Process, Responsibility and Inclusion in EU Constitutionalism: a contribution to the debate on a constitutional architecture

Jo Shaw

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by Jo Shaw[1]

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I. Introduction: raising questions

Is the current 'constitutional' debate in the European Union a new stage in the development of the 'ever closer union', or a continuation of longstanding debates in many academic and some media, opinion-former and political circles about the finality of European integration? Can any sort of debate about constitutions, constitutionalism and constitutionalisation assist in resolving the very real political problems faced by the EU at the present time, especially since these include not only the ongoing economic challenges of globalisation and the development of a global trading order through the WTO, the threats and opportunities of impending enlargement and the problems of a cumbersome institutional framework which does not assist the goal of transparent and efficient policy-making, but also of much more recent vintage the very specific challenges of a changing world order raised by the events of September 11 2001. Do such debates not risk dangerously privileging law over politics, diverting constructive polity-building energies into blind alleys of discussion amongst technicians and experts about constitutional authority, sovereignty and legal rights which fail to

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illuminate the fundamental questions of political acceptance and legitimacy which undermine the EU's capacity for action and its claim to be a responsible post-state polity?[2] Can the debate on the *Future of the Union* in the run up to the putative IGC of 2004 presaged in the Declaration attached to the Treaty of Nice effect an opening of options, rather than a closure of possibilities? What is at stake in the context of 'constitutional contemplation' for the EU? Above all, is the so-called Great Debate a risk-free activity, comprising myriad opportunities to educate all participants in the debate in the civilising forces of constitutional democracy, which are just waiting to be harnessed? Or can, in fact, such a debate provide a platform not only for those opposed to deepening and widening EU-based integration, but even for forces antithetical to the taken-for-granted premises of constitutional democracy. These are some of the pressing questions which are raised when we consider the possible constitutional futures of the European Union.[3]

None of this is intended to decry the necessity for setting out clearly the groundwork of possible legal frames for the future of European integration. It is merely to highlight some of limitations of solutions to political problems grounded solely within legal argument and doctrine. The important question engaged by Stefan Griller, for example, in his paper on *The Constitutional Architecture* is the following: what is the most helpful methodological framework for developing conceptions of the European Union's constitutional architecture? Specifically what is the role of the concept of 'state' especially for legal science's contribution to the Future of Europe debate? What is the structuring force of a legal scientist's insight that notwithstanding its formal similarity in many respects

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[2]   N. Walker, 'The White Paper in Constitutional Context', in C. Joerges, Y. Meny and J.H.H. Weiler (eds.), *Symposium: Responses to the European Commission's White Paper*, EUI RSC/Jean Monnet Program, 2001.

[3]   Although this brief paper draws heavily upon previous work by myself alone and with others in the field of EU constitutionalism, it is in fact more in the nature of a preliminary think-piece intended to stimulate further reflection. For more detailed exposition of my views on EU constitutionalism, see the following papers: 'Postnational Constitutionalism in the European Union', (1999) 6 *Journal of European Public Policy* 579; 'Process and Constitutional Discourse in the European Union', (2000) 27 *Journal of Law and Society* 4; 'Relating Constitutionalism and Flexibility in the European Union', in G. de Búrca and J. Scott (eds.), *Constitutional Change in the European Union: From Uniformity to Flexibility?*, Oxford: Hart Publishing, 1999.

to a state, the EU is not a state and will not become one – essentially for political rather than formal legal reasons? For Griller, it follows that there is more scope for institutional imagination to be applied to the task of future legal construction. Such construction should not be thought, automatically, to fall foul of the 'holy cows' of state sovereignty or to threaten the continued existence or viability of the Member States as sovereign states.

The 'touch of stateness' argument provides a different but complementary angle on this point. In earlier work together with Antje Wiener,[4] she and I have sought to isolate the various institutional and theoretical dimensions involved in the perverseverance of thinking about the state in studies of the law and politics of the EU. This helps to shed light on the paradox that the EU is simultaneously both 'near-state' and antithetical to stateness. 'Stateness' persists to a remarkable degree in both normative discussions of alleged deficits within the EU and many approaches to theorising the EU as a instance of governance beyond the state. Each of these dimensions continue to push the mainstream of scholarship on the EU overwhelmingly towards a positivist analytical and indeed normative perspective on issues about future development and reform. Following these dissections of the paradox of the EU polity both as it exists at present and in its ongoing process of becoming, we derived a set of methodological premises about studying the role and construction of norms, identities, practices and discourses in order to assist us in the task of analysing and presenting constitutional pasts, presents and futures.

This comment focuses primarily on the normative questions which frame debates about the EU constitutional architecture, although the following section comprises a re-presentation of the standard template of EU constitutionalist thinking with a view to identifying some of the key analytical questions which remain open. The main section of the paper, Section III, identifies the core facets of what is termed a 'responsible and inclusive EU constitutionalism', and draws on some contemporary theories of recognition and dialogic or relational

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4   J. Shaw and A. Wiener, 'The Paradox of the 'European Polity'', in M. Green Cowles and M. Smith (eds.), *The State of the European Union. Risks, Reform, Resistance, Revival*, Oxford: Oxford University Press.

constitutionalism in order to argue for a focus on process, freedom, fairness and democracy as well as formal constitution-building within the 2004 Debate. At the conclusion, I deploy some of the insights thereby developed in the light of current debates about the processes of constitution-building and Treaty-making in the EU.

II. The standard template of EU constitutionalist thinking

Four principal propositions can be advanced about the standard template of EU constitutionalist thinking. This paper does not seek the outright discarding of this template (and indeed it does not truly exist in the rather caricatured form in which it appears to be in the brief sketch which follows); it has served the EU relatively well in its piecemeal construction of a range of limited constitutional principles structuring the *status quo* of governance beyond the state. However, these propositions do need to be the subject of continuous critical reflection in the process of taking forward the challenges of constitutionalised governance in a site of political and legal authority situated beyond or outwith the state.

1. In much analysis of the EU's constitutional pasts, presents and futures, empirical and normative questions are conflated. For example, the literature on constitutionalism frequently slips between three distinct levels of analysis influenced by different strands of constitutional thinking: the discussion of aspects of the 'EU constitution' as empirical fact; the articulation, within a normative project, of the *desiderata* of a constitution for the EU as legal, political and economic integration project; and the use of political theories of constitutionalism, especially in their liberal and communitarian guises, and less often in the guise of neo-republicanism, to analyse the politics, practices and institutions of the EU especially in comparison to nation states. Certain assumptions often then slide into the discussion:
   - That the model of the EU legal order as a constitution for the EU demonstrates a higher degree of clarity, coherence, consistency and completeness than is the case. This often leads to an overstatement of the *status quo* of the *de facto* EU constitution.
   - That the *normative* project of EU constitutionalism must, by definition, be 'integration-friendly', fostering greater centralisation at the expense of decentralised or dispersed centres of powers, focusing on a monistic

system of EU/federal legal and constitutional authority, at the expense of the potential of constitutional pluralism.

- That the EU has a settled and now unambiguous relationship with states and 'stateness'.

When deployed these assumptions limit the vocabulary of EU constitutionalism, and also its capacity to contribute constructively to problems of polity formation in a governance setting beyond the state.

2. There have been many attempts to capture the 'essence' of EU constitutionalism, and to outline in as complete a way as possible what a constitutionalised European Union actually is and may become in the future. Much of the debate has of course concentrated on the question of whether the EU is or might become a state, even if not the conventional type of state with which we are most familiar. Alternatively, it might develop into some as yet incompletely specified halfway house between a state and an international organisation. The urge to categorise, to name and indeed to predict the future finality of the EU is hardly surprising, but arguably it results in ultimately circular arguments, based on an unrealisable attempt to confine the constitution as a document and as a discrete event. The naming process then becomes a self-fulfilling prophesy of establishing either affinity with or distance from the familiar domestic and international institutions. Several critical reflections need to be entered. First, although a constitutional framework for a polity such as the EU is unavoidable, it cannot provide answers to everything. Second, any constitution needs to be the subject of continuous critical reflection and should be seen more as a set of interlocking processes rather than as a single one off event or document. Following James Tully, it is illuminating to define a constitution in the following terms:[5]

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

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[5]   J. Tully, *Strange Multiplicity*, Cambridge: Cambridge University Press, 1995 at 30.

To put it another way – which leads us onto the third proposition – we could adopt the mathematical perspective of seeing the European constitution as a vector rather than as a point.

3. There is – as will already be clear – a powerful tradition of metaphor, simile and imagery in literatures on the EU in general, which has been carried over into constitutional studies in particular. Notable images include that of the 'bicycle', suggesting that the edifice of European integration – if ever it ceased moving forwards – would somehow topple over and crumble, and more recently the pillar imagery widely used to help bring some sense of order and understanding to the immensely complex legal and institutional framework of the EU. It is from the pillar imagery, via precisions such as the Greek Temple or the Gothic Cathedral developed in legal academic literatures, that we come to the suggestion that what is in the process of being built is a 'constitutional architecture'. Yet it is doubtful whether the conception of a constitutional architecture is a useful one, given that it fails effectively to capture the liminality and procedural, dialogic and relational aspects of EU constitutionalism, which will be presented in more detail in the following section.[6] The metaphor also suggests a single director of operations, the architect, who is in overall control of the creation of the edifice. This extension of the metaphor most emphatically does not work for the EU either descriptively or normatively. Descriptively it fails, because even if one were to view the Intergovernmental Conference as a single arbitrating body for constitutional development, the IGC itself is melded from multiple voices and inputs. Moreover, Treaties, once agreed, are subject to wider interpretative communities, including the Member States, the institutions and – especially – the Court of Justice. Normatively, the metaphor projects a top-down model of constitution-building which may have been dominant hitherto in the EU, but which is reaching the end of its use shelf-life, especially in view of the widely perceived legitimacy gap between the citizens and the EU. Finding new and effective mechanisms to secure wider participation in constitution-building is

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[6] Although the metaphor is taken up with gusto by Johan Olsen, 'Organising European Institutions of Governance', ARENA Working Papers WP 00/2, where he uses the analogy of the building of St. Peter's, Rome.

an important practical challenge for the EU at present. However, a procedurally-based analysis of EU constitutionalism requires more than simply the recitation of anecdotal expressions of the self-evident adequacies of current EU 'constitutional' processes.

4. The fourth point concerns the development of a vocabulary of reform. My interpretation of 'fighting constitutional taboos', as suggested as a constructive strategy by Griller's paper on the *Constitutional Architecture*, is the task of engaging with finding a shared reform vocabulary for a constitutionalised EU. This has been a problem for the EU so long as its reform processes have been episodic rather than continuous. Following Johan Olsen, this is an essential precondition of successful processes of institutional engineering, especially in complex scenarios such as the EU:

> 'successful reform is more likely if a shared reform vocabulary evolves in the EU and there is a convergence in causal and normative beliefs and identities. A precondititon for such a development is that reform is understood as occasions for interpretation and opinion formation as much as decision making.'[7]

Building an institutional account of the processes of reform of European institutions of governance, Olsen identifies a key challenge as that of establishing 'processes of change which nurture and develop good settings for reflective processes where participants can critically examine their own normative and causal beliefs and identities'. Much the same insight will be developed in the section which follows, but using rather different premises to those of Olsenian institutionalism.

III. The challenge of a responsible and inclusive constitutionalism

In a series of sequential steps I shall in this section build a picture of how the EU can engage with the normative project of developing a responsible and inclusive constitutionalism. The attachment to these two perhaps contentious adjectives stems from an intuition – strengthened greatly since the events of

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[7] J. Olsen, 'Reforming European Institutions of Governance', ARENA Working Papers WP 01/7.

September 11 2001 – of the pan-European space as an emerging middleground in which the often countervailing pressures of economic and cultural globalisation, ongoing religious and ethnic conflict and struggles against anti-democratic forces can play themselves out within a dynamic historical space of coordinated cooperation and competition.[8] Inclusiveness is a particular challenge to an EU with unsettled geographical boundaries and sometimes abbreviated national histories of ethnic and social inclusion. Responsibility is a global social and environmental demand, in a world where there are not only weapons of mass destruction but also human industrial capacities to destroy ecosystems and to create environmental disasters including famines and floods.

1. The first step enjoins explicit consideration of the challenge of developing 'postnational' constitutionalism in a 'non-state' polity. The fact that the EU is a non-state polity is more than simply a 'setting' for its constitutional practices and futures. The invocation of postnationalism suggests not abandonment of the anchoring of the national constitutions, which are hardly likely to be swept away in a Euro-philic tide of enthusiam for building a United States of Europe, but rather the reinforcement of a constitutional politics which is specifically non-teleological and accepts contestation and non-fixity as a way of life, not a deviant practice. Thus Zenon Bańkowski and Emilios Christodoulidis have argued for the EU to be understood as an 'essentially contested project', drawing upon W.B. Gallie's idea of the 'essentially contested concept'.[9] They develop a crucial variation, however, by focusing on contestation rather than contestability or contestedness. Linking their argument to a pluralist and heterarchical conception of the EU legal order, they argue that

> 'the whole point of trying to describe the EU in terms of 'interlocking normative spheres' is to be able to see the whole system as a continuous process of negotiation

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8   For an analysis along these lines see K. Eder and B. Giesen (eds.), *European Citizenship: National Legacies and Transnational Projects*, Oxford: Oxford University Press, 2001.

9   Z. Bańkowski and E. Christodoulidis, 'The European Union as an Essentially Contested Project', (1998) 4 *European Law Journal* 341; the reference is to W.B. Gallie, "Essentially contested concepts", (1955-56) 56 *Proceedings of the Aristotelian Society* 167.

and renegotiation; one that does not have to have a single reference point to make it either a stable state system or one that is approaching that end.'[10]

One of the key elements of that negotiation and renegotiation is the fact that the currency of the negotiation comprises emotionally charged and themselves contested concepts such as national identity and sovereignty, such that the 'statist heritage' is both carried forward into the evolution of the EU, and itself transmuted by the processes of transposition to the postnational dimension. Hence a dialogic and procedural conceptualisation of constitutionalism in the EU is, in my view, fundamental precisely to conceiving of the EU's constitutionalism as postnational. This is not meant to indicate that the EU is 'after' the nation state, in either legal or political terms, but precisely to capture the 'open-ended, indeterminate, discursive, sui generis and contested'[11] nature of the project. It problematises, for example, linear assumptions about progress from a union of states to an integrated polity, and posits a reflexive critique of institutions, legal forms and identity formations beyond statist limits, in which the nation state is one actor, but not a privileged one. If the EU has a constitution, then it can only be described as one in a state of relating to national constitutions and other national and international settlements. For these purposes, the national constitution is relevant to the development of EU constitutionalism, but it cannot make a privileged claim for recognition. Hence the discourse of postnationalism is essentially interrogatory, demanding that the practical and intellectual challenges to nation states posed by the twin developments of globalization and regionalization are reflected back upon taken-for-granted assumptions about the Westphalian system of states.

2. Following from this is the deployment of a definition of postnationalism as an open-textured concept used to express many of the dynamic and *sui generis* elements of the EU as *integration* process involving the *process* of polity formation and in particular constitutional processes. Indeed, the emerging constitutional edifice is poised between important normative questions about states, polities and citizens and longstanding questions about the nature,

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[10]   Bańkowski and Christodoulidis, above n.9 at 342.

[11]   A list of adjectives borrowed, with thanks, from Miguel Poiares Maduro.

process and indeed putative finality of EU-based integration. In terms of the development of *integration*, the EU does not merely replicate the states out of which it first emerged and to which it remains indissolubly linked, but is sustained by a separate logic. The institutional and constitutional processes of polity-formation demand to be understood on their own terms, but in a way which respects the diversity of the Member States themselves. In other words, the so-called 'postnational' 'post-state' context of the EU matters. Only then can we engage in the task of institutional construction which the current debates demand. We need a perspective which captures simultaneously the indeterminacy of the political community (states, regions, peoples, etc.) which is implicated by the constitutional settlement in the EU and the complexity of its institutional arrangements especially in the post-Maastricht phase. We need a perspective which allows for the definition and redefinition of community as the process of constitutional settlement continues. This is where the demand for dialogue starts to become clear. However, it is vital to remember, for the purposes of this analysis of the possibilities in normative terms for an EU constitutional settlement, that there is a world of difference between saying: 'there ought to be a debate' and building a thorough-going model of relational or dialogic constitutionalism.

3. In a closely related move we find the so-called no *demos* problem. Here the constructive potential of Union citizenship as an institutional framework can usefully be invoked. This offers one possible means to escape what Damian Chalmers terms the 'dialogue of the deaf' which occurs in relation to issues of both constitutionalism and democracy in the European Union, 'with those who believe in a European *demos* shouting past those who do not, and vice versa'.[12] The constructive potential of Union citizenship posits the possibility of processes and practices of citizenisation operating within a virtuous circle enhanced by the synergies between the formal legal figure of Union citizenship under the Treaties and the wider legal and political rights of citizenship established under the Treaties and secondary legislation.

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[12] D Chalmers, *European Union Law. Volume One. Law and EU Government*, Aldershot: Dartmouth, 1998, at 186; for a summary of the arguments see also B Kohler-Koch, 'A Constitution for Europe?', MZES Working Paper 8, 1999 (www.mzes.uni_mannheim.de/).

4. The relationship between the EU and the Member States continues to be shifting and contingent, especially the conventional tools of state-building, including constitutionalism. These cannot be applied unchanged to the EU because they fail to provide help in answering the paradoxes posed here: the problems of postnationalism, of the undetermined community of affinity, and the contested nature of EU politics, in which left/right cleavages are entwined with differing, shifting, and often strategically focused levels of support for 'more Europe' or 'less Europe', as well as interacting with the identity politics of a changing, globalizing, regionalizing, and localizing geo-political space in Europe.

5. Procedural and relational constitutionalism demands that the EU's constitutional reformers – whoever they are – must overcome the internalisation of the constitutional debate. The challenges include engaging with the outside and with outsiders – third countries and third country nationals – and eschewing restrictive concepts of 'progress' and 'development' (whether socio-economic or cultural) which can often bedevil the attempts by Western states and polities to engage with the outside and outsiders. We have to engage with the concept of constitutional responsibility in an emerging constitutional polity, with unstable political and legal boundaries and an unformed concept of 'territory' (place and space). Partly, this means addressing the reality of constitutional pluralism in the EU as it exists at present, a pluralism which the current process of reform is not going to wish away. In addition, it means understanding that the problem of process is not simply a commonsense dissatisfaction with the state of reform mechanisms which apply at present (whether an IGC or a putative Convention in its likely post-Laeken mode), but also the normative challenge of providing a theorization of constitutionalism which takes seriously problems of inclusion and exclusion in a highly contested polity with little or no sense of 'demos' and with a shifting boundary between inside and outside.

6. In a final move, the challenge for the EU is to overcome the privatisation of public reason taking place under current conditions of globalisation and

denationalization. For example, for Habermas,[13] the current model of social organisation being thrust upon small and medium-sized states by a currently dominant global economic regime comprises four problematic elements: an anthropological view of 'man' (sic) as a rational actor who exploits his own labour; a socio-moral vision of a post-egalitarian society that has come to terms with marginalisation, rejection and exclusion (by this, one presumes, has come to accept certain levels of these evils as tolerable); an economic conception of democracy that reduces citizens to the status of members of a market society and redefines the state as a service provider for 'purchasers' and 'clients'; and the strategic notion that there is no better form of policy than that which is self-designing. The dangers of these forms of privatisation in terms of limiting the possibilities of applying public reason to the task of problem solving or the allocation of public goods are legion. Certainly, if these conditions are allowed to go unchallenged, it is difficult to see the possibilities for applying the normative model which – by way of interim conclusion – I contend would be useful for the EU. In earlier work, I have made extensive use of the work of Canadian political theorist James Tully, which is based upon a linkage of constitutionalism and the negotiation of cultural recognition, combined with a normative presupposition (easy to share in the contested context of the EU) of the acute need for 'diversity awareness' amongst participants in a constitutional process.[14] In more recent work,[15] examining the co-existence of the principles of constitutionalism and democracy, Tully seeks to find both a public philosophy which can help us in the task of testing the constitutional and democratic legitimacy of contemporary polities, but also a pragmatic programme of research which tests such premises in real-world scenarios of polity-formation under contested conditions, of which the EU, like Canada which represents a useful comparator, is one. Tully suggests

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[13]   J. Habermas, *So, Why does Europe need a Constitution?*, Robert Schumann Centre, European University Institute, 2001.

[14]   Tully, above n.5.

[15]   J. Tully, 'The Unfreedom of the Moderns in comparison to their ideals of Constitutional Democracy', ms October 2001.

> 'working back and forth between actual networks of practices of democratic negotiation and critical clarification under the principles of constitutionalism and democracy. In a time when the legal and political order is constituted by open-ended networks of ongoing negotiated conciliation rather than rigid foundations, this kind of research must itself be an ongoing activity of reciprocal reflection involving a variety of relations of communication between philosophy and the public affairs it studies.'

He then suggests four steps for this 'critical and practical research project', which he envisages as a permanent activity, involving initiation, negotiation, capacity testing and retesting, implementation and review. Initiation is a preliminary step, necessarily bottom-up, in which the formalized institutions of deliberation are set aside, in favour of allowing social forces to 'expose, criticize and overcome local relations of exclusion and to enter prevailing institutions or invent *ad hoc* practices of deliberation'. The perennial search to organise and categorise civil society in the EU, evident once again in the Governance White Paper seems inimical to this essentially chaotic premise of open-ended initiation. Negotiations can only take place, however, if initiation is successful. Beyond agreement, assuming it can be found, however, the construction of constitution-building as a permanent activity requires us to recognise that any given agreement can itself be subject to reasonable disagreement and so will be contested by democrats, or indeed anti-democrats. Their claims must be tested against the agreement, and negotiations reopened as necessary. This is an anti-finality point, as well as one which raises the acute difficulty of determining how commitment to democratic practices can effectively be set as an entry standard for participants in the process. Finally, Tully urges us not to forget the stage of implementation, arguing that here legitimacy tests need to be set just as urgently. Problems of creative compliance to the letter but not the spirit of a settlement on the part of nominally committed actors will be a particular problem. In other words, 2004 will never be a finality – even if its terms become largely set in stone because of the difficulties of amendment processes. Implementation and the capacity for review will always be just as important.

Some brief comments on the EU status quo regarding questions of process can usefully follow this statement of the outline premises of the argument and the

normative standpoint taken. It has become quite commonplace in EU constitutionalist thinking to juxtapose the Intergovernmental Conference as a method of constitution-building (bad, exclusive, malfunctioning) and the so-called Convention, constructed after the model of the Fundamental Rights Convention of 2000 (good, inclusive, functional). In any event, of course, any post-Nice process of reform, whether it involves a thoroughgoing process of constitutional construction or a more limited reflection starting from the reference points provided by Declaration 23 on the Future of the Union will necessarily involve the authoritative determination of an IGC as provided for in the Treaty on European Union as well, as seems likely, as the more deliberative processes made possible in a Convention with the type of wider membership currently under consideration. But not everything about a Convention will necessarily be 'a good thing' in terms of the norms of inclusive and responsible constitutionalism posited here. Its workings can be captured by dominant forces. Its processes may be corrupted, subjected to the disciplines of neither the party politics of a conventional parliament nor the rules of diplomacy of a body such as an Intergovernmental Conference. It may be no more willing or capable of accepting and listening to minority, unpopular and antagonistic interests. In other words, a Convention should be subject to as much rigorous scrutiny in terms of the steps to test the constitutional and democratic legitimacy of a settlement and the processes whereby it is reached as the Intergovernmental Conference itself. It should not be assumed to have an *a priori* preferential status.

IV. Conclusion

A motivating factor for this comment was the fear that the premises and assumptions of constitution-building which would inform the 'Great Debate' would draw upon a rather limited palette of colours. In other work which this comment has made use of, I have sought to suggest that the postnational 'positioning' of the EU, along with key procedural, dialogic and relational aspects of the process of EU polity formation which can be developed using some contemporary political theories of constitutionalism, assist in the taks of understanding the emerging constitutional edifice as poised between important normative questions about states, polities and citziens and longstanding and unresolved questions about the nature and process of EU-based integration.

Descriptively, one can point to the constructive impact of dialogic and procedural aspects of EU polity formation. Normatively, we can contend that a responsible and inclusive constitutionalism for the EU can only be constructed through a permanent activity of critical review and reflection upon the initiation, negotiation, conclusion, review and implementation of a myriad of constitutional settlements.