It's Good to Talk

ZENON BANKOWSKI*

Introduction

In his paper on 'Constitutional Reticence', Jeremy Webber says 'we expect something more from our constitutions than ordinary politics'. In the republican scheme of things much of this might be seen in terms of 'constitutional moments'—that period of heightened activity when once again a polity fixes the mode of its ordering. The implications of this might be that at this time great things are done; that common values and aspirations are decided. That 'more' is what we are grappling with when we invoke consensus or 'the common values that all Australians share'.

Webber argues that we should not take such a grand and exalted view of constitutions. Shared values and consensus are important in that they give us a hint as to how to distinguish constitutions from ordinary politics but that we should not think of constitutions as fixing them in aspic. His argument is that this might sometimes have the effect of putting too much into the constitution—too many substantive rights that might have the effect of making things difficult in a pluralistic society, one that we cannot escape from. Thus describing and trying to fix the common values that all Australians have leads to difficulty when some clash as they inevitably will in a pluralistic society. This will be the case when we try to consitutionalise important substantive issues that might be better dealt with in the fora of ordinary political activity. For constitutionalising them makes citizens lose their sense of belonging to the country—part of the meaning of saying that 'this is our country' is to say that we have a common sense of values; that there is something that we can identify with.

However Webber wants to attack an argument which goes something like this: that to have a real country all citizens should agree on fundamental values, that these should be settled once and for all and that the best way to do this is to write them into a constitution. But does not this way of looking at it either argue against constitutions or argue for something that must be so thin that we cannot expect it to do the work of identifying our country? Webber does not believe this is the case and his argument for constitutional reticence is meant to put overblown constitutionalism in its place. He does not want such a great enthusiasm for constitutionalism. The desire to fix what makes us common because that seems to be the way we have to live, he argues, can become so great that in the end it destroys any commonality that we have by preventing us dealing with the

* Professor of Legal Theory, University of Edinburgh.

differences that we actually have. The paradox at base was neatly summed up by Gerald Postema:

> the attempt to take certain foundational matters permanently off the political agenda, rests on the assumption that the basic terms of political association in a democratic polity can be settled once and for all by some extra-political act. This is a mistake, I believe. But it is understandable because to reject this assumption is to embrace something of a paradox. If enduring legitimacy of a democratic constitutional regime depends on the willing allegiance of its citizens to the fundamental terms of association it defines, then not only our commitment to these terms, but the nature and scope of these terms, must be constantly open to reformulation. Precisely *because* of the overriding political importance and pervasive political influence of these terms of association, their precise determination and contemporary significance cannot be entrusted to others, either our political ancestors or some contemporary elite... The paradox in this idea lies in the fact that according to it the very terms (pre- conditions) of democratic association and so of democratic politics are to be settled *by* democratic politics. Yet, there is no alternative, consistent with our commitment to democratic self government in a pluralistic community.[1]

The Metaphor of Conversation

We can see the force of the paradox in Webber's paper. For him the metaphor of conversation expresses the commonality that he does deem necessary in a polity. So what gives us an identity is expressed much better through saying that we have public discussion with each other rather than through the language of common and shared values. This is not some idealised Athenian *polis* but rather participation in the context of discussions about the future of the community, how it is to be ordered and what challenges has it to face. Here we see the force of Postema's point. For if that commonality is to be found in the conversation and our fundamental identities seen in that process, then surely we cannot have some of these things as bracketed off? For however thin they may be then they will assume the fixity and non participativeness given by the non-fixity and participativeness. If we think of discussion as politics then we have a problem for Webber—for politics/discussion must too some extent beget non-politics, that is,. non discussion—we need, as Postema says some, fundamental terms of allegiance that are outside of it.

Now we may try to say, as Webber does, that what we have to do is to institutionalise this discussion and make it one that is able to structure our conversations so that we may be able really to discuss. But there is an ambiguity

---

[1]   See G Postema 'In Defence of French Nonsense: Fundamental Rights in Constitutional Jurisprudence' in N MacCormick and Z Bankowski (eds), *Enlightenment, Rights and Revolution* (Aberdeen: Aberdeen University Press 1989) 126-7.

here. For we may say that constitution here has two meanings which are not clearly separated. Firstly, we have the conventional notion of constitution and secondly, constitution in the sense of something that might be said to be the underlying order of a polity; something by which we can understand its order and which gives sense to it. But this is not a constitution in the conventional sense—it might rather be called the grammar of the order.

Let me give an example. When we talk of the constitution of the European Union we might mean two things: first a constitution for Europe in the conventional sense of the term—a document that fixes the way that the polity is to be governed and the various rights that we enjoy as part of the commonality of that polity. So what we are thinking of here is something like the constitution of a country and what we are trying to do is to establish the EU as a country with a fundamental constitution which defines it and those who are members of it. Secondly however, we might talk of a constitution of Europe not in the sense of a state and polity making business but rather as the grammar of how we can describe this polity; what it is about it that enables us to understand what sort of entity it is. Here we are searching for a way to theorise the entity by trying to look for its underlying structure. Here then we do not necessarily ask the sort of questions that were asked in the former case but rather whether we should understand it in terms of international law concepts or domestic concepts, whether transnationality as opposed to internationality has a different structure, whether the polity is so different that we have to theorise new concepts to be able to describe it.[2] Both these cases ask for fundamental things but the one is trying to freeze the conditions of the polity whereas the other is trying to understand the fundamental structures that make it work.

Webber, I think, straddles these points. For though he appears to be talking about constitutions in the ordinary sense, when he describes the polity using the metaphor of conversation, we might also see him as trying to look at what it is that structures, and how we can understand, a polity of the sort he favours. But the metaphor of conversation then becomes too broad. We lose sight of 'constitution' in the ordinary sense and we lose the ability to distinguish one polity from the other—for conversation might be seen to be the conditions of our existence as speaking beings. But how then can a constitutions be something special in the sense that they play the role that Webber wants them to do; that is in some sense be part of the definition of our commonality? It can only be that in the sense that it is of the essence of the structure and this is what makes us see the institution as one.

But what does it mean to say that we can be seen as common because we are speaking beings and have a polity based upon that? Even accepting this Habermasian way of looking at things, that is rather like saying we are all humans as opposed to frogs. Though this is true, it is altogether too thin to be of any use in

---

2   DN MacCormick, 'Democracy, Subsidiarity, and Citizenship in the European Commonwealth' (1997) *Law and Philosophy* 331-356; ZK Bankowski, 'Subsidiarity, Sovereignty and Self' in K Norr and T Oppermann (eds), *Subsidarität: Idee und Wirtlichkeit. Zur Reichweite eines Prinzips in Deutschland und Europa* (Tubingen: JCB Mohr 1997) 23-39.

the form of constitution that Webber has in mind. Webber sometimes appears to be saying that the constitution that he has in mind is one that is really to be seen as the presuppositions of getting a genuine free conversation going. That might enables us to speak but doesn't it have to do something more if it is to give us a genuine commonality? We might say that each polity has a particular form of conversation and it is that which gives us our particular commonality. But that is not enough for, though the presuppositions enable us to speak and have conversations and thus to construct some sort of identity and commonality, it is not the presuppositions that are our common identity but what we construct from it. It is not our identity but the means whereby we construct it.

But there are still dangers that we can all the more see in the paradox with which I started. Let us look at this more closely by following Webber's metaphor into a look at grammar. What part does grammar play in the idea of language? Grammar can be seen as part of the structure of language and we get our commonality from being genuine (grammatical) language users in a particular language. So we might see ourselves as being speakers of French and our identity is precisely in speaking French within its discursive presuppositions (its grammar). But grammar is both normative and descriptive. We might see grammar as descriptive, as what the current presuppositions of a language are and thus not fixed—for a language moves on. Thus speaking ungrammatically might not be such a great sin because this is just a sign that the language is changing. Grammar then, being pre-eminently descriptive, makes it more difficult to find criteria for thinking some usage wrong. This is clearly very flexible and open and we might think of a language (within certain limits!) as operating in this way. But one can also take grammar as normative and something that fixes a way that we speak. In this view there are clear criteria of what is wrong—just saying what you want (an extreme version of the first view) is not enough. This can be taken as wanting to preserve and fix a commonality that we have produced by language—precisely what Webber wants to avoid and what the first view does not do. This is of course a concrete problem –one only has to look to the Academie Française and their insistence on correct French and the protection of the purity of the language from the incursion of foreign idioms and words (especially English) into it. Franglais is something that is detested.

Interlocking Normative Spheres

We can see this as a problem of commonality and identity. A group seeking to preserve the French identity, which has come from our commonality of speaking, from the incursions of English and thus an English identity. Thus we might say that the commonality that we have preserved by the free political discussion (grammar in the first sense) must be preserved by things that are off limits to that discussion (grammar in the second sense). And nations tend to exhibit these characteristics as do grammars—thus Postema's dilemma.

What Webber is ultimately talking about is not merely the amount of normative grammar, as opposed to descriptive, that is necessary but the flexibility

that there should be between the two. He tries to find this flexibility by adopting a minimalist approach or, as he calls it, constitutional reticence. In this way he hopes to get round the problem as put in Postema's dilemma; that is that we stand the risk of losing everything in a mess of politics—precisely and paradoxically, though we hold it in great importance, what we wanted to get away from. In terms of our grammar metaphor the problem was that of managing the gap between normativity and description in grammar while preventing their collapse one into the other. Webber does not so much solve this version of Postema's dilemma but try and get round it by saying entrenchment is so minimalist that it will not matter and that conversation will do the job.

I want finally to suggest a way of getting at a solution, starting from Webber's insights. I use problems of the European Union as an example. Part of the issue at stake here is that identity is important in looking at nationhood and the polity but that it can be seen as too exclusionary—we must build a commonality that does not permanently exclude or include. The problem would seem to be that to assert one's identity as a polity means excluding others: 'We are Scots because we are not English'.[3] Now the question is how is it possible to build a non-exclusionary identity—if at all. Webber's attempt is by making thin enough to include many—but not too thin.

However his idea of the constitution as process can take us on another, though similar route. We might say that though we are Scots and not English we, and the English, are Europeans and so we have a common identity. Now this is a way forward but at the same time it is rather too static since the overarching identity will be the one that will control the identities at the lower level. What is important is to see identity as something in flux, as something that is found in its creation and as something where the overarching identity is not the unchangeable part but is also in flux. What we need then is some sort of model where we can think of horizontally layered identities that do not privilege one another but create their identity in their interaction. Their unity is to be found in their interaction.

To make this clearer, I will take the European Union as an example because it seems to me that here we have the sort of problem that Webber is talking, not in an already established polity but rather in one that is in the process of becoming. Here these questions take on importance because we must be careful not to fall into what Neil MacCormick[4] calls the 'monocular' vision where we can see sovereignty only within the context of a homogeneous unity. We either see sovereignty at the centre in the overarching organisations of the European Union with the local jurisdiction encompassed within them or *vice versa* with each local jurisdiction encompassing the European dimension.

What MacCormick and others have worked on is to see the polity as a system of 'interlocking normative orders' with no one being privileged as against

---

[3]   Z Bankowski and A Scott, 'The European Union?' in R Bellamy (ed), *Constitutionalism, Democracy and Sovereignty* (Aldershot: Avebury Press 1996) 77-95.

[4]   DN MacCormick, 'Beyond the Sovereign State' (1993) *Modern Law Review* 1-18.

the other. It is in the articulation of these orders and their adjustments that one gets a European identity or unity. In this way then we can avoid the perceptions held in such decisions as *Brunner.*[5] There, the German Constitutional Court held that The European Court of Justice could not be held to have *competence/competence* and thus the court could override European Organs when they came into conflict with European Law. But this case was not merely asserting German sovereignty at the expense of European Law. The Court based its decision in part on the idea that one could not see Europe as a democratic polity since it did not have a people who could be represented. What counted as the definition of people could be seen in the way the court contrasted the European polity with that of the German state. The latter was a polity precisely because it had a *volk* that had a unity in being, in some ways at least, 'essentially the same'. The problem here is that what counts as commonality is being defined in a homogeneous and exclusionary way. Europe might become such a polity, the court says, and then it would have *competence/competence*—but it would construct an identity and then would become static there would be no identity in construction.

Conclusion

How can we visualise a set of interlocking entities that can have a unity in their articulation and not have that unity take over the 'lesser identity''?[6] The problem then is how to think of something as a unity when the notion of a system of interlocking normative orders makes it appears as merely a set of different spheres or legal orders. How do we see this as a unity when at one level, at least, it seems to be something that is coalescing in one legal order or is a degenerating legal order? What is important here is to see the unity as something that emerges from the interlocking of the orders and their mutual adjustments—but at the same time, to see that unity as something that interlocks and relates with the other identities at the same level. Thus Europe stems from the interaction of the various identities but that identity does not subsume the various identities but rather interacts with them to modify further—the whole interaction creating a dynamic unity.

A rather Hegelian look at marriage makes this point and I finish with it by adapting somewhat Gerry Cohen.[7] Think of the following images of a relationship. In one the partners seem to be inseparable in the sense that if you ask one of the, 'what are you doing tonight?' they will always answer 'We...' They act in such a way that one thinks of them as one person and not two separate people. They are in a state of what Cohen calls 'undifferentiated unity'. Another sort of relationship might be one where it is impossible to tell that the couple are in a relationship at all so separate are the lives that they lead. We might call that, following Cohen, 'differentiated disunity'. A mature relationship though, will be one where people

---

5   2BvR 2134/92 and 2159'92 JZ 1993, 1100 cf [1994]CMLR 57.

6   See Z Bankowski and E Christodoulidis, 'The European Union as an Essentially Contested Project' (1998) 4 *European Law Journal* 341-354.

7   See GA Cohen, 'Marx's Dialectic of Labour' (1974) *Philosophy and Public Affairs* 235-261.

are together and at the same time, they are their own person. The couple are in a state of differentiated unity. The relationship produces a third party, their love—the unity between the couple is not their love as such but a dynamic, interacting relationship between those three parties. In that sense then what we get is European identity stemming from the dynamic interaction between the differing local identities but which does not subsume them and rather produces unity in its interaction with them.