex transnational economy from protectionist or otherwise market-jeopardizing interventionist political forces? Secondly, as regards technology, how to ensure that the increasing range of questions of modern governance which require technical knowledge in areas as varied as environmental impact, product safety standards, public health and internal and external security are treated with the requisite expertise while preserving the scope for open political contestation over those associated normative choices which are not reducible to merely technical considerations? Thirdly, as regards administration, how to ensure fairness, consistency and calculability of administration in an era of increasingly 'big government' without succumbing to the pathologies of bureaucracy's "iron cage"<sup>xxxii</sup> - where legality descends into mere legalism<sup>xxxii</sup> and public administration becomes insensitive to differing social needs and unsusceptible to supervision, guidance or transformation in accordance with a legitimate normative vision.

Importantly, these problems are of course staples of *all* modern advanced societies, including states, and are not peculiar to systems of multi- level governance. Yet in its recognition that the complexities and potential of transnational economic circuits and the boundary-transgressing ramifications of new technological processes may be usefully addressed through political mechanisms other than the state, multi- level governance can be seen both as a particular response, or at least as a reaction to the problems in question, and also as a setting in which these problems, through being merely reconfigured rather than transcended, are as likely to be exacerbated as resolved. The general explanation for such a perverse possibility, which is explored in more depth below, is not hard to seek, for the various problems outlined by Joerges speak to the significance and delicate balance of a plurality of values which remain in tension

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the European House in Order: From Grossraum to Condominium – A Comment.” Both also forthcoming in Joerges (ed) *The Darker Legacy of European Law* (Oxford: Hart).

<sup>xxx</sup> Joerges, *op. cit.* n.29.

<sup>xxxii</sup> In Weber's famous metaphor. See M. Weber, *The Theory of Social and Economic Organization* (Glencoe: Free Press, 1947).

<sup>xxxiii</sup> For a recent discussion of this distinction, see Z. Bankowski, *Living Lawfully: Love in Law and Law in Love* (Dordrecht: Kluwer, 2001) esp. ch.3.

with one another regardless of how many levels of government are involved in their treatment and in what combination, and where often the prioritization of one value may be to the unhealthy detriment of others. So the relentless Nazi emphasis on the primacy of the political beyond the German state and throughout the occupied *Grossraum*, and Schmitt's apologia for this strategy,<sup>xxxiii</sup> seek to exorcise the demons of soulless technocracy and rudderless bureaucracy, but do so at the expense not only of the virtues of independent expertise and unbiased and non-arbitrary administration but also of any conception of the political itself as democratically pluralist and so 'weak' (in National Socialist terms) rather than authoritarian and ideologically 'strong'. In the context of the European Union both ordoliberalism and functionalism, two of its deepest founding roots, stand in stark contrast to fascist doctrine in terms both of the moral defensibility of their intentions and their explicit *defence* of economic and technical rationality patterns in an economic constitution protected from the vicissitudes of politics, whether quotidian or millenarian. Nevertheless, as Joerges indicates,<sup>xxxiv</sup> these approaches may err too much in the other direction and create an opposite imbalance, even if profoundly less dangerous in consequence. For, as the European Union, through an increasingly deep-rooted and wide ranging process of positive integration, is transformed "into a political community of open and undetermined political goals",<sup>xxxv</sup> the relationship between the economic, the technocratic and the political logics which inform decision-making and regulation within the Union defy any simple demarcation into different compartments, while the traditional indirect, state-centered democratic legitimation of the expanding Union mandate looks ever more threadbare.

Yet however insightful Joerges's work and however appropriate to the particular historical comparison in which he is engaged, for the purposes of providing a general framework of constitutional translation the balance between contextual appropriateness, generality of explanatory scope and depth of normative foundations required to provide a sound basis for such translation has to be further adjusted to allow normative questions to be abstracted from issues of governance and to be granted a separate and more prominent status. By concentrating on problems of governance and the diverse and sometimes contending values associated with these, Joerges indeed develops a non-constitutional language for a comparative evaluative framework that succeeds in indicating many of the constitutional dilemmas of modern advanced societies in

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<sup>xxxiii</sup> Even though, as Joerges points out, (*op. cit.* n.29) there was much in Schmitt's pre-Grossraum writings that could have mitigated this emphasis.

<sup>xxxiv</sup> And see, more expansively, his "'Good Governance' in the European Internal market: An Essay in Honour of Claus-Dieter Ehlermann," EUI Working Papers, RSC No. 2001/29.

<sup>xxxv</sup> M. Maduro "Where to look for Legitimacy?" *op. cit.* n.13, 81.

other state and non-state sites. But although the questions of administration, expertise and economics which he highlights do underpin and inform constitutional choices, we have to dig deeper in search of a fundamental and generalizable set of normative concerns which in turn inform these problems of governance in the various site-specific settings. That is to say, beneath the governance puzzles which Joerges identifies and places in mutual tension may lie other even more fundamental political values and an even more basic set of objective tensions concerning the reconciliation of these values. If constitutionalism as a form of practical reasoning is to begin to meet its aspiration of finding a context-transcending way of approaching the legitimate regulation of political community these more fundamental values must be drawn out and rendered explicit within the conceptual framework.

*(iii) A modest proposal*

Recent work by the social theorist Ralf Dahrendorf work may be helpful in identifying this configuration of fundamental values.<sup>xxxvi</sup> For him, *the* great problem of modern political thought lies in the reconciliation of the three virtues of economic or material well-being, social cohesion and effective freedom (both the political 'liberty of the ancients' and the personal 'liberty of the moderns', the latter being both intrinsically valuable and a necessary underpinning of full political freedom).<sup>xxxvii</sup> Affluence, community and (personal and political) liberty, in other words, are the often inarticulate major premises on which we base our political visions, frame our governance dilemmas and, finally, make our constitutional choices. Here, at last, then, we may be on more promising ground to develop a mechanism to aid a general translation of the constitutional *problematique* between sites.

It was argued earlier that the proof of the value of any system of constitutional translation is to be found in the questions it allows us to ask across constitutional sites embedded in very different social and political contexts as to the significance of the various institutional choices available in the construction of particular constitutional schemes. How, if at all, might Dahrendorf's approach be developed to meet this challenge? In addressing this question, let us again look at the European context - not as a way of avoiding the requirement of generality, but simply as a method of illustrating with some concreteness the issues which might arise in a particular context of translation in light of the general principles of translation.

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<sup>xxxvi</sup> R. Dahrendorf, "A Precarious Balance: Economic Opportunity, Civil Society and Political Liberty, (1995) 5(3) *The Responsive Community*, 13.

<sup>xxxvii</sup> On this distinction, see famously B. Constant "The Liberty of the Ancients Compared with That of the Moderns" in B. Fontana (trans. and ed.) *Constant: Political Writings* (Cambridge: Cambridge University Press, 1988).

Weiler himself provides a useful general orientation towards the key issues of translation between state and European Union. He argues<sup>xxxviii</sup> that two of the main founding imperatives, even ideals, of the European Union were 'peace' and 'prosperity'. Lasting peace was to be achieved through the binding of the states and peoples of Europe (with Western Europe as a starting point rather than a terminus) into "an ever closer Union" of economic interdependence and, increasingly, social interaction and "interculturality".<sup>xxxix</sup> Lasting prosperity was to be achieved by the pooling of the factors of production at the level of the continent and ensuring the free circulation of goods, services, capital and - if with less conviction - people across the old state borders. A third ideal, which Weiler argues exists only in emergent form, is that of 'supranationality' itself, here defined as a way of introducing a scheme of interdependent national and European citizenships in which each curbs the excesses or supplies the deficiencies of the other. Supranational citizenship tames nationalism - its tendency to internal discrimination and external aggression, to cultural insularity and imperialism, "with a new discipline"<sup>xl</sup> - the self-binding of the states of Europe in a framework which involves "transnational affinities to shared values which transcend the ethno- national diversity"<sup>xli</sup>; likewise, national identities guard against the alienating tendencies of the broader and more cosmopolitan European identity, preserving the best of the creative and solidary impulses of national identity which may be in shorter supply at the European level.

With the help of some "stylized facts"<sup>xlii</sup> about the 'thick' context of national and postnational political communities, the framework of mobilizing factors supplied by Weiler allows us to indicate how concern for the treatment of the fundamental political values identified by Dahrendorf helps both to explain the opening up of a European constitutional space and to make sense of the problems arising and concerns articulated within that new space as belonging to a general category of constitutional problems and concerns. Following some liberal nationalist thinkers,<sup>xliii</sup> we may think of national identity as the "battery"<sup>xliv</sup> which helps modern nation

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<sup>xxxviii</sup> Op. cit. n.1 ch. 9.

<sup>xxxix</sup> To use Tully's nice expression depicting the permeability of all cultural boundaries. See *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) 11.

<sup>xl</sup> Weiler *op. cit.* n.1 251.

<sup>xli</sup> *Ibid.* 346.

<sup>xlii</sup> To borrow a term of J Cohen and C F Sabel in "Sovereignty and Solidarity: EU and US" in J. Zeitlin and D. Trubek (eds.) *Governing Work and Welfare in a New Economy* (Cambridge: Cambridge University Press, 2002) ch.13.

<sup>xliii</sup> See e.g. Y. Tamir *Liberal Nationalism* (Princeton: Princeton University press, 1993) M. Canovan, *Nationhood and Political Theory*, (Cheltenham, Edward Elgar: 1996); D. Miller, *On Nationality* (Oxford, OUP: 1995); N MacCormick *Questioning Sovereignty* (Oxford: OUP, 1999) W. Kymlicka, *Politics in the Vernacular* (Oxford, OUP 2001) esp. ch.2.

states, and even "pluri- national states"<sup>xliv</sup> run. Briefly, we may identify three types of 'constitutive public goods'<sup>xlvi</sup> as key interrelated components of the "battery". These goods are aptly described as 'constitutive' because not only do they produce results that are public goods in themselves but they also help to *constitute* or reinforce the very collectivity or public which is the subject of such goods. One is the good of political dialogue - the basic sense of a political community as a community of communication and mutual understanding. The second is the good of solidarity - the creation of a sense of common concern, a preparedness to think of the collectivity or other parts of the collectivity as part of the same community of attachment whose welfare and interests have to be considered when engaging in political decisions. The third constitutive good, which both derives from and reinforces the first two, is the creation of a societal infrastructure - the production of the minimum means of social co-ordination necessary to produce certain other primary goods such as security, media, education and mobility, which are in turn necessary to produce second order public goods and private benefits (e.g. cultural goods, material wealth) which may themselves reinforce the sense of community.

This basic set of constitutive public goods - or elements of a "societal culture"<sup>xlvii</sup> -exists in a paradoxical relationship with supranational polity developments and the broader globalization of political, economic and cultural circuits of which these developments are part. On the one hand, the limitations of the "battery" help to stimulate supranational polity-building. Both its stuttering (but still not inconsiderable) capacity to drive these functions to which it is suited - its decreasing purchase on the establishment and maintenance of the 'constitutive public goods' of communication, solidarity and infrastructural development in the face of new circuits of power - *and* its intrinsic pathologies and limitations - its tendency to cultural insularity and external aggression, the limitations of production scale, competition and choice its favouring of nationally framed markets and production processes imposes, its incapacity to deal with market 'externalities' which transcend national boundaries - encouraged the call for supranational political development in the name of peace and prosperity. In Dahrendorf's terms, what we see, then, is a series of tensions within and between the core values: (1) a secular decline in the capacity of the nation state as a host of political community and social cohesion, particularly in plurinational societies, together with (2) certain associated declines in its capacity to produce and

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<sup>xliv</sup> M. Canovan *Nationhood and Political Theory* (Edward Elgar: Cheltenham, 1996) 80.

<sup>xlv</sup> M Keating *Plurinational Democracy: Stateless Nations in a Post-Sovereign Europe* (Oxford: 2001)

<sup>xlvi</sup> See further, N. Walker *op. cit.* n.5.

<sup>xlvii</sup> Kymlicka *op. cit.*n.43.

distribute affluence and risks, which is at the heart of material well-being, and, finally (3) the perennial vulnerability of the nation state to its social cohesion project being prosecuted at the cost of an intolerance to personal freedom within the state and reasonable communication across states, together with an effective decline in the potential of individual and group political freedom and participation 'to make a difference' in consequence of the declining overall political capacity of the state.

On the other hand, these supranational developments at EU level (and beyond) exacerbate some dimensions of the very problems of the state they are intended to alleviate or resolve. In particular, they threaten to accelerate the secular decline of the socially constitutive and broader economic regulatory capacity of the state, with the various linked consequences in terms of social cohesion, material well-being and effective freedom. At the same time, the EU's capacity to supply those omissions and counterbalance those excesses of the state which are both cause and consequence of its very assumption of supranational political capacity, and so its capacity to address its historical agenda in the best or 'idealized' sense identified by Weiler, is both limited and deeply contested.

Again, in Dahrendorf's terms, just as we can at the state level we can make sense of these limitations and contestations at the supranational level in terms of a series of tensions within and between the core values, underscored by the elusiveness of the conditions for the flourishing of these values. To start with the value of social cohesion, it is far from clear or uncontested to what extent the constitutive attributes of dialogue, solidarity and common societal infrastructure are relevant at the supranational level. If public goods associated with these attributes of community are already generated at the national level, even if to a declining degree, any assessment of the potential and warrant for the development of the attributes of community at supranational level is bound to be complex. It must take account of the ways in which the existence of prior national community encourages or inhibits the development of a new and broader sense of community. It must also take account of the nature and extent of the justification for 'added value' in terms of the generation of additional public goods or, indeed, of those existing constitutive and other public goods which the state finds increasingly difficult to deliver.

These questions, then, which are central to Scharpf's analysis of the "joint decision trap"<sup>xlviii</sup> - the gap created by the declining political capacity of the state coupled with the

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<sup>xlviii</sup> *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999) esp. ch.2; see also, his "The Joint Decision Trap: Lessons from German Federalism and European Integration" (1988) 66 *Public Administration* 239-78. For critique, see O. Gerstenberg, "The New Europe: part of the Problem or Part of the Solution to the Problem?" *Oxford Journal of Legal Studies* (forthcoming)

absence of the legitimating conditions for the European Union to assume the displaced political capacity thus displaced - are both empirical and normative, and closely engage the two other core values, namely freedom and material well-being. They depend upon an analysis of the social forces at the national level that would deter the transfer of political capacity, as well as of the forces available at EU level to nurture such a capacity. That nurturing capacity in turn depends upon the extent to which the EU, like other postnational sites, can help provide new answers to collective action problems by generating new bonds of association which, either alternatively or in combination, (1) are parasitic upon the statist political configuration (i.e. simply endorsing the existing social and political infrastructure as 'the inter-governmental' or, more generally 'inter-existing solidary units,' framework of decision-making),<sup>xlix</sup> or (2) recreate some features of the statist configuration at the supranational level<sup>l</sup>, or (3) encourage new, less centralized decision-making sites organized around discrete transnational communities of interest and practice,<sup>li</sup> or perhaps around existing or emerging non-nation state based communities of attachment.<sup>lii</sup> In turn, these questions demand an understanding and articulation of the conditions in which effective voice and participation – political freedom - may be optimized in a postnational context.

Crucially, the answers to the questions concerning the value of social cohesion at the supranational level also depend upon preferences concerning the level of solidarity presupposing political initiatives – in particular initiatives which directly or indirectly redistribute wealth and risks and so speak to the value of material well-being, a redistributive task made harder by the increasingly modest reach of existing forms of pooled resources in an eastward-enlarging Union - which are appropriate at the supranational level, and indeed appropriate *tout court*. In turn this raises complex questions about the relationship between these three solidarity-presupposing activities - risk redistribution, wealth redistribution and the involvement of the collectivity in the public revenue-based support of the creation of private wealth<sup>liii</sup>- about whether, and to what extent these forms of intervention are divisible, and about whether, and to what extent, they each have different solidarity 'tariffs' or preconditions.

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<sup>xlix</sup> What Cohen and Sabel call the 'association of associations' approach; *op. cit.* n.42.

<sup>l</sup> What Cohen and Sabel (*op. cit.* n.42) call the 'Eurodemocracy approach', which they associate with Habermas. e.g. J, Habermas, "Why Europe Needs a Constitution" *New Left Review* 11 September-October 2001.

<sup>li</sup> See Cohen and Sabel's own vision of 'experimental democracy'; *op. cit.* n.42.

<sup>lii</sup> Tully's analysis of agonistic democracy is relevant here. See Tully *op cit* n.15.

<sup>liii</sup> See, in particular, G. Majone's work. For example, "The Credibility Crisis of Community Regulation" (2000) 38 *Journal of Common Market Studies* 273.

Finally, we must bring these dimensions of personal freedom which are less closely linked to political freedom and participation into the complex equation. As we have seen, social cohesion has traditionally been viewed as a particularly strongly sustained core value at the nation state level, yet examination reveals that this is both a fragile strength and a strength that is indivisible from certain weaknesses. Similarly, at the postnational level, personal freedom has tended to be seen as the least threatened and most comfortably embedded core value, but again close analysis reveals a more complex and troubling picture. To begin with, the traditional distance of postnational political sites from the 'state-defining' questions of internal and external security has narrowed as the European Union has gradually assumed a capacity in both Foreign and Security Policy and Justice and Home Affairs, the two outer 'pillars' of the post-Maastricht Three Pillar Treaty structure. Once these capacities gained a jurisdictional foothold, the questions of personal freedom from public interference associated with them - questions of the limits of police and military power to interfere with freedom and privacy and of general administrative and regulatory power to control freedom of movement and entry – were bound to become less abstract and to lie more at the mercy of broader political developments. Witness, in particular, the controversial acceleration of supranational initiatives in the field of anti-terrorism, common policing and public order capacity and common immigration and asylum policies encouraged by Brussels after September 11th.<sup>liv</sup> Moreover, if, as Weiler, suggests, we should also think of the supranational level's stewardship of personal freedom in more positive terms - as a potential moderator of internally and externally directed national- level intolerance, it is not clear how effectively it is capable of pursuing this more ambitious role beyond the EU's more general (if by no means insignificant) promotion of a more mobile and interpenetrating European cultural space helping to foster an attitude more tolerant of the diversity of forms of expression of human dignity and lifestyle preference. As a vast literature attests, questions concerning the relationship between universalism and localism in human rights protection are deeply complex and controversial<sup>lv</sup>, what is clear is that there is no obvious 'positive sum' relationship between the two levels of protection. We cannot assume that the protection afforded at supranational level, now consolidated in the newly minted Charter of Fundamental Rights for the European Union

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<sup>liv</sup> These developments, including the proposal of a common arrest warrant, the development of a common definition of terrorism and the creation of a European Corps of Border Guards, are moving at such a pace that it is pointless to cite specific references charting their progress. Probably the best ongoing commentary is that supplied by the bi-monthly *Statewatch* Bulletin (<http://www.statewatch.org>).

<sup>lv</sup> For an interesting recent overview, see, for example W Sadurski "It all Depends. The Universal and the Contingent in Human Rights" EUI Law Department Working Paper No.2002/7.



which was given declaratory status at Nice in 2000, even to the limited extent that it bears upon state-level practices will necessarily *augment* protection of freedom already provided at the state level. Different aspects of personal freedom - privacy, expression, life, bodily integrity etc - are often in tension with one another and indeed with other values - including those such as security and social welfare intimately associated with the promotion of social cohesion and material well-being - and so European level protection, although perhaps of value in reinforcing existing national standards, to the extent that it differs from and 'goes beyond' these national standards will produce results more complex and troubling for the ensemble of core political values than some simple and cost-free 'freedom dividend.'

### **3. Conclusion**

Hopefully, the use of the basic co-ordinates of social cohesion, material well-being and personal freedom provides at least a rudimentary framework through which we might be able to translate constitutional concerns from the state level to the supranational level. When we ask questions of the value and function of the various constitutional institutions and principles at the EU level or in other postnational settings we should do so from a starting point which never assumes that a superficial institutional or doctrinal similarity with the state level - say between national Parliaments and the European Parliament, or between national administrations and the European Commission, or between national Supreme Courts and the ECJ, or between 'states rights' within national federations and 'subsidiarity', or between state Bills of Rights and the European Charter - is the basis for translation and modeling, but rather from a starting point which moves from the general framework of core values through their particular configuration at particular levels of political community and *only then and against that deep background* to what is required in order to develop a viable and legitimate regulatory framework at the level of political community in question. That does not, of course, imply institutional innovation for its own sake, or that we can never learn from the experience of state constitutional institutions and principles and adapt them to the postnational context, but for such learning and adaptation to be meaningful it must proceed through an examination of the common core values and of how they inform and condition the normative frame of constitutionalism in any particular context. The results then, as forewarned, are modest, a mere framing of some of the common questions which should inform and validate constitutional analysis across all sites of authority rather than a set of definitive solutions, but this modesty is hopefully not just a failure of imagination or analytical rigour, but at least in some part also due to the particular character of constitutionalism as a deeply contested but indispensable symbolic and normative frame for thinking about the problems of viable and

legitimate regulation of the complexly overlapping political communities of a post-Westphalian world. Two closing remarks may help to reinforce the value of the approach taken.

In the first place, an appreciation of the inextricability of the three core values may encourage us to resist the temptation to focus too closely on one or more core values, and on the institutional implications of the pursuit of these values, to the neglect of others. Even the best work on the legal and political theory of European Union has a tendency to bracket some of the core values at the expense of others, whether the emphasis is on political freedom and the democratic deficit,<sup>lvi</sup> or on the meaning and mutual articulation of national and supranational identity in citizenship discourse,<sup>lvii</sup> or on the regulatory structure necessary to achieve an effective internal market without neglecting the importance of retaining a problem-solving capacity which can fairly and effectively distribute the risks and resources associated with an affluent economy<sup>lviii</sup>. Yet however understandable this selective framing, the complex political puzzle which lies at the core of the European Union, as of any multi-level polity, means that in the final analysis *all* the relevant values must be held equally in focus.

Secondly, it is worth noting that there is an inherently reflexive element involved in the process of translation. It is a trite truth of multi-level political organization that particular polities and political communities, still less the specific institutions of these polities, and political communities cannot be regarded in isolation. Where there is no one 'centre' of political life, ideally each institution which exercises political authority should address from a particular simple or compound constituency perspective - regional, national, Union, functional group, expert - and in a particular simple or compound governance modality - legislative, executive, administrative, judicial, executive – the particular constitutional puzzle with which it is concerned *in the light of the* same complex master-puzzle involving the optimal articulation and balance of core values, and always bearing in mind the need to complement the contribution of each of the other differently constituted and tasked institutions towards that same master-puzzle. In terms of constitutional discourse, this development points to the increasing significance of the Relational dimension generally within the post-Westphalian configuration. In this plural configuration, unlike the one-dimensional Westphalian configuration, the 'units' are no longer isolated, constitutionally self-sufficient monads. They do not purport to be comprehensive and exclusive polities, exhausting the political identities and allegiances and personal and group aspirations of their members or associates. Indeed, it is artificial even to conceive of such sites as

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<sup>lvi</sup> See e.g. Schmitter, *op. cit.* n.19.

<sup>lvii</sup> See e.g. Weiler, *op. cit.* n.1.

<sup>lviii</sup> See e.g. Scharpf, *op. cit.* n.48.

having separate internal and external dimensions, since their very identity and *raison d'être* as polities or putative polities rests at least in some measure on their orientation towards other sites. The overlap of jurisdictions and governance projects is emerging as the norm rather than the exception, the constitutional processes developed to address these becoming 'central at the margins.'

Accordingly, constitutional translation should be conceived of as an active and dynamic process, one where the lessons of translation must be internalized in each constitutional site, including the source state sites. Institutional design, even in the most venerable and venerated constitutional settlements, must always be viewed as a derivative and contingent exercise, always at the service of the core values and the changing detail of material and cultural conditions and of diversely located solutions which influence the articulation and optimal balance of these core values. The lessons of historical experience and of political theory are that there is no timeless key to good constitutional design and practice. Rather, this depends first and foremost upon a critical reflexivity - upon a healthy awareness within constitutional discourse of the contingent and provisional quality of its multi-faceted and intricately interdependent solutions to the remorseless puzzle of the balance of the core values of political organization.