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The Paradox of the 'European Polity'

JO SHAW AND ANTJE WIENER

Introduction

This chapter focuses on features of the process of European integration which suggest that the European Union is simultaneously both 'near-state' and antithetical to stateness. The centerpiece of the chapter is the paradox of the 'European' polity with particular regard to its 'stateness'. This paradox consists of a parallel development of two dimensions: one *institutional*, the other *theoretical*. The institutional dimension can be assessed through studying the process of supra-, trans-, and infranational institutionalization, with contrasting conditions of decision-making and legitimacy attaching to the different levels observed (Weiler 1999: ch. 8). This process generates shared norms, routinized practices, and formalized rules and procedures which are part of the *acquis communautaire*, the shared political and legal properties of the EU (Gialdino 1995). As the institution that now carries a strong structuring weight within European integration over the past fifty years, the *acquis communautaire* has come to include a number of key elements of state-building processes. It entails, for example, a common market, citizenship, a common monetary policy and currency, and, with the communitarization of the Schengen *acquis*, now an increased pooling of sovereignty in relation to the emerging Area of Freedom, Security, and Justice. In sum, there is indeed little dispute among students of European integration that governance beyond the national state is a fact in Europe (Jachtenfuchs 1995). The question is how to characterize and understand this polity.

In turn, the theoretical dimension encompasses a peculiar mismatch between theories and politics of European integration that cannot escape the reference to stateness. A good example is the concept of 'integration through law' which has long dominated both legal practices and legal

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studies in European integration, respectively. That is, while EC law, understood as a body of texts ('the letter of the law'), has never made explicit reference to the concept of stateness, what we might term the 'spirit of the law' which has guided the generation of the leading constitutional principles of 'direct effect' and 'supremacy of EU law' is shaped by the touch of stateness even so (Armstrong 1998; Shaw 1996; Capelletti *et al.* 1986). It follows that both dimensions, the institutional and the theoretical, underscore a recurrent, albeit often unintended and rarely rationally debated, reference to the image of the final shape of the EU as something to be kept in mind (Diez 1996). The *risk* of studying European governance then lies in the continuous *revival* of the idea of stateness, whether that takes the form of *resistance* against or *reform* towards the establishment of statelike patterns. It lies in studying a non-state polity within the frame of stateness, with all its theoretical and methodological implications.

Indeed, the perseverance of the 'touch of stateness' is quite impressive in the context of European integration studies. Two examples may suffice to demonstrate the problem. First, stateness is the implicit reference of most work on the condition of 'deficits', including deficits of democracy, legitimacy, accountability, equality, and security (Grimm 1995; Dehousse 1995; Grande 1996; Weiler 1999). This discussion of 'deficits' implies that, in the EU, many core principles of sovereign modern nation-states (Zürn 1998) are lacking. The language of 'deficit' clearly suggests a comparative dimension referring to the political form of the state, and not, for example, to international organizations. It begs the normative response to overcome the deficit (see, critically, Wiener and Della Sala 1997). Not surprisingly, normative theories provide the leading touch of stateness in this respect (Habermas 1992; Bellamy and Castiglione 1999). A second example is provided by the debate about different approaches to European integration. While this debate advanced substantially from juxtaposing neofunctionalism with intergovernmentalism in the 1980s to discussing more differentiated nuances of new institutionalisms in the 1990s (Pollack 1996), the touch of stateness has remained a constant factor none the less. While the underlying neofunctionalist assumption was that governance would eventually lead to a 'Europeanized' superstate (Haas 1964; Lindberg and Scheingold 1970), intergovernmentalists contend that the degree of institutionalization created in the process of European integration can be explained by studying member-state interests and preferences (Moravcsik 1993, 1998). While neofunctionalism thus evokes the image of the (federal) superstate, (liberal) intergovermentalism cannot account for the forming and changing institutional interests beyond states.

This chapter addresses the pitfalls of the often invisible touch of stateness and proposes a methodological perspective with a view to

overcoming them. We point out that recent social and legal constructivist approaches to European integration have begun to discuss new ways of assessing the 'European' polity. Their specific validity with a view to avoiding stateness, we argue, lies in an ontological shift from a focus on the state towards analyzing the impact of norms, identities, language, and discourse on politics and practices in the 'European' polity. We specifically highlight the important insights gained through analyses of constitutionalism that have begun to set new parameters for the study and characterization of the 'European' polity. The argument develops from noting a tension between those formal elements of a 'European' constitution or the constitutional framework which have evolved so far, on the one hand, and the abstract ideas about civilized coexistence within polities which are necessarily implicated by the invocation of the term 'constitutionalism', on the other. While this tension is particularly interesting, thus far it has remained largely under-researched.

With a view to generating further empirical research, we discuss the emerging link between social and legal norms through the empirical lens of policy practices.[1] More specifically, on the basis of studying constitutional discourse and policy-making practices, we propose to trace the emergence of social norms and discuss their potential to materialize. For example, the shared reference to 'subsidiarity' or 'flexibility' as a guiding rule of constitutional bargaining at intergovernmental conferences (Shaw 1998; Wallace 2000) may, potentially, turn into a legally stipulated rule. In other words, we argue that through the routinization of practices, and/or the institutionalization of principles, social norms can, potentially, acquire the status of legal norms. We exemplify this argument by reference to the Treaty of Amsterdam. We seek to demonstrate that an example for a case that contributes to challenging the paradox of stateness is provided by the changing meaning of the principle of *flexibility*, from operating as an organizational idea to achieving constitutional status in the Treaty of Amsterdam (Curtin and Dekker 1999; Von Bogdandy 1999*a*, 1999*b*; Wallace 2000; Leslie 2000). We suggest that asymmetrical solutions such as opting-in/out possibilities emerge as the guiding norm for politics and policy-making in the EU, as well as giving rise to unusual types of legal problematics.

The chapter is organized in four further sections. The first discusses constructivist approaches in political science and law that offer an ontological focus on ideas, norms, and identities. The next section turns to the debate over constitutionalism and constitutional change in the EU as an

[1] See, for further detailed exposition, A. Wiener, *Governance under Changing Conditions of Democracy* (provisional title, Manchester University Press, in preparation).

approach to the paradox of stateness. Then an empirical example of a process in which social norms become gradually materialized into legal norms is discussed, focusing on the emergent principle of flexibility. Finally, we summarize our findings and reflect these back upon the promise to circumvent the cul-de-sac effect which state-centric approaches have upon the challenge theorizing the 'European' polity.

Constructivist Approaches to the 'European' Polity

A range of interdisciplinary legal-political science work offers ways of making it possible both to preserve the potential of the *sui generis* assumption about the EU and to provide guidelines for comparison. In general terms, the reformulated view of EU constitutionalism we develop in this paper on the basis of the discussion of social and legal constructivism is a case in point. Its focus is a tension between the abstract and the formal. More specifically, we argue that debates over the meaning and composition of new institutions in the 'European' polity, such as, for example, Union citizenship, or, the Schengen Convention, provide an access point for our argument, especially in so far as they instantiate the principle of flexibility and its emergence as a new norm. In the following two sections, we proceed to elaborate on the interdisciplinary approach which, as we suggest, will allow us to track norms from 'the social' to 'the legal'. The leading questions are which norms have come to guide practices and processes in the 'European' polity, and how do these norms change, that is, from social norms to legal norms?

Explaining this link between the social and the legal on the basis of an interdisciplinary perspective on norms is not entirely new, to be sure. It has been most prominently explained in Jürgen Habermas's work on the functional importance of law and its potential to generate integrity in a society that is fragmented into separate social and political spheres (Habermas 1992). The role of law in linking the validity and the facticity of norms has subsequently been applied and elaborated on in normative work on compliance mechanisms beyond the nation-state (Zürn and Wolf 1999). While this chapter endorses the link between the social and the legal, it does not share the normative thrust of the argument. That is, we do not elaborate on the problem of establishing an adequate problem-solving capacity of a political system based on law (Zürn and Wolf 1999: 282). Instead, we seek to trace the empirically observable process of norm construction and change. In the following, we elaborate on the core methodological innovations that constructivist approaches offer for this endeavor from both political science and legal perspectives.

We argue that an interdisciplinary politico-legal approach is particularly useful with a view to examining aspects of 'European' constitutionalism. Within this framework, the ontological focus on norms provides a helpful methodological starting-point for political scientists and lawyers alike. Both political scientists and lawyers are interested in questions of which norms have implications for practices and politics in the 'European' polity. Yet the respective conceptual conclusions drawn from the empirical insight of an emergence of (social) norms differ as between political scientists and lawyers. While the former are primarily interested in how norms, through their impact on identities and interests, change actors' behavior in, say, decision-making, policy-implementing, or policy-planning situations, the latter are more specifically concerned with the normative range of norms, and in understanding norms as rules, standards, or principles as well as the adjudicatory and allocative responses which they provoke. It is our contention that both perspectives taken together provide an excellent empirical starting-point with a view to comprehending the 'European' polity from a perspective that is not blurred by a touch of stateness. This position will be more specifically elaborated from the perspectives of social constructivism and legal constructivism respectively, in the remainder of this section.

Social Constructivism

It needs to be emphasized that there is no single shared constructivist approach either in international relations theory or in European integration. In the latter case, where constructivist theorizing has only recently begun to become an issue, this point needs to be made more strongly. Instead of a general theory, constructivism is understood as an umbrella approach. It is a 'middle ground' on which specific theoretical interests merge and from which various research strategies emerge (Adler 1997; Checkel 1998). It has been characterized as a methodological practice of 'establishing a middle ground' between the two poles of rationalism and reflectivism (Christiansen *et al.* 1999: 535–7). Engaging in this practice allows scholars to create an arena in which ontological shifts and meta-theoretical moves can be debated. For example, some maintain a strong interest in explaining decision-making, and generating hypotheses, albeit of a heuristic nature (Checkel 1999; Marcussen *et al.* 1999), while others are primarily interested in identifying the emergence of practices and concepts with a view to discussing their impact on political and legal processes (Koslowski 1999; Diez 1999). Crucially, the participating scholars do not necessarily share epistemological assumptions. They do, however, agree about the importance of the social for both understanding and explaining European integration (Risse and Wiener 1999: 776).

A core constructivist insight stresses the importance of communication and intersubjectivity in situations of decision-making and bargaining beyond the borders of nation-states (Kratochwil and Ruggie 1986). Actors act within an environment that is structured by the social that contributes, in turn, to shaping the structures of this very environment. The environment or the norms that emerge in this context have an impact on identities. In turn, identities influence interest formation and subsequently behavior. International relations scholars have, so far, referred to three types of norms. *Regulative norms* order and constrain behavior, in a way similar to rules. *Constitutive* norms create new actors, interests, or categories of action, and *evaluative or prescriptive* norms create the much less defined and often actually excluded category of oughtness, that is, they set the standards for socially appropriate behavior (Katzenstein 1996: 5; Jepperson *et al.* 1996). The interdisciplinary approach pursued in this chapter argues that, while for analytical reasons such distinction of types of norms may prove helpful in specific political situations, the emergence of norms in the 'European' polity actually suggests a much more closely linked interrelation between types of norms.

This link emerges very clearly in studies of the *acquis* (Wiener 1997, 1998; Jørgensen 1998). Thus, it has been shown that the structuring power and the ability to change of the *acquis* have long been grossly underestimated. The case of citizenship policy demonstrates particularly well how a methodological bracketing of the *acquis*, that is, de-linking it from its social environment, often produces misleading results. Studies that rely exclusively on a bracketed definition of the *acquis* fall short of assessing the meaning of genuinely 'European' concepts, such as, for example, the concept of citizenship of the Union. That is, studies of citizenship that refer to the contents of the *acquis* without acknowledging its embedded structure will invariably miss the social processes (and cultural ideas) that preceded the legal stipulation of citizenship. Subsequently, they find the concept to entail a 'deficit' (O'Leary 1995). In turn, studies of European citizenship that seek to understand the meaning of citizenship by studying citizenship as a practice, including the ideas and policy objectives which have been formed in the process as part of the 'embedded *acquis communautaire*' (Wiener 1998), have found the 'European' concept of citizenship to be genuine, and see it as a potentially powerful challenge indeed to nation-state citizenship (on the crucial importance of embeddedness, see also Chalmers 1999: 522). Studies of changing policy frames have similarly endorsed the importance of tracing the link between informal and formal resources of the *acquis* in the sector of environmental policy (Lenschow and Zito 1998).

In other words, by missing out on the social norms that precede the stipulation of legal norms, a gap emerges. Ignoring this gap may well imply

a recurring touch of stateness, for example, by falling into the trap of 'deficit' talk. In relation to the example on citizenship, one could make the following comments: the first approach entails a normative study that is infected by the touch of stateness; the second focuses on norms and can study the interrelationship between EU and national institutions in a way that is free of that touch. To overcome this gap, it has been suggested that one could conceptualize the formal resources, that is, the shared legal and procedural aspects of the *acquis*, as embedded in a social environment. Informal resources such as ideas and social norms emerge in this environment through practices and routinization. These social norms potentially contribute to the formulation of legal stipulations, or the emergence of legal norms, if they may materialize. Analytically, the parts of the embedded *acquis* are best approached by identifying informal resources, routinized practices, and formal resources based on analyses of public discourse. It should be noted that, while this approach does have a historical institutionalist bias, that is, it acknowledges historical contingency of institutions (Pierson 1996*b*; March and Olsen 1998), it does not suggest a teleological development along a straight line from informal to formal resources. Instead, the formation of informal resources, such as social norms, and the stipulation of formal resources, such as legal stipulations, do not develop in a linear way. They are, however, interrelated through practices. Furthermore, it is important to note that, even if social norms are not included in the formal *acquis*, they still have a crucial role in the process of accepting legal norms. They have significant impact on rule-following and compliance (Zürn and Wolf 1999).

For example, studies in international relations have convincingly shown that norms have a pervasive power across national borders. Thus, the increasingly globally shared perception of human rights norms has crucially influenced agency behavior in different countries in similar ways (Jacobson 1996; Klotz 1995*a*; Soysal 1994). In this way the same norms have an impact on different actors and contexts. Equally, by examining actors' behavior in different contexts, it has been demonstrated that specific social norms have spread across borders. With a view to studying how norms matter to practices and processes in the 'European' polity, we distinguish between two basic types of norms, namely social and legal norms. More specifically, we argue that the crucial contribution which interdisciplinary politico-legal research about norms has to offer is its ability to demonstrate the link between social and legal norms and, subsequently, to discuss the constitutional potential of norms.

This approach shares the assumption that socialization matters to analyses of political decision-making (Risse and Wiener 1999: 776). Taking norms as the starting-point, it follows the observation that social

meanings are discursively constructed. As such, discourse reflects institutional structures and helps to construct them in the process. Public discourse hence offers a crucial medium to assess the link between social and legal norms, or for that matter, the materialization of social norms in the legal sphere. Most generally, it has been observed that norms are profoundly 'social' once they are shared (Klotz 1995*a*). That is, communication about norms establishes their meaning and subsequently their impact. This broad definition of norms implies, for example, assumptions about behavior that are shared by the majority of individuals within a specific area, a decision-making process, a group, or, a nation. As such, norms can be crucial factors in decision-making processes. Indeed, Friedrich Kratochwil argues, for example, that 'actors *have to resort to norms*' (Kratochwil 1989: 5; emphasis in the original).

A number of political and legal scholars have stressed the impact of 'the social' on politics and policy-making in the EU. For example, it has been demonstrated that the perception and guiding force of world-views and ideas, as well as processes of socialization, are each significant for accepting or resisting norms and are hence crucial to the assessment of legitimate governance (see e.g. Jachtenfuchs 1995, 1999; also March and Olsen 1998). Equally, social ethics have been identified as shaping administrative processes (Everson 1998). In sum, it has been argued that socialization matters for political and legal processes of institution-building and decision-making. This insight crucially challenges rationalist assumptions of a 'logic of consequentialism'. Instead, constructivists refer to the 'logic of appropriateness' and/or the 'logic of argumentative rationality' instead (March and Olsen 1998; Risse 1999). Both latter rationales for political decision-making are innovative in an important way for European integration studies, in so far as they both involve a return to 'the social'. Thus, appropriateness is measured against shared norms, whereas argumentative rationality proceeds from an assumption about a belief in moral virtues, which are to be maintained from, or achieved by way of, arguing. It is precisely at this point where social constructivist perspectives on norms (and the logic of appropriateness which they generate), on the one hand, and legal-philosophical perspectives on norms (and their normative range), on the other, will merge.

Legal Constructivism

In the field of legal studies, it is in relation to the study of international law that constructivism has had probably its greatest impact, especially as regards interdisciplinary scholarship. The contribution of constructivism has been emphasized, for example, in the context of the broader agenda

examining the interdisciplinary interactions of international relations and international law. More specifically, the potential of building interdisciplinary research agendas through the key insight that 'actors, identities, interests and social structures are culturally and historically contingent products of interaction on the basis of shared norms' has been noted (Slaughter *et al.* 1998: 384). It has been suggested that we should be looking to the development of research which will 'develop convincing accounts of precisely how such structures are continuously formed and transformed by discursive practice, and how they continuously set the terms by which actors interpret their own and others' identities, interests and actions' (Slaughter *et al.* 1998: 389). This suggestion follows from a focus on 'the idea that norms and other intersubjective structures are "always in process" '. The same authors emphasize also the extent to which discursive practices in relation to arguments about shared norms are situated or embedded in deeper normative structures—which in the case of international law are enumerated (non-exhaustively, one presumes) as 'states, sovereignty and anarchy' (Slaughter *et al.* 1998: 389), for which one could read in the case of the law of the European Union 'states, sovereignty and *markets*'.

For lawyers, constructivist accounts often have the particular merit of promoting a critical perspective upon the use of definitions in determining the proper scope of legal claims (Kingsbury 1998). Thus, similar to the various debates in international relations theory, critical constructivist work in legal studies is frequently posited in contrast to positivism, which would favor closed and fixed definitions of categories or claimants, on the basis of which the legal interpretative process proceeds. With a view to methodological innovation, a constructivist approach to the definitional task rejects the idea of universally applicable criteria. Instead, it posits a 'continuous process in which claims and practices in numerous specific cases are abstracted in the wider institutions of international society, then made specific again at the moment of application in the political, legal and social processes of particular cases and societies' (Kingsbury 1998: 415).

This contextualized definitional method can usefully be applied to the use of the term 'constitution' in relation to the EU. In the first instance, 'defining' the 'European' constitution is itself a contested process. Initially, the method permits us to develop an approach which is sensitive to the 'universal' abstract characteristics of constitutionalism in relation to the balancing of majoritarian power and individual rights within a structured institutional framework common to all liberal nation-states and characteristic of civilized coexistence. But this abstract universalism stands in a creative tension to a second aspect of EU constitutionalism, namely the discursive specifics of ongoing European negotiations as a *sui generis* case

of polity formation outside the nation-state which results in identifiable formal outputs. In addition, it is possible to link issues of definition to the constructivist ontological focus on language and communication. Thus one could hypothesize that, in the case of 'European' polity formation, a constructivist approach is helpful precisely because the focus on communication through language proves to be a crucial factor. In this *sui generis* context, constitutionalism depends upon mediating the meanings of 'new' institutions, norms, rules (see e.g. Curtin and Dekker 1999) as well as upon adapting 'old' institutions using a comparative method.

Constitutionalism depends also upon the constructive potential of the 'community of law' which underpins the project of European integration in both symbolic and practical terms. After all, the EU is a 'pure creature of law' (Beaumont and Walker 1999: 170). It has no pre-political community out of which it has emerged as a polity. That insight does not, however, in itself guarantee a seamless and productive interdisciplinary enterprise in relation to the study of law *and* politics. For example, while political scientists have undoubtedly discovered the Court of Justice as a legal institution, some might doubt whether they have discovered 'law' (Armstrong 1998: 155). Borrowing from Jürgen Habermas (1986), Kenneth Armstrong suggests that a fruitful interdisciplinary conceptualization of the role of law in relation to the EU will see 'attempts to use law as a medium' confronting 'the role of law as an institution'. Forces external to law will necessarily be mediated through law's institutional structure. In other words, law gives a different 'reading' to social, political, and economic phenomena because of its institutional structure, which includes its normative qualities. In those terms, legal analysis can be about 'bringing the law to bear' upon phenomena hitherto studied solely in 'political' terms.

However, a legal-political constructivist analysis is a more ambitious enterprise, identifying and explicating the role of what might be termed the 'spirit of the law' as a shared norm in relation to the EU. The dominant political-science approach to the role of law and legal institutions has been used to account for the compliance of the member states (for example, the work of Karen Alter 1998*a*, 1998*b*) and to explain the phenomenon of 'legal integration' involving the acceptance of EC law by national legal orders and national courts. But it is more sensitive to the specificities of law as a normative system to argue that:

> the processes of persuasion and justification on the basis of norms play a *constitutive* role in the formation of actors' identities and interests and in the structure of the international system itself. On a deeper level, this approach rejects a simple law/power dichotomy, arguing instead that legal rules and norms operate by changing interests and thus reshaping the purposes for which power is exercised. (Slaughter *et al.* 1998: 381)

However, the 'spirit of the law'—like many facets of the EU—displays a paradoxical character when observed more closely. The rhetoric of the Court of Justice may be primarily focused upon the integrative, unifying, and cohesive force of the legal order. In practice, as it develops incrementally, that same legal order both tolerates and embodies aspects of disintegration, differentiation, and disruption (Shaw 1996). This point emerges clearly from the narrative about EU constitutionalism, which has shifted from the so-called constitutionalization of the Treaties by the Court of Justice to the reconceptualization of the post-Maastricht EU as a constitutional order. Aspects of this narrative are covered later in this chapter.

While the methodological approach of this chapter focuses on social norms, and their capability to materialize and thus develop normative potential as legal norms, it should be noted nevertheless that the *theoretical* approach employed in this chapter should be contrasted with a *normative* or *ethical* approach based on moral imperatives of social organization and, especially, those which concentrate upon the European Union as an entity caught between nation-states and processes of globalization (Habermas 1999). Others have characterized this shift as the so-called 'normative turn' in studies of the European Union (Wincott 1998; Bellamy and Castiglione 1999), part of the vocation of which is to find 'the politics' in integration studies and integration theory. Nor is this chapter an attempt to add to the literature which seeks to capture the 'mixity' of the EU.[2] Moreover, while MacCormick's work (e.g. 1999), which is based on an institutional theory of law which does not privilege the nation-state but is premised on plural sources of authority for the purposes of identifying the law, is a rich framework for assessing the specific character of the EU and its legal order as escaping the conceptual constraints of both national law and international law, it does not provide a full conceptual framework for assessing the *mutual* constitution of norms between legal *and* political actors. Also outwith our consideration is the question of technocratic efficacy and functionality, which in the view of some authors might lend some degree of legitimacy to the EU, such that its pursuit can likewise be seen as a normative imperative. Still less does this project lend support to the view that the EU should become more like a liberal democratic state, because only thereby can problems of legitimacy be solved. Indeed, our questions are not directly concerned with *legitimacy* at all, whether referring to that of the Union as a whole, its institutions, or the

[2] See e.g. authors whose work is rooted in legal and political philosophy, although the normative stipulations about the consequences of that mixity represent important insights in EU studies: Neil MacCormick (1997*a*, 1999) or Richard Bellamy and Dario Castiglione (1997, 2000).

activities it pursues. Rather our questions represent a twofold enterprise. They involve the meta-theoretical attempt to problematize taken-for-granted conceptions often fed into the study of the Union, such as 'state', constitution, or citizenship, for the one part, and the task of disaggregating the processes and actors involved, according to the guiding norms of this process, for the other.

In sum, constructivist approaches to European integration contrast with other approaches, such as, for example, normative and conceptual approaches to the 'European' constitution, as well as 'integration-focused' approaches. While the latter struggle to escape stateness, for example, by focusing on what must be done to establish a European constitution, or by discussing the final shape of the European polity, respectively, constructivists do not focus on the whole. Instead, they propose referring to meta-theoretical approaches and new ontological perspectives, when studying European integration. Empirically, we suggest linking political and legal approaches on the basis of rules and norms that emerge from and structure the day-to-day practices of constitutional politics. We suggest that this approach has great potential for studying the processes and practices without falling into the trap of implicit recurrence to stateness in the 'European' polity, precisely because of its focus on ontology. Thus, constructivists have begun to study the impact of identity, discourse, and norms and their respective impact on explaining and understanding the 'European' polity (Christiansen *et al.* 1999). The main implications of constructivism lie in the methodological tools that prove helpful for analyzing processes of fragmentation (of concepts), as well as the process of differentiation (of legal regimes). As we will proceed to demonstrate, a focus on constitutional politics, understood as day-to-day practices in the legal and political realm as well as the high dramas of IGCs and new Treaties, provides an interesting case to prove the point. In the following section we turn to defining traditional approaches to constitutionalism and its role in nation-states and then proceed with a review of constitutionalist debates with reference to the 'European' polity.

Constitutionalism and the 'European' Polity

Constitutionalism represents a useful focus for debate as it attracts both continuing public attention in the media, where there are relatively frequent calls from commentators for a European process of constitution-building,[3]

[3] See J. Freedland, 'This Institution has Failed. For we, the People, have Not Spoken Yet. Europe in Crisis', *The Guardian* (17 Mar. 1999), and I. Pernice, 'Vertragsrevision oder Europäische Verfassungsgebung?', *Frankfurter Allgemeine Zeitung* (7 July 1999) 7.

and a growing degree of attention across political science and international relations commentary on the EU. Continuing the cross-disciplinary theme, we investigate in this section how different disciplines address the 'touch of stateness' question in the specific context of constitutionalism which has significance both in relation to institution-building and at a more symbolic level. This provides a general introduction to the more specific assessment of the principle of flexibility as emergent norm in the next section.

As a concept, the 'state' evokes different—but fundamentally complementary—reactions in political scientists and lawyers. For political scientist two aspects are crucial for defining the state. The first is the 'Westphalian state' (Caporaso 1996) that had its point of origin in the 1648 Treaty of Westphalia. The subsequently emerging international system of states was structured by mutual acceptance of territorial state borders that mark the limits of foreign intervention other than by force (of war), and the rule of sovereignty became the guiding norm of international politics (Krasner 1995; Lyons and Mastanduno 1995; Chayes and Chayes 1995; Biersteker and Weber 1996; Ferguson and Mansbach 1996). The second aspect equally refers to sovereignty. However, instead of relations between states within the international realm, it has been forged by the citizen–state relation which emerged in the eighteenth and nineteenth centuries. Both definitions of the state converge around the familiar Weberian definition of sovereignty, as involving the monopoly of the legitimate use of force within a bounded territory (Weber 1946). States have been perceived as the key actors in world politics, whether in the process of representing interests to the outside, that is, within the international state system (Morgenthau 1985; Waltz 1979), or to the inside, that is, representing the constituted power to the constituency.

The assumption of the state as the single most important actor has been challenged, in particular, by processes of globalization in a number of policy areas. While an abundant amount of material has been produced to define, debate, and discuss the role and impact of a variety of actors, the role of 'the social', emphasized by Max Weber as fundamental for legitimate state politics, has stirred little interest amongst political scientists.[4] The tension that has emerged from the process of modern state-building, on the one hand, and the increasing institutionalization of global politics, on the other, brings the Hobbesian dilemma of civilized interstate relations to the fore. Can states be sovereign and still maintain profoundly civilized, that is principled, relations without having to succumb to a global

[4] For exceptions, see early constructivists such as Kratochwil and Ruggie (1986), Young (1989), or, for that matter, Gramscian contributions to the study of international relations, such as, for example, Keyman (1997), Murphy (1994), Whitworth (1989).

Leviathan? This is the larger question which accompanies any discussion of European 'stateness'.

For the lawyer the state's systemic character is one issue which comes to the fore, in particular in relation to the constitutional settlement which underpins every modern liberal nation-state. The historical and conceptual links that hold together state, constitution, and law as a system have proved hard to break and, from time to time, it has been suggested that they should have been transferred *en masse* to the EU (Mancini 1998). The temptation towards this wholehearted embrace of stateness has occurred partly because, in spite of a general intuition that the EU is *not* a state and *never* will be a state even though it satisfies basic criteria in relation to territoriality, population, and government, legal scholars have struggled to find a convincing alternative vocabulary to express the mixity, 'betweenness', or liminality of the EU (Curtin 1996). This is unsurprising if, for example, the starting-point for an analysis is the enumeration of different types of legal order. If the starting-point for analysis accepts (what are, for these purposes, simplified) Kelsenian positivist precepts that there are essentially two forms of law, namely international law and domestic or municipal law, then the features of the law of the EU must necessarily be observed and described in relation to the (closed) conceptual systems which these types of legal order offer. Moreover, the analysis is predisposed towards a hierarchical conceptualization of the relationships between different legal orders, and diligently though the Court of Justice has pursued its vision of EC law as *sui generis* and superior in nature to national law, it has never been wholly successful in persuading national legal actors, especially constitutional courts vested with the specific task of preserving and developing the national constitution, of the appropriateness of that approach. There have been many occasions on which legal scholarship has been caught between the tension of the *sui generis* nature of the EU (in empirical if not conceptual terms) and the temptation to argue by analogy with established legal and politico-legal categories.

Yet within its own terms, there is no doubt that the European Community, specifically through the agency of the European Court of Justice, has aped stateness, at least in legal terms, because of its strong adherence to the formal properties of the rule of law and the creation of the hard legal core often contrasted with the 'soft' political domain. The juridification of intra-Community relationships between institutions and between the institutions and the member states, as well as the oft-lauded creation of rights which individual private actors can enforce in national courts against member states and (sometimes) other private actors, have all contributed to that trend. But while the instrumental character of the EU legal order is not in doubt—especially in relation to the concepts of

the supremacy and direct effect of EC law—there is a great deal more uncertainty about its systematic character. The lack of systematization of the European Union after Maastricht and now after Amsterdam has often been commented upon (Curtin 1993). This commonsense presupposition about the fragmented nature of the EU as order will be problematized in the discussion of constitutionalism which follows.

Where lawyers and political scientists can most comfortably join debate is in the domain of constitutionalism, and the related notions of constitutional law and the practice of constitutional politics. These figures suggest the possibility of giving simultaneous attention to the need for order (that is, law) to give a framework to the exercise of political choice and the need for a politics to structure the exercise of formal authority. A crucial tension exists between the formal principles or framework of EU constitutionalism, which make the system work in practice, and the abstract qualities associated with a regard for constitutional ideas and practices as the framework for civilized coexistence within polities. At the points of intersection between these formal and abstract aspects, a legal-political approach to constitutionalism borrowing from constructivist methodologies can elucidate both the troubling aspect of applying notions to the EU which are traditionally associated with the state and also its constructive potential in a post-national setting (Shaw 1999) and it is upon that distinction that we must focus.

Applying, for instance, the method of contextualized definition identified in the previous section we can problematize the meanings and languages of constitutionalism in the EU. We can see that both 'a constitution' (and, to a more limited extent, the idea of a 'need' for such a constitution) and the individual elements which make up this constitution in the formal sense have become crucial shared norms involving the coalescence of law and politics. On the other hand, when constitution-making is under discussion, the language of the 'normativity' of such norms is never far away. Thus EU constitutionalism is often seen in normative terms as being about the challenge of designing good institutions for the future Euro-polity. This is normativity in the sense of filling the legitimacy deficit. In that sense, the understandable demand for constitutional formality slips into a rhetoric of seeking the supply of constitutional ideas in order to bring stability and legitimacy to the people which draws instrumentally upon the abstract attractions of constitutionalism as a set of ideas. Seen in this register, constitutionalism for the EU has more than a hint of the 'touch of stateness'. It is about identifying a single end-product, and then about naming that end-product according to the conventional toolbox of constitutionalism (liberal, republican, democratic, etc.). In formal legal terms, it is about transgressing but not ultimately transcending the established divide

between domestic law, in which constitutionalism is a comfortable discourse, and international law which swings between the formal legitimacy offered by the principle of *pacta sunt servanda* operating between formally equal and sovereign states, which holds together the EU from an external perspective, and a more base power politics involving realistically unequal relations of political and economic power.

From a constructivist perspective, a more fruitful conceptualization of the emerging EU constitution in this formal sense would concentrate on disaggregating its key elements (Shaw 2000), with a view to tracking emerging norms and to ascertaining both the embeddedness of norms and their 'normativity' in the sense of their claim to authority from political authorities, including the member states. Aside from the functional provisions on the single market, Economic and Monetary Union, the flanking policies on social affairs, the environment, regional redistribution, and on internal and external security, there are four main groups of provisions within the EU Treaties—buttressed in many cases by case law of the Court of Justice—which sustain a plausible claim to be 'constitutional'. First there are provisions which address the nature of the polity, by proclaiming the existence of the Union, including the constituent Communities and forms of cooperation which comprise the Second and Third Pillars. They are buttressed by basic value statements such as Article 6(1) TEU, which commits the EU to the principles of 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'. So far as these provisions include also those relating to the possibilities of flexibility and closer cooperation, they often beg as many questions as they answer about the precise nature of the polity. Second are provisions which establish the rule of law and its systemic properties, and which address the authority of the Court of Justice. As a third group, we can bring together provisions regarding the key values, principles, and norms within the system, including fundamental rights, non-discrimination, and the institutionalization of Union citizenship. Finally, there is an important group of provisions governing the exercise of power within the EU, covering the whole question of competence and the limits upon it. However, these provisions have not come all at once through a single formative constitutional experience for the EU, but have been the result of gradual accretion through the original treaties, amending treaties, and their associated intergovernmental conferences, constitutional-type interpretations and rulings by the Court of Justice, and the practices of the institutions and the member states which have set up many of the constitutional cornerstones which are now being increasingly recognized.[5]

[5] A good example would be the wording of Article 6(2) TEU which is intended, *inter alia*, to set the basic conditions for admission to the EU, as well as to be a constitutional

Constitutionalism can be seen as both a risk and a source of revival for the EU. As a practice of polity-formation, for example, constitutionalism is a natural progression for a polity which continues to transgress both the boundaries of the 'traditional' international organization and the functional borders of the project of economic integration. The significance of economic integration in the original treaties establishing the European Economic Community was mixed: *functionally* it was to the fore in the sense that only limited instruments for policy development were given to the new supranational institutions and it represented the focal point of the legally binding and enforceable treaty dispositions (what were, previously, Articles 9, 12, 30, 34, and 36 EEC on the free movement of goods, for example; Poiares Maduro 1998). Yet in terms of *rhetoric*, economic integration took its place from the very beginning alongside a more ambitious if vague project for the 'ever closer union of the peoples of Europe' (as in the Preamble to the EEC Treaty, for example). In practice, it was the project of market-making which decisively relaunched what we now know as the European Union from the mid-1980s onwards, with the Single Market Program, the planning and gradual achievement of Economic and Monetary Union, and the politico-economic project of enlargement after 1989.

Explanations of these outcomes have commonly focused upon the balance of causes: autonomous institutional driving force deriving support from the logic of policy spillover, or (rational) choice of the member states. Michelle Everson has argued that market-making has in fact unleashed a set of *private* as well as *public* national and Community interests which compete for prominence at the EU level. These interests were propelled in the first instance by a fundamentally neoliberal program, but this subsequently was gradually 'socialized' over the years (Everson 1998). Constitutionalism—or, a set of choices about the formal underpinnings of the polity and the societal bargains upon which those choices are based—is, on that reading, part of a sequence of market-oriented polity-formation, capable of explanation using either of the standard toolkits of European integration studies (neofunctionalism and intergovernmentalism), but one which, we would argue, reveals its paradoxical nature most clearly when subject to constructivist analysis. For that analysis allows us to make a specifically legal-political analysis. For when the emphasis is upon the significance of constitutionalism as a question of *legal order* a different perspective emerges.

cornerstone for the present membership. Although inserted in the TEU by the Treaty of Amsterdam, it is derived directly from the so-called Copenhagen Principles, articulated when the European Council first formally acknowledged the prospect of enlargement to include the newly democratized countries of Central and Eastern Europe (European Council 1993; also *Bulletin of the EC*, 6 (1993), para. I.13).

Constitutionalism gives meaning to the idea of the EU as a 'community of law', as its most visible sign is the role of the European Court of Justice in 'constitutionalizing' the legal order. As Kenneth Armstrong has argued, the idea of the 'constitutionalized treaty' is one of the most powerful instrumental images within EC law (Armstrong 1998: 161). This is the most important facet of the formal elements of EU constitutionalism sketched above. But what, in fact, the Court has done is first and foremost to establish the federal character of the EU legal order by creating an explicit hierarchy between EC law and national law, with EC law becoming *part* of and taking precedence over national law. Remedies in national courts are guaranteed for aggrieved individuals on the basis of this dogmatic system. It has then buttressed the near-state nature of the EU by finding that the European Community—at least—holds 'sovereign powers' (not sovereignty as such), powers which are limited in nature but are increasing by incremental steps both as a result of further transfers by means of Treaty *fiat* and as a result of teleological interpretations of those powers by the Court itself and its application of the principle of implied powers.[6] Constitutionalism in this sense comes tantalizingly close to an ideal closely related to a formalized notion of the rule of law which offers a commonsense goal which many observers and commentators find it easy to accept that the EU *should* aspire to in so far as it represents a common endeavor of a collectivity of liberal states. That is, constitutionalism as a frame of reference for analysis beckons suggestively towards a normative discourse for the future of the EU in an evolving world of liberal states and even liberal post-state and post-national polities. This is a discourse which underpins implicitly much legal commentary on the EU and its legal order. It is a discourse which reveals, once again, the touch of stateness.

However, the contribution of a constructivist analysis is not limited to uncovering these touches of stateness in constitutionalism. It can also contribute to a legal-political understanding of EU constitutionalism based on shifting definitions and emerging norms. For example, an interesting question is whether the discourses of the constitutionalized treaty, and indeed the socialized market, are confined to describing and evoking a constitutionalism of the *European Community*, paying insufficient attention to the *additional* challenges of considering the *European Union* as a proto constitutional order. This is another example of seeking to define the EU's constitutional framework. Since the Treaty of Maastricht (and continuing after the Treaty of Amsterdam), an important and sophisticated debate has been enjoined amongst lawyers about how to characterize the EU in legal terms, in particular its relationship with the established

[6] Opinion 1/91, *Re the Draft Agreement on a European Economic Area* [1991] ECR I–6079.

legal entity of the European Community (Von Bogdandy and Nettesheim 1996; Dörr 1995; Pernice 1998, 1999; Curtin and Dekker 1999; Von Bogdandy 1999*a*, 1999*b*; De Witte 1998; Koenig and Pechstein 1998). The question has been asked whether the European Community, gathering together the three Communities (EC, ECSC, Euratom), and the EU, gathering together the 'three pillar structure' of Maastricht along with the common provisions of the Treaty on European Union, are fundamentally separate entities with separate legal orders. A specific problem is the fact that formal international legal personality is ascribed to each of the three Communities, but not to the European Union itself, although the latter acts in certain ways in the international domain as if it were a recognized legal person, and is given the objective of asserting the identity of the Union on the international scene (Article 2 TEU). On the other hand, the principle of coherence offers an important institutional counterweight to such differentiations between Community and Union (Article 3 TEU).

A number of questions are raised about the transformative process and its outcomes. Does one (EC) belong to the domain of supranationalism and the other (EU) to the domain of intergovernmentalism? Or is the picture clouded by gray areas, as Meyring suggests, especially if one has regard to the activities of the institutions in the context of justice and home affairs (Meyring 1997)? Is it permissible to focus on the EC as representing the best efforts of the integration dynamic based on the functionalities of the single market and economic and monetary union, treating the EU as the poor political relation, ignoring the cross-cutting influence of structures such as the institutional framework? Or is it correct to revert back to the categorization of EC law as a species of international law (the 'new legal order of international law' characterized by the Court of Justice in the foundational case of *Van Gend en Loos*),[7] and to assert that now international law and EC law are (re)converging (Denza 1999). To characterize this essentially *legal* debate as being fundamental to the constitutionalism of the European Union in broader politico-legal terms seems, at first sight, to be falling victim to excessive law-centrism. Is this type of formalized conceptualization of EU constitutionalism not merely replicating the pitfalls of the earlier generation for whom the constitutionalized Treaty was the central image, albeit on this occasion without the Court of Justice in the vanguard, given its relatively decentered position in the overall EU framework (Peers 1999)?

On closer inspection, it is perhaps less the narrow question of the putative fusion, interlinkage, or separation of the EC and EU legal orders, but

[7] Case 26/62, *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1.

rather the related endeavor to characterize the EU in terms self-consciously based on meta-theoretical understandings and social scientific ontologies which is of significance in this context. Curtin and Dekker (1999), for example, draw on the institutional theory of law developed by Neil MacCormick (1997*b*) in order to argue that the regime established by the Treaty on European Union represents the institutional concept of the 'international organization' rather than that of the (mere) 'Treaty'. Central amongst their arguments is the way a single institutional framework operates across the entire EU system, with a resultant mixing of principles in relation to decisions and decision-making, judicial practices, constitutional practices, and practices in relation to the protection of human rights. Practices are 'borrowed' and applied, for example, in relation to the whole system when a strict interpretation seems to indicate that they 'belong' only to a part of the system. A good example has been the interpretation of transparency provisions by the Court of Justice and, most notably, by the Court of First Instance. The characterization of this system as 'layered', however, recognizes that within the basic shell there are 'various autonomous and interlinked entities with their own specific roles and legal systems' (Curtin and Dekker 1999: 132).

A related analysis comes from Armin von Bogdandy who characterizes the EU as a supranational federation (1999*a*, 1999*b*). Although the analysis builds upon an earlier argument about the unity of the EU legal system (Von Bogdandy and Nettesheim 1996), the strength of the argument comes from a juxtaposition of unifying elements (such as the assertion in the Treaty of Amsterdam of a more clearly demarcated external borders and a starker distinction between insiders and outsiders in relation to the Union: Article 11 TEU; Articles 62 and 63 EC) and elements of polycentrism and fragmentation evident in the plurality of institutional methods and configurations. While not hesitating to deploy the emotive term 'federalism', Von Bogdandy is still careful to stress its capacity to express the diffusion of the holding of power in *non-state* contexts, and to urge the integration of federalism and supranationalism as (for him) a potent blend—in a normative as well as a descriptive sense—for the Union. Although he deliberately distances his argument from 'postmodernist' arguments in relation to law, in practice Von Bogdandy relies heavily upon concepts of networks and heterarchy commonly used by such analyses.

The analyses by Curtin and Dekker and Von Bogdandy represent, in our view, an application of the notion of the 'embedded *acquis communautaire*', or 'the continuously changing institutional terms which result from the constructive process of "integration through law" ' (Wiener 1998: 299). In the case of Curtin and Dekker, the emphasis is upon the contribution of certain routinized institutional practices to the constitution of

the *acquis* and the transformed understanding of the EU in legal-political terms. Von Bogdandy, meanwhile, draws out the paradox of flexibility and fragmentation within a framework of unity, which is an important condition of the *acquis* since it is dependent upon its 'constitutive practices' (Wiener 1998: 300–1). It is to the concept of flexibility which we now turn, in order to develop a further empirical specification of our methodological premises, by examining the emergence and transformation of this concept as 'norm' within EU constitution-building and polity-formation.

Flexibility and the Treaty of Amsterdam

Observers have developed a number of interesting parallels between flexibility and the concept of subsidiarity which was included in the EU Treaties by the Treaty of Maastricht in 1993 (Shaw 1998; Wallace 2000). Like flexibility, subsidiarity finds a number of different forms in the Treaties, juxtaposing the 'legal' and the 'political' (De Búrca 1999). The political statement is that now contained in Article 1 TEU, about decisions being taken as closely as possible to the citizen. Its specific legal form is to be found in Article 5 EC, where it sets out conditions to the exercise of *shared* competences between the Community and the member states, including a reference to levels of appropriateness for decision-making. Flexibility meanwhile is part of the deep political penumbra of the Treaties, which comprise increasingly common differentiated solutions to the challenges of integration. In legal terms, it also has two different faces (Walker 2000). On the one hand there is the 'unplanned architectural sprawl' (Walker 2000) of *ad hoc* arrangements principally for social policy (1993–7), for EMU (1993 to the present), and for matters relating to free movement, asylum, and immigration (since the 1980s in respect of the Schengen Convention, but since 1999 only in respect of this newly 'communitarized' policy). On the other hand, there are basic principles which are supposed to govern any future and potential flexibility *within* the Treaty frameworks, setting conditions on what is constitutionally tolerable (Articles 40, 43–5 TEU and Article 11 EC).

The two concepts also arguably offer languages on the basis of which ostensibly antagonistic interests can keep a conversation going, that is, by providing a shared terminology into which very different meanings can be invested. Thus subsidiarity can be seen as a form of advanced federalism with its prescriptions on the decentralization of power, or it can be the reassertion of the statal grab for power and a symbol of a revitalized proud nationalism. Equally, flexibility in the run-up to the Amsterdam IGC was asserted as a vital principle as much by those seeking 'more Europe'

through enhanced cooperation within a hard core, if need be leaving behind the laggards, as it was by those such as the then UK government which wished to place a brake on the whole principle of intensified integration by introducing increased 'pick and choose' or à la carte options (De la Serre and Wallace 1997*a*).

However, to encompass these varied meanings, as well as the specific legal terms and usages highlighted here, it is necessary to deploy a wide definition of flexibility. Thus in using the term 'flexibility', we are combining a number of different levels and dimensions of differentiation and fragmentation within the EU polity. For example, at a macro-level we include the development of complex overlapping systems of authority, exemplified by the extra-EU evolution of Schengen, the development and transformation of the cooperation in justice and home affairs before and after the Treaty of Maastricht, and the subsequent Amsterdam-inspired communitarization of Schengen and construction of the new Title IV of the EC Treaty on Visas, Asylum, etc. States—notably the UK, Ireland, and Denmark—have moved laterally across these systems of authority as they have developed greater depth. Other examples at that level include social policy from 1993 to 1997 and EMU as it continues today, in relation to the non-participants in Euro-land and their various conditions of non-participation. Flexibility also operates within the EU, as the example of open-textured concepts such as Citizenship of the Union illustrates, where the flexibility operates in a temporal sense of ensuring 'fit' and complementarity between an allegedly common Union concept and diverse national notions of citizenship.

At a more technical level in relation to the internal market flexibility has, since the date of the Single European Act, offered an outlet for national sensibilities, by allowing member states to deviate under certain conditions from harmonized arrangements on, for example, product safety (Article 95 EC). Here there appears to be a more formal convergence of the concerns of flexibility and subsidiarity, given the need for much internal market legislation—falling within areas of shared competence—to respect the principle of subsidiarity. Indeed, it is in relation to internal market legislation (broadly defined) that the Court of Justice has so far made its limited pronouncements on the effects of the subsidiarity principle. Notably in the UK's challenge to the legal basis of the working time directive, which was based on a competence to regulate health and safety matters,[8] and a German challenge to the adoption of a directive harmonizing national laws on deposit guarantee schemes,[9] the discussion

[8] Case C–84/94, *UK* v. *Council* [1996] ECR I–5755.
[9] Case C–233/94, *Germany* v. *Parliament and Council* [1997] ECR I–2405.

by the Court does not betray any particular sensitivity to any new inter-institutional balance which the insertion of the subsidiarity requirement into the Community legislative process might have brought about (De Búrca 1998).

If there is an emerging common agenda in the Court of Justice about the concepts of subsidiarity and flexibility, it appears to be in a general reluctance to allow these principles to fetter the judicial role. Thus, in addition to the subsidiarity case law highlighted already, in relation to flexibility the Court of Justice has shown a disinclination to allow the presence of differentiated or partial arrangements to undermine the coherence and uniformity of the legal order it has created. So it decided to classify the 'law' arising when measures were adopted under the Social Policy Agreement from which the UK opted out between 1993 and 1997 as 'Community law',[10] and it declined an invitation from the Council *not to intervene* when it concluded that it has jurisdiction to consider whether a Third Pillar measure, which it could not in normal circumstances review, was unlawful because it should have been adopted under EC Treaty provisions.[11] A more positive contribution to the embedding of these norms in the legal and political systems, by their invocation as underlying structural principles of that legal order is not, therefore, presently in view.

An important research agenda suggests itself as a result of these insights. For example, is it possible not only to track the discourse of flexibility through phases of decision-making, but also to pinpoint moments at which it transforms into 'norm', and then at some point shifts from 'the social' to 'the legal'? Such work would, for example combine studies of norms as informal resources that are influential in various policy sectors (Lenschow and Zito 1998; Marcussen *et al.* 1999) as well as research on compliance with norms (Zürn and Wolf 1999). What sort of future do we envisage for flexibility in the Court of Justice? Is it limited to the fixing of the boundaries of differentiated decisions, or will it be elevated to the status of a more general interpretative principle along the lines of the notion of 'institutional balance'? A major new research field which will prove crucial to the formation and role of the flexibility principle will be policy areas that are covered or touched by the Schengen Implementation Agreement (Hailbronner and Thiery 1997), such as, for example, research on asylum policy, visa policy, and policing.

[10] Case T–135/96, *UEAPME* v. *Council* [1998] ECR II–2335.

[11] Case C–170/96, *Commission* v. *Council (Air Transport Visas)* [1998] ECR I–2763.

Conclusions

In this chapter, we began by outlining the paradox of the 'European' polity, so far as it struggles—in the context of both the studies and practices of governance in relation to European integration—to escape the touch of stateness. We outlined a methodological stance which builds upon the constructivist middle ground where scholars can debate ontological shifts and meta-theoretical moves. We chose to focus on the embeddedness and embedding of norms, using the concept of the embedded *acquis communautaire* as an example of the strong structuring properties of norms, and their impacts upon actors as guiding social norms, as well as legal rules. At the same time, this paper has emphasized the fluid nature of norms: on the one hand, norms may achieve strong structuring power, on the other hand, norms are created through interaction. The processes of norm construction and rule-following are mutually constitutive. In this conclusion, it is important to highlight the relevance and interest of this analysis, which elaborates upon the general field of constitutionalism as an object of study and the specific case of flexibility.

We identified a tension between the formal and the abstract in EU constitutionalism, and subsequently sought to highlight the continuing paradoxical relationship between a non-state polity and a touch of stateness presented often implicitly in analyses of this polity. With a view to overcoming the touch of stateness, we turned to constructivist approaches, arguing that the focus on the social and an ontological shift away from state actors offers a fresh perspective on the 'European' polity as *sui generis*, yet comparable. We argue that constitutionalism might be about fundamental ordering principles which have a validity outwith the formal setting of the nation-state. Yet, in practice the ways in which these principles find expression in the EU's legal order are either frequently dependent upon premises about the 'good society' which draw directly upon the normative properties of states, or are drawn into the Court of Justice's design of a federalized 'Community of law', in which the spirit of that community draws strength from the extent to which the EU as legal order apes a statal order.

It follows that reconceived on the basis of a constructivist ontology which allows a focus on norms—and their emergence and transformation from the social to the legal—constitutionalism presents a research area that is key to understanding and explaining the specific non-state conditions of the 'European' polity. Thus, we propose identifying the emergence and impact of norms in various policy sectors. In this chapter we particularly stressed the IGC processes as an arena in which social norms emerge

(Wallace 2000). With reference to the principle of flexibility and its increasing social acceptance as well as legal insertion in the Treaties, we suggest that norms are a factor structuring, for example, the redefining of the constitutional scope of the Euro-polity as it has shifted from Community to Union, and as it transforms once again in the wake of the Treaty of Amsterdam and the vital structural and political changes which that has introduced.