Post Sovereignty and the European Legal Space

Gibbs, Nathan

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Post-Sovereignty and the European Legal Space

Abstract

The political constitution of the European polity has come under strain in recent years faced with insistent pressures on its institutional capacity to resolve social problems. The EU's polity crisis needs to be placed in the context of the development of a distinctive modern conception of secular constitutional authority, focused on the ideal of sovereign self-determination in order to understand the exact nature of these challenges. As the work of Neil MacCormick illustrates, the EU provides a radical challenge to the on-going capacity of the concept of sovereignty to provide a framework in which to address problems of legitimacy. The article explores the exact nature of this challenge, its historical context and its consequences with reference to debates over the nature of constitutional pluralism. It also sets out a path to the renewal of the European constitutional debate through a re-consideration of the nature of secular constitutional authority and the necessity of its connection to the idea of sovereignty. In brief, the article seeks to re-engage in the task of 'questioning sovereignty'

Key Words

European Union, Constitutional Pluralism, Secularism and Sovereignty

1. Introduction

The last two decades of European integration have witnessed three significant events that have placed the basic constitutional identity of the European Union in question: the rise and fall of the project to create a Constitutional Treaty; a series of on-going crises linked to co-ordination problems within the EU, most notably, regarding the Eurozone in the wake of the financial and sovereign debt crisis; the migrant and refugee crisis and finally, the gradual reassertion of a more agonic nation-state sovereignty through the German Constitutional Court jurisprudence and culminating in the UK's membership referendum. At this moment of acute difficulty for the EU project, this article seeks to develop a narrative perspective on the development of the constitutional dimension of European integration, a dimension which has consistently proven elusive and difficult to categorize from a theoretical point of view and which has posed a range of fundamental problems regarding the meaning of democracy, political identity and citizenship. The essential point underpinning this investigation is the

idea that a broader context related to the link between modern constitutionalism and the historical evolution of, what might be termed, a secular social order needs to inform a re-evaluation of the normative and constitutional categories underpinning the strategic approaches which have thusfar shaped responses to recent events of major political and legal importance within the discourse of European constitutionalism in the broad sense.

Although the ideas of secularity and modernity will be unpacked at a later stage, the essential purpose of categorizing European constitutionalism within a broader historical and ideological context is to frame a discussion of how tenable certain key assumptions pertaining to the recognition of fundamental values and the creation of institutional forms are likely to prove in shaping its response to contemporary challenges. The approach adopted is to take a step back from some of the basic values typically used to evaluate institutional and policy developments: values whose meanings are relatively contested like democracy but whose salience is broadly accepted as well as more specific, conceptually sophisticated and detailed evaluative frameworks like Rawlsian liberalism whose applicability is contested. This step back is taken in order to problematize questions of overarching polity legitimacy and polity formation that are typically bracketed by inquiries that focus on intra-polity questions such as distributive equality or the configuration of civil and political rights. The approach used involves, in focusing on ideas of secularity and modernity, the examination of questions about polity formation, polity type and polity legitimacy through a narrative and hermeneutic investigation of the presuppositions and worldviews through which we have framed and answered these sorts of basic political questions of collective identity.

Section one sets out the context for thinking about the problems of European constitutionalism in terms that are first, addressed at a deeper cultural-political level and, secondly, are addressed to the historical and narrative formation of a common overall political outlook. In brief, section one outlines the view that understanding the constitutional problems of the EU and of the European political space more generally entails a shift from thinking of these problems in terms of the concept of a more limited institutional legitimation crisis to thinking instead about the broader idea of a polity crisis. This legitimacy question relates to the essential nature of the EU as a type of political regime. It presupposes that there are pivotal and insistent questions to pose about the overall political ontology of European integration as opposed to discrete empirical problems of procedural justice and transformative strategy posed by an essentially indeterminate process of integration, however important these may also be in pragmatic terms.

Section two outlines certain broader cultural structures, pertaining to polity legitimacy in modern secular societies, within which we might begin to locate the deeper ontological dimensions of a European polity crisis. Crucially, this section distinguishes two different schemes in which the notion of a secular society might be interpreted and sets out how various political implications flow from this both in general and for understanding European integration in particular. The first way of thinking about secularism emphasizes the ideals of individual and collective self-determination, the capacity of human agency to transcend prior conditions and to organize its society in ways that reflect autonomously generated norms. This way of thinking about secular modernity in turn supports a model of constitutionalism

and polity legitimacy focused on the concept of sovereign authority. Such a notion of sovereignty symbolizes at the level of constitutional structure the broader ideal of self-determination and autonomy. A second way of approaching the analysis of secular politics emphasizes the finite nature of personal and collective agency exercised within fluid and complex historical and basic existential conditions, which exceed easy conceptualization. Secularity within this perspective refers to a specific type of historical condition and worldview that forms the background for human action and decision.

Sections three and four employ and elaborate the basic ideas outlined in section two to clarify the concrete evolution of attempts to conceptualize legitimate authority within the European legal space. The key point to note is that, in various ways, the ideal of sovereign self-determination has heavily influenced both directly and indirectly the structure of the conceptual debate on Europe's evolving form of constitutionalism. This predominant influence is due to the historical connection between the ideal of self-determination and the form of constitutionalism that developed in secular societies. Crucially, however, this influence is currently exercised in spite of the sense in which the distinctively post-state dimensions of the European polity's praxis problematize key features of the sovereignty ideal. In brief, the European legal space develops a constitutional practice that has decoupled the link between the historical dynamics of a secular society and the ideal of sovereign self-determination.

Section three begins with a reconstructive interpretation of the work of Neil MacCormick and his thesis that the European constitutional arena should be interpreted as 'post-sovereign' in nature. MacCormick's work was the first to expose the tension between the on-going salience of sovereign discourse in constitutional theory and the practice of European constitutionalism. Placing MacCormick's work in a broader historical context helps both to illustrate the concepts set out in section two and to shed light on the significance of the changes in constitutional form charted in his work. Two particular issues are discussed here: first, the relationship between the historical process of secularism and the ideal of sovereignty and second, a discussion of the way in which the broader dynamics of secularism have challenged the ideal of sovereignty in the context of the EU. MacCormick's 'post-sovereign' understanding of constitutional pluralism is also examined in the light of this discussion as an alternative to the ideal of sovereignty. Two particular issues are highlighted as posing on-going difficulties in a post-sovereign context: the problem of connecting political legitimacy with collective identity and the problem of institutional capacity. Section four examines the debates concerning late-sovereignty and constitutional pluralism that emerged after MacCormick. A key characteristic of these debates was the argument for an on-going role for a modified conception of sovereignty in framing the landscape of constitutional pluralism. These debates further exemplify the tension that has resulted between the deeper historical conditions underpinning the European legal space and a constitutional imaginary centred on the symbolic form of sovereignty. They further highlight the difficulty of providing an alternative to the symbolic functions played by the traditional concept of sovereignty. The concluding section does not provide any straightforward solutions but it suggests that a consideration of the finitude of political and social agency

implies that the legitimacy of European integration can only be addressed through a problematization of its characteristic forms of market and bureaucratic co-ordination.

1. From Legitimacy Crisis to Polity Crisis: A General Overview

Why is an examination of the cultural presuppositions of the forms of European constitutional integration so crucial? The contemporary problems faced by the EU, such as the problems of social dislocation and disorientation consequent on economic integration as well as the politics of humanitarianism in a globalized world demand a high level of co-ordination for their resolution. Such a level of co-ordination arguably presupposes some kind of way in which the collective interest of the European legal space as a whole, the interest of what we might term a 'European polity', can be articulated and subscribed to by various agents involved in its implementation. The question then arises: what conception of the legitimacy of the European polity will enable the construction and implementation of a common political framework? The difficulty at present appears to be that the sources of political legitimacy remain attached resolutely to the nation-state or such sources are linked to a new 'global' model of human rights that is not primarily addressed to the political problems associated with the formulation of collective action projects.[1] In some ways, this looks like an 'old-fashioned' crisis of legitimacy: a crisis related to the legitimacy of transferring powers to the EU and to the substantive principles for organizing and directing them. For some time, this type of legitimacy crisis is one which we have hoped would eventually arrive at some kind of resolution through a combination of functional necessity and a public deliberative clarity and honesty about the nature of these challenges and the supranational forum appropriate for framing an adequate response to them.

This appears to be the hope embedded in, to use the most sophisticated and persuasive example of this approach, the work of Jurgen Habermas.[2] Despite a clear-eyed assessment of the seriousness of the challenges facing contemporary Europe, Habermas remains optimistic that the EU can mature as a polity in the very process of meeting these challenges. This optimism arguably stems from his broader work setting out the communicative presuppositions of collective action and the mutual implication of private and public rights in the essentially deliberative structure of constitutional democracy. Whilst there are perhaps concerns over the timeliness of these developments, there appears to be a sense in which Habermas's understanding of the dynamism of modern society and the variety of technocratic systems accompanying it can ultimately be comprehended within the structures of a communicative rationality. It is a question of making these links explicit and developing their implications in terms of values and institutions.

The key point is that, from within a Habermasian perspective, all the pieces of the jigsaw are present and available within the 'common constitutional traditions' of the member

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[1] For a useful overview of the global human rights model see K. Möller, *The Global Model of Human Rights* (Oxford: OUP, 2012). The model centres on the role of entrenched human rights in ensuring a balance between public regulation and a relatively open-ended set of individual rights via proportionality review.

[2] J. Habermas, *The Lure of Technocracy* (Cambridge: Polity Press, 2015) and J. Habermas, *The Crisis of the European Union: A Response* (Cambridge: Polity Press, 2013)

states in order to resolve the EU's legitimacy crisis. Part of the persuasiveness of his work lies precisely in the fact that he articulates a shared assumption that the dynamics of a modern global society consist of elements of constitutional propriety and deliberative openness on the one hand and of more problematic market and technocratic systemic structures on the other, but in such a way that we can be confident that the latter can never operate entirely without the support of the former. However, many of the EU's current political problems seem to stem from the difficulty of re-integrating the world of shared solidarity with systemic imperatives linked to technology and the operation of global markets simply through, what we might hope are, the protean forms of a transnational constitutional democracy. The present set of problems, from the Eurozone to Brexit, seems to indicate that what might have once been perceived as a difficult social process of development and transformation now appears to be characterized by structural incompatibilities between transnational systems and any meaningful process of deliberative legitimation.[3]

The position set out in this article is that the solutions to the EU's legitimacy crisis do not lie straightforwardly within existing paradigms of constitutional self-understanding. The diagnosis of the present crisis needs to be understood differently from how it was generally interpreted during the period beginning with the post-Maastricht ratification process and ending with the Constitutional Treaty. The distinction here is that the predominant discussion of the earlier crisis was arguably carried out more in terms of how an *existing*, although relatively dynamic, institutional structure was to be reconfigured in terms of the basic animating ideals of the EU.[4] The assumption was that there were a certain range of ideals or values underpinning the development of the European Union, ideals such as peace, prosperity and tolerance (to use a trio of values selected by Joseph Weiler as an example). The EU's legitimacy problem was then understood in terms of developing an institutional structure that was capable of underpinning and clarifying these existing values with a view to a more rapid completion of the institutional framework required to realize them.

It was this type of diagnosis that arguably led to the discussions relating to the Constitutional Treaty. The underlying logic here seemed to be to articulate the existing values and institutional structures of the EU with an overall clarity that would correct the rather pragmatic and piecemeal way in which the EU had, until then, been developed. The technical challenge was to construct a higher level legal organization of the key EU competences and institutional processes functional to policy implementation and to subject the resultant framework to the input legitimacy of national ratification in addition to the new more deliberative convention process. However, what we now arguably need to acknowledge or explore, in the light of the seemingly intractable obstacles to re-integrating transnational systems into transnational democratic processes, is instead what might be described as a 'polity crisis' rather than a more technical and limited institutional legitimacy

[3] See W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London: Verso, 2014)
[4] In fact, this paradigm of thinking of legitimacy in terms of a relatively fixed body of established institutions, processes and rights is far broader than the field of European integration. The work of John Rawls arguably falls within this paradigm in so far as it is difficult to disentangle the concept of justice from the concept of a 'basic structure' of a relatively self-sufficient society. The European Union therefore supplies a useful test case for examining the limits of this type of idea.

crisis. This might be understood as a deeper form of crisis connected with the legitimation, not of an existing structure, but of a more basic formative structure: a crisis concerning the ideals which are aspired to and how such aspirations connect with basic questions of allegiance to particular political forms with the capacity to pursue them. Arguably, it is this underlying polity crisis that, from Maastricht, through the failed Constitutional Treaty and on to the present day, has shadowed and determined the key decisions of constitutional significance within the broader process of EU integration.

II. Secularism and Political Form

The key to gaining a preliminary grasp of the EU's polity crisis is to take a step back from more immediate institutional questions and to discuss this crisis in the broader context of the evolution of political forms within (Western European) modernity. This broader way of setting a context for the discussion of the constitutional problems of the European Union, enables a deeper set of presuppositions regarding our understanding of constitutionalism to be explored. A further critical point is that such modernity also needs to be understood in terms of the development of its characteristic forms of political life. Accordingly, the political regime might be said to be marked by a *particular* constitutional understanding of the secular nature of society more broadly; that is, it is understood in terms of a fundamental capacity to re-shape and reconfigure the fundamental civic structures that constitute its collective life. This understanding of the political form of a distinctively *modern* constitutionalism can be described in terms of the concept of sovereign self-determination. Negatively put, such a political regime does not understand its specific form of legitimacy in terms of a prior historical normative setting of an unquestioned tradition or in terms of a symbolically constructed idea of a prior universal order of being. However, the distinctively modern understanding of secularism places a positive emphasis on the ideal of self-determination which means that it also excludes the idea of any prior ontological structure of human agency playing a role in its legitimation.[5] This more specific political understanding of a secular society as one that is self-determining in nature might be contrasted with a more limited and broader view of secularism which places an emphasis on the open-ended character of its political and civic institutional structures. These structures are, crucially, not underpinned by forms of legitimation in terms of custom or a broader total worldview that provide a particular mandate for their specific structural features.[6] In what follows, this contrast between a broader notion of secularism and the more specific idea of self-determination will be examined in more detail with the case of the EU in mind. Firstly, however, we need to set out how the development of the EU not only problematizes the ideal of self-determination but also how it challenges the broader process of secularization to provide a renewed sense of

[5] For further useful discussions of this complex notion of secularism and its relation to modernity see Charles Taylor, *A Secular Age* (Cambridge, Mass.: Harvard University Press, 2007) and P. Manent, *An Intellectual History of Liberalism* trans. R. Balinski (Princeton: Princeton University Press, 1995). See also M. Reidel, *Between Tradition and Revolution: the Hegelian Transformation of Political Philosophy* (Cambridge: Cambridge University Press, 1984) for a discussion connecting the concept of formative self-determination with the constitutional structure of the modern State and market-orientated civil society.

[6] This broader concept of a secularism as it pertains to the legitimation of the basic form of social relations is indebted to Marcel Gauchet's account which is set out in M. Gauchet, *The Disenchantment of the World: A Political History of Religion* trans. O. Burge (Princeton: Princeton University Press, 1997)

normative orientation with regard to constitutional and political questions. Some answers to this problem of providing a new perspective on normative problems of civic association will then be set out in terms of their basic parameters.

At its deepest level, the polity crisis of the EU is a striking and perhaps paradigmatic symptom of a crisis in the concept of sovereign self-determination that has characterized the predominant understanding of modern secularism. Accordingly, solutions to the legitimacy of the European Union have thusfar been shaped by this particular conception of modern constitutionalism. The task has been, so it seems, to determine whether the EU ought to be recognized as sovereign, whether the nation-states retain sovereignty or whether we are living with a necessarily pluralist configuration of authority. Once the correct understanding of the locus and configuration of authority is thus determined and 'input' legitimacy adjusted to these structures, the values of the European Union, connected to this form of authority - the values typically of peace, prosperity and tolerance - set the output related standards determining the tasks and enabling the accountability of the relevant authority structures.[7] The idea of sovereignty underpinning attempts to respond to the legitimacy crisis of the European legal space has been both too demanding and too restricting. It has been too demanding in the sense that neither the EU nor the Member States, considered individually, are capable of sustaining a plausible claim to a classic modern form of self-determination exercised with regard to a social space at large. It has been restrictive in so far as residual sovereignty claims, drawing on powerful symbolic resources, are able to articulate and motivate various veto points, both within the European Council and within national ratification processes, in respect of the formulation of common European policy.[8] This means that whereas output legitimacy often clearly necessitates certain policy solutions, the 'input legitimacy' required to set them in motion is faced with inherent problems of structural inertia.

Instead of seeking to retain a residual connection with sovereignty as an organizing governance and societal ideal, the constitutional discourse and practice connected to the European project, on the view I will attempt to explain here, involve an implicit problematization of the form of political authority in modern society and the nature of the sort of 'secular' authority that characterizes it. It is in this context that the EU's underlying polity crisis can be seen as ultimately identical with the polity crisis of the modern 'sovereign' form of the State as such. The (not inconsiderable) challenge for the EU is to fashion a conception of political legitimacy that can replace that of state sovereignty. Accordingly, we should not be seeking to establish whether the European Union or the member states possess or should possess sovereignty in the sense of an *unlimited and absolute* capacity to shape the normative horizon of social relations within the European legal

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[7] For the classic discussion of input and output legitimacy see F. Scarpf, *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999). It will be recalled that input legitimacy refers to legitimacy deriving from the procedures leading to a decision; for example, democratic processes. Output legitimacy refers to the legitimacy deriving from the effectiveness of a decision.

[8] Fritz Scharpf has discussed the structural problems of joint decision-making within the context of the European Union in terms of the idea of the 'joint decision trap'. See F. Scharpf, 'The Joint Decision Trap: Lessons From German Federalism and European Integration' in *Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe* (Frankfurt: Campus Verlag, 2010)

space. Rather, the idea that will be explored is that the basic constitutional structure of the European legal space is shaped by a profound political and historical process marked by the broader 'secularization' of society. As has been noted above, this is a process which is only contingently, though predominantly, related to the modern ideal of self-determination. In this context, it might be possible to find alternative points of normative reference for the dynamic historical processes unleashed by the broader movement of secularization.

The wider political dynamic of secularization can arguably be used to account for both the instability of the EU's political form and for the predominance of the notion of sovereignty in formulating responses to this instability. In this context, are there any clues as to an alternative way of approaching the problem of legitimacy? In reference to what was set out above, the key lies in distinguishing secularism in a broad and narrow sense. The narrower form of secularism has been set out in a way that closely ties it to the 'modern' concept of collective self-determination. The broader form of secularism, as we have seen, places a decisive emphasis, in a more negative sense, on the open-ended character of civic and political institutions which develop forms of authority independent of unique and fixed references of legitimation. In a more positive sense, an alternative understanding of certain points of normative orientation within this broader form of secularism is possible where political legitimacy and the structure of political regimes are understood by beginning with two key dimensions of human agency which can be termed *finitude* and *historicity*.[9] As we will try to explore, these two dimensions of human agency point to distinct though overlapping features of the problem of political legitimacy and polity formation.

First, *historicity* refers to a background social, narrative and pragmatic context that shapes and qualifies the interpretation and application of normative expectations. This is in contrast to the typical understanding of the ideal of self-determination according to which normative expectations or fundamental values determine from the outset certain social structures such as, for example, institutional forms, a scheme of private rights and norms relating to citizenship entitlements. As we will see, the process of European integration marks a point where the underlying historicity of modern society as it develops its various trends becomes detached from the ideal of sovereign self-determination. Secondly, the notion of *finitude* also refers to the way in which normative expectations are not *formulated*

[9] These ideas of finitude and historicity draw on a wider body of hermeneutical and philosophical reflection linked to post-Husserlian phenomenology. In particular, we might note the critical contributions of Martin Heidegger (*Being and Time*), Hans-Georg Gadamer (*Truth and Method*) and Merleau-Ponty (*Phenomenology of Perception*). In brief, and following Taylor, we might say that the idea of human agency as characterized by finitude and historicity (engaged agency) can be contrasted with an ideal of human agency as paradigmatically 'disengaged' from specific contexts (for this distinction see C. Taylor, 'Overcoming Epistemology' in *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1999 and Charles Taylor, 'Engaged Agency and Background in Heidegger' in *The Cambridge Companion to Heidegger*, ed. Charles Guignon (New York: Cambridge University Press,1993)). The insights were applied in the context of political philosophy in the so-called liberal-communitarian debate. For example, we see how the idea of engaged agency allowed Michael Sandel in *Liberalism and the Limits of Justice* 2nd. Ed. (Cambridge: Cambridge University Press, 1998) to question the coherence and plausibility of John Rawls' stress on the procedural rationality of the social contract for constructing the principles governing society's basic structures. The article attempts to develop these insights in the context of questions pertaining to constitutionalism and jurisprudence rather than in the field of political theory in the strict sense.

and posited at the outset of the political process or the initiation of social practice. However, the notion of finitude does refer to the *priority* of normative expectation in shaping historical social practices. According to this view normativity is, however, always already embedded or rooted in the essential features of human agency that enable political association. The importance, by contrast, given to *reflexive* value formation in political and social life is arguably a central feature of the modern understanding of sovereign self-determination and an expression of the self-contained character of autonomous rationality. However, a phenomenological approach to normative questions suggests that authentic normative expectations are not reflexively constructed but are rather embedded in the development of social life as a set of intrinsic teleological goods and related imperatives and virtues that are essential to basic questions of social reproduction and commitment.[10]

A crucial point to note from the outset is that such normative imperatives related to finitude are in turn relatively opaque in terms of their responsiveness to systematic pressures stemming from the market imperatives of a modern civil society or the bureaucratic norms of 'governance' processes. This from the outset creates a certain tension between finitude and historicity and some of the characteristic institutions of constitutional modernity. A good example of such spheres of social life governed by their own finitude in their relative unresponsiveness to reflexive pressure is provided by Karl Polanyi's idea that the availability of human capital (as well as land and politically guaranteed currency) is often not straightforwardly connected to market demand, something which in turn generates periodic and sometimes serious crises of under or oversupply.[11]

To sum up the discussion thusfar, the conceptions of polity legitimacy elaborated within the context of a secular society need to be re-examined in order to understand the difficulties posed by the instability and dynamism of the European Union's political form. Typically, the idea of sovereign self-determination, identified with the concept of the modern state, has underpinned, in various ways, our understanding of polity legitimacy. However, this focus on the concept of sovereignty has side-lined two critical co-ordinates of human agency relevant to problems of political legitimacy; namely, historicity and finitude. In the context of discussions of a post-state political space, such as that formed by the European Union, this becomes particularly problematic. As we will see, a careful analysis of the debate on constitutionalism and authority in the European Union, reveals the interrelationship between the historical secular structure of modern society (its basic 'historicity'), secularity

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[10] Finitude is thus understood experientially, as indicating the form of a certain experience of obligation and meaning within the context of the intrinsic goods of what Alasdair MacIntyre terms 'social practices' in A. MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame Press, 2007). The key features of a social practice in this sense are the intrinsic nature of the goods that pertain to it and its teleological structure such that moral obligation is interpreted in relation to the goods of the practice and the requirements of mutuality. A further crucial dimension of finitude, also brought out by MacIntyre, is the traditionary or 'given' nature of the social practice. Participation in the intrinsic rationality of a social practice is primarily a matter of initiation and solidarity rather than reflexive construction: '…[the possibility that] reason can only move to being genuinely universal…insofar as it is neither neutral nor disinterested…that membership in a particular type of moral community…is a condition for genuinely rational inquiry…' (A. MacIntyre, *Three Rival Versions of Moral Enquiry* pp. 59-60 .

[11] See K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Times* (Boston: Beacon Press, 2002)

in the broad sense, and the ideal of self-determination. The key point to be elaborated here is that the development of the European Union reveals the limitations and the contingency of the historical connection between a secular society and the concept of sovereignty and the present absence of any ready alternative. The examination of the underlying *historicity* of the EU's political form and its relationship to the ideal of sovereignty takes place in sections three and four. The conclusion reflects on the alternative understandings of political community and strategies for institutional development that emerge based on a clearer grasp of finitude and historicity as basic conditions of political action.

III. Constitutionalism and the European Union: From Sovereignty to Constitutional Pluralism

In this section, we will examine how authority has been conceptualized in respect of the EU and European legal space more generally in order to explain how the notion of constitutional pluralism first emerged as a way of problematizing the idea of sovereign self-determination. The notion of constitutional pluralism problematizes this idea in so far as it draws attention to shifts in the structure of authority that are incompatible with the concept of sovereign self-determination.

A significant and important position in a developing reflection concerning questions of legitimacy and authority in this context was marked out by Neil MacCormick who, noting the absence of an Austinian or Diceyean sovereign, a body capable of claiming unlimited and peremptory legislative power within the European legal arena, argued that Europe could be seen as having moved into an era of post-sovereignty.[12] Although MacCormick described this relation in a negative sense, he was followed by scholars like Neil Walker who attributed a more positive significance to the concept in describing the EU legal order and indeed legal order within an interconnected global environment in general using the idea of 'late sovereignty'.[13] Neil Walker's later development of the idea of constitutional pluralism will be reviewed in the next section. In this section we will look at how MacCormick's work, placed in a wider context, usefully demonstrates the link between the underlying development of secular modernity and the concepts of sovereign political authority associated with it.

MacCormick's notion of post-sovereignty was employed as a way to understand not only the constitution of the EU but also of the new constitutional dimensions of the European legal area as a whole.[14] The concept of a broader European legal area might include both the formal structures of the EU as well as the legal structures of the member states. It might also be capable of extension to Council of Europe organizations as well as organizations like the European Economic Area. The constitutional dimensions of the European legal area could be seen both as spatial, in the sense that they involved a configuration of distinctive and overlapping institutional and authoritative structures alongside the 'variable geometry' of

[12] N. MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999)
[13] 'Late Sovereignty in the European Union' in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003)
[14] The overall constitutional structure of this broader European legal space is generally characterized here in terms of the idea of a European polity.

specific spheres of policy co-operation, and as temporal, in the sense that they inaugurate a distinctive 'post-sovereign' era in international relations. MacCormick also began a process of exploration and analysis of the new dimensions of constitutionalism within the new European legal area, an exploration which drew on the 'post-positivist' turn in his wider thinking on the nature of legal order.

MacCormick's analysis ostensibly focused primarily on the spatial dimension of the problem. In this respect, MacCormick emphasized how the overlapping and co-ordinated relations of legal authority involved were difficult to reconcile with a unique and overarching final instance of sovereign power or authority. Such a centralized and hierarchical conception of sovereign authority has an important pedigree within common-law thinking and this distinctive idea appears to be presupposed by MacCormick's understanding of the development toward 'post-sovereignty'. Implicit in the post-sovereignty thesis was not only the 'spatial' diagnosis about competing and overlapping jurisdictional claims within a new type of legal constellation, there was also a sense that an underlying 'temporal' or narrative dimension to this that marked a new development in how legal authority was conceived in modern societies. However, it was the spatial dimension of the post-sovereign - the dimension concerned with the existence of a plurality of autonomous and overlapping legal orders replacing a more unilateral and bounded form of sovereignty - that was the predominant focus of MacCormick's analysis. Nevertheless, the narrative or temporal aspect of his discussion of the idea of post-sovereignty will be brought out in what follows and it is this aspect that clarifies the connection with the constitutional ideal of sovereign self-determination and secular modernity as well as the contingency of this connection.

Initially formulated in the social contract thinking of the early modern philosopher Thomas Hobbes, the concept of the sovereign power of the state that structured MacCormick's analysis was re-stated during the nineteenth-century by Austin and Dicey in a way that detached it from the natural rights and social contract framework. Whilst all three writers developed nearly identical conceptions of sovereignty as an absolute and unlimited power, the intellectual context within which such a conception gained its broader significance was significantly different. Further exploration of these concepts in turn allows the 'temporal' significance of these changes in the structure of legal authority, the change in the narrative understanding of legal community as such, to be clarified. To anticipate, these changes are connected with the wider shifts in how the legitimacy of the social structure is understood within a secular society.[15]

Thomas Hobbes' work belonged to the initial stages in which a distinctively modern way of understanding the nature of secular political authority was being established. In contrast with notions of political authority that emphasized the priority of a transcendent natural law, and which had determined the medieval conception of secular or temporal

[15] The concept of a secularism as it pertains to the legitimation of the basic form of social relations is indebted to Marcel Gauchet's account which is set out in M. Gauchet, *The Disenchantment of the World: A Political History of Religion* trans. O. Burge (Princeton: Princeton University Press, 1997)

political authority, Hobbes constructed an immanent theory of absolute political authority out of the natural rights of isolated individuals, living in a state of nature, and no longer bound to an a priori natural law, customary norms and so forth. Hobbes can be regarded as a foundational figure within a developing modern conception of an essentially *absolute* political authority: a sovereign. Such an absolutist idea of political sovereignty emphasizes its radical immanence; that is, it is not bound by any prior customary law or, indeed, any a priori normative framework linked to the finite structure of human agency. At the same time, it claims to represent a qualitatively distinct form of power capable of shaping and ordering social relations in general. The paradox of this notion of sovereign power is that it is at once immanent in formation but 'transcendent' in terms of its capacity to act on society. This absolutist idea of sovereignty was later to undergo a more democratic shift in Rousseau's notion of the general will, a concept which later prepared the way for the more nuanced ideas of sovereign self-determination associated with Hegel and even Habermas.

For Austin and Dicey, however, the purposes for which a theory of absolute legislative power was developed were somewhat different and more limited in scope and this in turn meant that their work did not focus on exploring and resolving the paradoxes associated with the early modern idea of sovereignty. Underpinning this more limited deployment of the concept of sovereignty, was a more perspicuous understanding of a concrete historical process that had witnessed the entrenchment and extension of the modern understanding of legitimate social order across a broad range of social practices. Two features of this social order should be noted: the increased importance of market based and of bureaucratic forms of social co-ordination. Both can be seen as generated by the new demands placed on social co-ordination by the absence of any publically attested or posited form of fundamental law structuring the terms of social relations and of personal identity.

As Louis Dumont has described it, the de-centred and impersonal structures of a market-orientated system of production and exchange, indexed to the laws of supply and demand, become a natural means for indirectly determining social structures and roles in the absence of any sort of prior and assumed normative standards.[16] Due to their construction around the concept of individual choice, reinforced by private rights of property and contract, as well as the absence of any distinctive and directive normative standard, markets enjoy a considerable degree of legitimacy in modern societies. However, the sense of the temporal openness of societies orientated to future self-initiated developments, rather than the re-enactment of a traditional founding law or as subject to a sense of the finite structure of human agency, was also expressed through systems of bureaucratic social control and transformation linked to democratic institutions. Such institutions enabled unpredictable new possibilities to be contested, articulated and organized within social formations no longer shaped by prior normative expectations.

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[16] L. Dumont, *Homo Aequali I: Genèse et épanouissement de l'idéologie moderne* (Paris: Gallimard, 2008). For further discussion of Dumont's work in this respect see M. Gauchet, 'De l'Avènement de l'Individu à la Découverte de la Société' in *La Condition Politique* (Paris: Gallimard, 2005)

Presupposing this context, then, the concept of sovereignty served, for both Austin and Dicey, the narrower legal function of overcoming a residual 'customary law' conception of law as a whole within the common law system.[17] The idea of law as primarily customary in nature emphasized law as a practice held together by a largely tacit form of practical professional knowledge. Such a conception challenged the nascent modern idea of law as a key transmission point for social transformation and reflexivity and also provided a less plausible idiom in which legal knowledge could be legitimized and professionalized within a market-centred civil society. Accordingly, the customary conception of law was replaced with the idea of law as essentially 'enacted' in character in a way that was consistent with new forms of bureaucratic co-ordination and professionalized knowledge of law. A further point, which Dicey's work brings out, is how a centralized concept of enacted law, encapsulated in the doctrine of parliamentary supremacy, served to underpin a distinctive conception of the rule of law, which laid a particular emphasis on a link between legal certainty and enacted law.[18]

Ultimately then the notion of sovereignty within the tradition of common law jurisprudence was invested with multiple layers of significance, drawing from both its Hobbesian and Austinian/Diceyan roots. At one level, it corresponded to a distinctively modern demand for a fresh conception of political authority, legal knowledge and bureaucratic power. It offered a modern conception of authority legitimated by elemental structures of social order in the shape of natural rights (for Hobbes) and later of the changing regulative requirements of a dynamic laissez-faire market society (for Austin and Dicey). At the same time, it also, in the idea of a centralized, comprehensive and ultimate form of legal authority, of the idea of sovereignty, presented an ideal of social unity in the shape an institutional form and symbol of collective self-determination. Such a symbolism was all the more powerful in the light of the dislocations of the confessional wars of early modernity and the dynamism of modern secular societies. The symbolism of sovereignty could therefore be seen as providing a form of legitimacy for the precipitous changes wrought by the modern form of secular authority governed by market and managerial rationality, operating as a substitute for traditional community solidarities. Thus, sovereignty was not only functional to modern systems, but also provided a focal point for a type of identity formation and communal solidarity. As such, as we shall see, this type of symbolic function performed by the traditional concept of sovereignty has been difficult to replicate in the environment of constitutional pluralism.

MacCormick's challenge to this model of sovereignty in the context of developing a theoretical understanding of the European legal area was focused largely on the accuracy and suitability of this traditional concept sovereignty in relation to new spatial configurations of authority. However, the depth and complexity of the tradition which McCormick was

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[17] G Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1989)

[18] Dworkin captured this conception of the Rule of Law in *Law's Empire* with the ideal of legality which he described as 'conventionalism'. This is the view that the past political decisions can only justify the imposition of government coercion where they are in accordance with rights stemming from past political decisions (as determined by their conventional meaning).

challenging meant that he was not only putting in question a certain way of mapping legal space but he was also implicitly problematizing a certain conception of legal ordering which defined a broader *narrative* of political identity and social understanding: sovereignty as a marker not only of the technical competence of legal authority but also as the symbolic form of legitimacy of legal authority within the modern conception of secular authority.[19] Thus, there was an historical and narrative context – a temporal - as well as a spatial dimension to the questions about sovereignty which MacCormick was raising in the context of the European Union. The scope of this challenge to the central symbol of modern constitutionalism implicitly raised a serious set of questions concerning alternative sources of legitimacy and authority in this new context.

More positively, therefore, McCormick suggested that the European legal arena should best be understood in terms of alternative conceptual frameworks and in particular frameworks such as Hart's concept of the 'rule of recognition' and his own idea of law as an 'institutional normative order'. The salient feature of both, for these purposes, and from a general theoretical perspective, was a certain picture of the legal system that emphasized the way in which the substance of the legal order (its rules, standards, principles etc.) and the manner in which it was developed and operated depended on a complex structure of official authority. At the core of this structure was what Hart described as the 'rule of recognition'. This referred to a set of criteria that operated as a relatively dynamic customary rule between the key officials of the system, enabling the identification of law. Hart's original conception of the 'rule of recognition' seemed to be related, in contextual terms, to the immediate post-war understanding of the British Constitution that was centred on a fairly classical Diceyan understanding of the sovereignty of the Queen-in-Parliament.

Later developments linked with the growth of a new model of judicial review, human rights and the membership of the European Union seemed to indicate that the notion of the 'rule of recognition' was more complex than the relatively simple example of the doctrine of Parliamentary Sovereignty might have originally suggested. Certainly, the example of US constitutionalism and the interaction of limited legislative competence with prior constitutional rights already created a powerful impetus for qualifying, revising, developing or indeed rejecting the notion of the rule of recognition as the debates over inclusive and exclusive legal positivism and the debates between Hart and Ronald Dworkin later showed. The point of such 'post-positivist' currents in jurisprudence which formed the context for MacCormick's work in the field of EU law was to challenge the classic positivist view that the nature of legal authority could be explained satisfactorily with reference to social convention alone. It set the scene for a more reflexive conception of legal authority whose claims could only be justified with reference to a network of moral principle intertwined with an on-going body of interpretive case law generated by appellate and supranational jurisdictions.

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[19] In 'On Sovereignty and Post-sovereignty', MacCormick refers to these broader historical shifts in ideas of legitimate political authority in introducing his discussion of the EU. See in particular pp. 123-25

This approach to the analysis of the problem of the structure of legal authority in the European arena was developed as a hermeneutic both of the EU narrative of constitutionalization and of the cross cutting developments associated with the national judicial response to the increased scope and depth of the EU legal order exemplified most notably in the case law of the German Constitutional Court. Accordingly, the European legal arena could be seen as consisting of a plurality of institutional normative orders each with their own structure of official practices of recognition and where none could plausibly claim that their own institutional rule of recognition provided the ultimate standard of legality for the space as a whole. In this way, the European constitutional arena could be conceptualized in terms of the idea of *constitutional pluralism*.[20]

At the same time, MacCormick's version of constitutional pluralism appealed to a broader constitutional umbrella through which such claims might be adjudicated. In part, this appeared to be a matter of using the opportunity of conflicts over authority claims to seek a principled understanding of the issues at stake and thus resolving the claims at a higher level. However, this same process was also capable of being embodied in a particular 'institutional normative order': that of international law.[21] In key respects, the plausibility of this frame of reference was strengthened by the growing normative specificity and intensity of international law with the advent of what has since come to be termed a global regime of human rights.[22] At first glance, this seemed to suggest that MacCormick's pluralism ultimately reverted to a form of hierarchical thinking at odds with a 'post-sovereignty' paradigm in so far as it sought to integrate conflicts within and between systems in the context of a post-positivist jurisprudence emphasizing the importance of human rights and moral principle in navigating this type of legal terrain.[23]

From within a broader historical and sociological context, however, this pluralization of legal authority within a transnational space characterized by a common point of reference in terms of ethical principle in the form of a 'global' or cosmopolitan paradigm of human rights and international law can be understood as consistent with MacCormick's basic 'post-sovereigntist thesis'. The plural structure of authority combined with reference to universal moral principles can be seen as an attempt to conceptualize a more appropriate form of constitutionalism for the dynamic structure of modern society than the traditional absolutist symbolic form of sovereignty. According to Marcel Gauchet's insightful interpretation of the present situation, for a society whose dynamism has developed to the point where its future

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[20] This idea of constitutional pluralism was later to be developed in a number of different directions. See in particular M. Avbelj and J. Komárek, *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart, 2012) for a discussion of different strands of debate provoked by this. K. Jaklic, *Constitutional Pluralism in the EU* (Oxford: Oxford University Press, 2014) provides a useful taxonomy and evaluation of the different forms of constitutional pluralism. A clear early statement of the fundamental of constitutional pluralist position is N. Walker, 'The Idea of Constituional Pluralism' (2002) 65 *Modern Law Review* 317.

[21] N. MacCormick, 'Judicial Pluralism and the Risk of Constitutional Conflict' in *Questioning Sovereignty*

[22] K. Möller, *The Global Model of Human Rights* (Oxford: OUP, 2012)

[23] Neil MacCormick's later work involved a broader conception of the pervasive role of morality in law. See for example N. MacCormick, *Institutions of Law* (Oxford: OUP, 2007). Also M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', (2005) 11 European Law Journal, 262

development has escaped prediction and control, its identity, in responding reflexively and discursively to these changes can only be anchored in the realm of self- prescribed ethical and legal principle.[24] The function of a framework of normative principle is, in this context, not to act as a timeless or relatively fixed law defining in advance questions of social structure and personal identity; rather, it supplies a 'vector' of social transformation in a society regulated by markets and bureaucratic agencies. In addition, the broadly individualizing character of these principles, codified in the form of fundamental rights, coincides with and reinforces the overall social trends generated by a global market society in which personal identities are often tied in an open-ended and reflexive manner to dynamic social processes.

However, this link between individual identity and more dynamic social processes tends to impede the formation of stable frameworks of communal self-understanding as witnessed by the precarious social legitimacy of the integration project. For all its deficiencies, the ideal of sovereignty did seek to address questions of identity and community and thus at one level a 'post-sovereign' constitutionalism can also be seen as an evasion of these sort of pressing problems. A further critical problem is that a constitutional pluralism that was held together largely by cosmopolitan principles and human rights frameworks might not be in a position to coherently implement the ideals it proposes. The realization of these rights would seem to require the existence of stable institutional frameworks that sustain co-operation over time. In the absence of forms of legitimation that sustain a coherent link between institutions, community and personal identity, it is not clear how such stability can be achieved.

Ultimately, then, MacCormick's post-sovereignty thesis and its accompanying idea of constitutional pluralism, marks off a constitutional moment at which the self-understanding of modern society must recognize that the *symbolic* claims of the traditional concept of sovereignty are no longer straightforwardly available but that there is no evident replacement. The increasingly evident dynamism of the modern form of secular society, its openness to an indeterminate future as well as its connection to an ineluctable past, mean that it is no longer able to construct the legitimacy of legal authority around the idea of a collective agency of self-determination. MacCormick's notion of constitutional pluralism can be seen as an attempt to develop a post-sovereign constitutional framework better suited to the dynamic character of a secular society. As Gauchet's work shows, this development, provoked by the unique circumstances of the EU could arguably be said to be entirely consistent with the deeper structures of secular modernity. However, the symbolic functions of sovereignty are not easily replaced. As we have seen in recent events, notions of national sovereignty – with its powerful connection of identity and community - provided an on-going challenge to the legitimacy of European constitutionalism, a challenge which has not dissipated but which has intensified. Further, it seems that a cosmopolitan framework of political morality provides a thin, contestable and unstable substitute for the classic functions performed by the ideal of sovereignty and an inadequate basis for the constriction of stable institutions.

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[24] M. Gauchet, 'Les Taches de la Philosophie Politique' in *La Condition Politique* (Paris: Gallimard, 2005) at p. 522

Within this broader pluralist analysis of legal authority, if the traditional symbolic concept of sovereignty no longer carried conviction, was it nevertheless possible that a reconstructed and more modest conception of sovereignty might still prove to have some utility in the new – late modern- context? The next phase of European constitutional discourse arguably reflected the logical pursuit of this possibility. The promise it held out was that the pluralist character of secular order could be negotiated through a formal concept of sovereignty that might provide a more effective and flexible way of co-ordinating social transformation and developing stable institutional capacity than MacCormick's appeal to the contested authority of international law or substantive cosmopolitan rule of law principles.

Section IV: Sovereignty Qualified: Between Relativism and Pluralism

MacCormick's pluralist analysis of the European legal space, with its implicit challenge to fundamental paradigms of modern legitimacy, was accordingly renewed in a number of distinctive ways that arguably owed a considerable debt to the more continental, Kelsenian analysis of the modern constitutional state than the common law tradition. First, Neil Walker theorized the emergent European legal space in terms of the concept of 'constitutional pluralism' and 'late sovereignty'.[25] Walker's work was marked by the re-introduction of what might be described as a more radically pluralist reading of the nature of constitutional order and in the latter case, a proposal that the concept of sovereignty retains its utility in understanding the overall nature of legal authority even in this context. In Walker's work, as well as in the work of other pluralist writers like Maduro, a distinctive form of principled 'constitutional' legal reasoning remained important in mediating the sovereign claims of different systems.[26] The development of a more radically pluralist perspective reached its most decisive and extended exposition in the work of Nico Krisch, for whom pluralism implied the acceptance of a straightforward transactional relationship between different systems.[27] All these perspectives might be seen as presupposing explicitly or implicitly, what might be described as a 'Kelsenian' paradigm of legal-theoretic analysis, where Kelsenianism is here intended in a broader and more ethical and epistemic sense. These two dimensions will now be briefly outlined.

First, we might set out the epistemic aspect as follows. The Kelsenian picture of law is one of a normative practice intrinsically hierarchical in structure and formal in nature: a valid legal norm does not derive its validity from its content but from its authorization by a prior norm which was validated in the same way and so on.[28] This hierarchical character – what Kelsen termed the 'dynamic' nature - of legal normativity seemed in turn to imply a

[25] See N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* and N. Walker 'Late Sovereignty in the European Union' in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003)
[26] M. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Walker ed.
[27] See N. Krisch, 'Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space' (2011) 24:4 *Ratio Juris* 386 and N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: OUP, 2010). Krisch's work tends to argue that the rubric of constitutionalism is no longer appropriate in tackling the challenges presented by a more pluralist legal environment.
[28] H. Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967)

monist rather than a pluralist understanding of law. The existence of two basic norms whose validity could not be resolved by a higher-level norm appeared to leave the status of other norms in doubt. The imperative of resolving the question derives from an epistemic concern: the demands of legal cognition imply the possibility of tracing legal validity back to a point where all positive sources have been accounted for and a basic norm accordingly posited as the starting point of the analysis. Thus, from a Kelsenian point of view, it would be possible to retain a hierarchical understanding of the structure of law and, with this, the concept of sovereignty in a limited epistemic sense, even within a pluralist structure in which the strong symbolic claims of sovereignty were set aside.

Secondly, within Kelsen's value-free legal science there was always a more normative background judgment that the pluralism of value engendered by a modern society meant that the sort of dynamic normative order based on a formal hierarchical structure was capable of acting as a generally acceptable instrument of co-ordination.[29] To base, at any point, legal validity on a substantive evaluation of its merits would compromise any claim the law might have for co-ordinating action on a 'value neutral' basis. This tacit normative position initially implied support for an international law monism. The action co-ordinating function of law within a context marked by value pluralism is best achieved where the structure of norms is global rather than fractured into distinct and incommensurable jurisdictions. In this sense, the use of a Kelsenian template might not therefore, at first glance, have appeared an appropriate hermeneutic in the context of an increasingly plural legal order and one in which normative argument in the shape of human rights instruments play an increasingly important role.

From a strictly value-free perspective, however, it might appear that the overriding preference for this type of 'global' co-ordination and order is, in the light of broader pluralism of value, a contestable value preference amongst others. In this way Kelsen's commitment to a form of international monism might be revised consistently with his underlying premises. From this point of view, it might appear more appropriate to acknowledge the necessary fact of distinct starting points for legal normativity rather than seek to engineer an artificial mechanism for performing an impossible or at least artificial co-ordination function. For example, it is entirely appropriate to think of the European area from the standpoint of a national constitution or from the point of view of the EU without resolving the tension. The result of such reflections logically culminates in a form of constitutional pluralism shaped by Kelsenian categories. Crucially, underlying this idea of an unavoidable tension between different basic norms as a part of legal practice is in fact a normative movement of considerable importance that is still engaged with the key ethical intuitions underpinning the Kelsenian system.

For Kelsen, the (for him) necessary subjectivity of ethics did not mean a commitment to an irreducible and unavoidable pluralism of ethical judgment, in which social agents would necessarily start and end their interactions from incompatible value positions. It was instead

[29] This position seems to underpin Kelsen's arguments for the importance of law and democratic procedure from a morally relativist standpoint. See H. Kelsen, 'Foundations of Democracy' (1955) 66:1 *Ethics* 1

possible for agents to adopt what he termed a *relativistic* attitude to ethical difference. This would entail a recognition of the *validity* of different judgments and further such an attitude would seek to look at how each could be practically co-ordinated within a wider systemic structure. For Walker and Maduro, it might be said that this is where they modify but do not fundamentally break from the ethical dimensions of the Kelsenian paradigm. Even if the solution to pluralism does not involve superimposing yet another formal legal structure of norms, there can still be a higher-level juridical 'recognition' of the relative validity of diverse systemic starting points, a form of recognition which nevertheless carries with it certain possibilities for resolving disputes in a normatively coherent manner.

Although the form of constitutional pluralism associated with Walker and Maduro attempts to conceptualize distinctive forms of legal reasoning and negotiation through which fundamental conflicts over diverse authority claims might be reconciled, there is a sense that the dynamic of pluralism tends in a more radical direction, a tendency which Kirsch's work takes as its starting point. From this point of view, the sphere of juridical construction and normative development, far from enabling a standpoint for social co-ordination independent of the value conflicts of a Weberian modernity, is in fact one of the critical media through which such (conflicting and sometimes polarizing) values are initially elaborated. On the basis of this understanding of legal order, we might say that the European legal space as a whole presents us not only with an example of the acknowledgment of an inherent pluralism of authority in the governance of a secular society, but crucially an insight into the *essentially* fragmented nature of modern civil society. There is no central agency that is capable of re-imposing a form of overarching sovereign self-determination. Further, as the serious symptoms of Europe's polity crisis develop, it is becoming clear that the dynamic of a basic pluralism in sources of symbolic authority tends to make a relativistic attitude of constitutional adjustment in Walker and Maduro's sense increasingly elusive. Further, even pragmatic transactional co-ordination, in Krisch's sense, is far more difficult than we might have assumed given the widespread abandonment of any relativistic stance toward normative difference.

The intractable issues raised by the pluralist environment in which the EU was operating, although dramatized in recent crises, were perhaps first clearly evident in the failure of the Constitutional Treaty project. In this context, the Constitutional Treaty strategy can be seen as the attempt to begin framing a response to this pluralist challenge in Kelsenian terms. From this standpoint, it appears as a project aimed at transforming a more radical pluralist clash of competing claims into a more manageable configuration of claims capable of being interpreted as *relative* in value within a broader institutional framework. The notion of a distinctively Constitutional Treaty, with a more definite institutional and normative structure may, from this point of view, have served to provide a framework for locating a more comprehensive source of legal authority at the European level. Even if precise questions of competence and accountability would remain contentious, a more comprehensive legal settlement would help to provide a measure of stability and legitimacy. In the long term, the function of a formal constitutional settlement might have been expected to consolidate a more organized capacity for pre-emption and co-ordination of conflicting

norms within a pluralist system. However, as we know, faced with the continuing force of symbolic claims located at the level of the nation-state, any bootstrapping project focused on documentary constitutionalism at the European-level had limited prospects for overcoming various 'joint-decision-making traps' presented by resilient national claims in order to claim an overarching legitimacy of its own.

Section V

Conclusion: Summary and Institutional Implications

In this concluding section, I would like to explore in outline some of the institutional implications for the future of the European project of the above diagnosis. However, as a prelude to this, it might be worth providing a synthesis of the discussion so far. The first point to note is that the EU's underlying polity crisis follows on from the sense that the application of a traditional model of polity legitimacy, that of the sovereign state, has become implausible in the light of the increasingly evident complexity, dynamism and fluidity of modern society. Within the context of EU integration, this has prompted an investigation of the relationship between this emerging global space of governance and traditional constitutional concepts of sovereignty. An examination of this debate over post-sovereignty and constitutional pluralism leads to the following conclusions.

First, the largely symbolic notion of a unified sovereignty is no longer a self-sufficient basis for thinking of polity legitimacy in this broader space. Second, it may be that a more 'cosmopolitan' set of ethical and moral principles might help navigate the challenge of constitutional pluralism and societal dynamism. However, the experience of the last decade would suggest that such principles are too thin and too contested to result in a stable institutional alternative and in addition they fail to secure an adequate form of collective identity at the EU level. Third, the more modest idea of self-certifying, or ultimate, legal authority (sovereignty in a more limited epistemic sense) discussed by Walker apparently offers a potential basis for the creation of more permanent institutional and organizational forms but as a matter of fact encounters significant practical limitations. For example, the sort of project, symbolized by the Constitutional Treaty, which seeks to harness law in this formal sense to provide a kind of bootstrapping legitimacy to the institutional system of EU integration has encountered fairly definite obstacles in the shape of persisting and resonant claims to ultimate legal authority bolstered by the symbolism of national sovereignty within national jurisdictions. The lesson would appear to be that the complex symbolic and institutional functions of authority and legitimacy embodied in the classic concept of the sovereign state cannot easily be replaced with a concept of sovereignty understood in a more limited epistemic sense or with a post-sovereign cosmopolitan framework of governance.

To sum up, the problematic character of constitutionalism in the context of European integration does not stem from a crisis in the formal legitimation of the integration process but from a broader polity crisis in governance stemming from the way in which the classic and distinctive political form of state sovereignty has been rendered inapplicable by broader social developments. As a political form, state sovereignty was capable of uniting, within

one symbolic system, bureaucratic processes of market governance, with normative ideals of public and private right in addition, crucially, to collective identity. At present, there seems no obvious replacement for this project from within the dynamic secular frame within which modern societies conceive themselves. By its very success, European integration developed the presuppositions implicit in modern institutional forms of social development to the point where they seem to have naturally decoupled from the precarious and historically contingent political legitimacy they derived from the concept of sovereignty.

On the basis of the present discussion, European integration's polity crisis appears to be deadlocked and this serves to clarify some of the uncertainty that characterizes normative reflection on the EU's constitutional settlement. A wider sociological and historical analysis of the context of the European integration process that locates it within the broader dynamic of secular modernity reveals the underlying reasons for the indeterminacy of its political form and the difficulty of reconfiguring it within the classic ideal of sovereign self-determination or even, as we have seen, of some kind of more formal normative or juridical framework derivative from it. Even more disconcerting is the sense that the very idea of a polity structure, capable of unifying commitment over time will itself have to be set aside in the context of a 'late modern' secular society which has become conscious of its own 'post-sovereign' and indeterminate character. However, this would be to assume that the *relative* indeterminacy of a secular society heralded in the decline of any presupposed timeless symbolic or traditional norm that would fix and legitimize its specific authority structures in turn also implies that such a society need remain *wholly* indeterminate in terms of its points of normative orientation. Whilst we might be sceptical for the reasons we have explained of some of the ideals of self-determination (and connected normative principles) associated with the earlier political form of the modern nation-state, we can nevertheless arguably still look for points of normative orientation for a common political life within the context of what has been earlier termed, in section two, the finitude and historicity of human agency and social relations. Paradoxically, the present crisis of the conception of secularism focused on the modern ideal of self-determination makes it easier to recover such a sense of finitude and historicity.

It will be recalled that the complex notion of *finitude* refers to the way in which human agency is embedded in certain kinds of teleological structures which are themselves mediated through the embodied and social character of its agency. Historicity as it pertains to finitude refers more specifically to the social dimension of finitude and in particular the weight of past social expectations and futural indeterminacy and commitment in determining the structure of options in the present. Both these dimensions of human agency can, subject to appropriate reflection clarify normative demands on politics in the context of contemporary dilemmas and difficulties and provide a focal point for the construction of institutional frameworks and the support of collective forms of identity and social practice.

After this brief concluding summary and synthesis of the argument contained in the article as a whole, some of the institutional implications of the discussion can usefully be examined. From the point of view developed here, arguably the critical normative clue for resolving the polity crisis of EU integration involves recognizing the constitutional

significance of certain key dimensions of the largely market-centered and bureaucratic nature of existing levels of institutional integration at present. It involves coming to terms with concrete issues of how to build through common action and dialogue viable forms of social reproduction that reflect the reality of norms pertaining to our finite interdependence and solidarity, an interdependence that is not recognized in market-based forms of social co-ordination. Further, as we have seen, the teleological structures of shared social practice also express intrinsic goods that are in tension with the predominantly instrumental approach to social practices characteristic of market societies.

An important part of what needs to be addressed in the dynamic forms of co-ordination underpinning the European legal space is accordingly a specific sort of politicization of a market-centred politics. This type of market-centred politics has been securely constituted and embodied within the European legal space. The politicization of the market needs to take the form of an attempt at re-embedding it within a set of overlapping spheres at which it is large enough to be reasonably productive but within the jurisdictional reach of political action to correct its ecological and social imbalances. In concrete institutional terms, this might mean pursuing, for example, Fritz Scharpf's call to politicize as well as Europeanize the process of carving out national exemptions to the EU's internal market rules.[30] Currently policed by the European Courts through the discretionary concept of proportionality, the idea would be to return the process of granting exemptions to supranational bodies connected to contestable and deliberative political processes.[31] It is possible that a reconfigured Economic and Social Committee and Committee of the Regions could provide a focus for this mixed political-adjudicative function. The point would not initially be to complement negative integration with a comprehensive form of positive integration with the model of a European state in mind, but instead to ensure that current market-based negative integration is not permitted to erode existing forms of social solidarity and interdependency. In addition, it might be possible that the European level co-operation required to mutually safeguard forms of national and regional solidarity will generate a European-level solidarity to address issues, through positive integration, that arise at a distinctively European level.

In final summary, we have seen a relatively implicit process of de facto institutional co-operation to create a new sort of European legal space at the European level. This European legal space consists of overlapping formal structures of authority such as those of the EU, the nation states and sub-state administration, alongside discursive processes and normative frameworks that mediate their interaction. The polity crisis which this structure is facing consists in the fact that although such co-operation has produced a measure of output

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[30] See F. Scharpf, 'Legitimacy in the Multilevel European Polity' in F. Scharpf, *Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe* (Frankfurt: Campus Verlag, 2010)

[31] Scharpf discusses the ways in which such a proposal might be implemented. The first would be via a Treaty change and the second would be through what might be called a change in the 'customary' structure of legal integration. This would involve a group of nations publically demanding a suspension of general four freedom norms with a view to agreeing and validating such an exemption in the context of the European Council. It could be argued that this is one instance where the formalization of this process might be sensible and appropriate in so far as a clear and legally valid process might enable a more orderly implementation of such a scheme.

legitimacy, its input legitimacy and its overall normative political character has been relatively unclear and has not inspired widespread allegiance. The political constitution of the European polity has accordingly come under strain in recent years faced with more insistent pressure on its capacity to resolve social problems. These social problems and the EU's polity crisis need to be placed in the context of the development of a distinctive modern 'secular' conception of constitutional practice, focused on the ideal of sovereign self-determination, but invested with an underlying historical dynamic, in order to understand the exact nature and in particular the acuity of these challenges. The overall structure of the pattern of constitutional authority within the European legal space has, accordingly, taken the form of a shift away from an overarching model of sovereign self-determination to one of constitutional pluralism. The move to structure and relativize these pluralist relations within a broader juridical framework symbolized by the constitutional treaty project arguably left questions regarding the symbolism of collective identity unaddressed. In addition, attempts to provide strategic direction through general normative principle failed to connect concrete policy challenges to specific institutional forms as well as to forms of collective identity.

The key to moving beyond these difficulties and the attempted formal constitutional solution is to clarify the nature of the *political regime* characteristic of the European polity in terms of its capacity to frame flexible policy solutions to common existential problems within more deliberative and participative institutional forms. It has been suggested that the focal point for identifying such common problems lies in the difficult relation between the market economy and the general demands of social reproduction and the protection of the intrinsic goods embodied in specific social practices.