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Constitutionalism and Regional Integration:
Lessons from Europe's Constitutional Conundrum

by

Dr. John Hopkins
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Dr. W. John Hopkins
School of Law
University of Canterbury/Te Whare Wananga o Waitaha
New Zealand/Aotearoa

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1 Introduction
The Constitutional Convention process was portrayed by its proponents as a major step forward in the development of the Union and for some was seen as a step change in the nature of this most successful of international regional organisations. This process would lead to a European Union Constitution upon which to base future development of the Union. The rejection of the Constitutional Treaty which eventually emerged from the Laeken process at the hands of the French electorate and their Dutch compatriots thus marks an equally serious reversal for those with such high hopes for this document.

The failure of the Constitutional Treaty is more than a mere rejection of a European Treaty. This has happened before, both after Maastricht and Amsterdam, but the rejection of the Constitutional Treaty in core Union states marked a crisis not only in terms of this treaty but in the confidence in the European project as a whole. For the first time since 1957, the onward march of the European regionalisation process was clearly and unmistakably halted by the populace of its Member States. Their had been warnings before and rocky times along the way but this event, public as it was, could not be wished away by any amount of spin or political manoeuvring. The people had been allowed to speak and their voices were an unmistakable Non or Nej.

However, although the failure of the Constitutional Treaty is clearly a fundamental
problem for the continuing development of the Union it also has significant implications beyond Europe’s borders. The success of the Union and the realisation that the same drivers that brought the Union’s Member States together in 1957 apply increasingly to nation-states across the globe has led to interest in and the creation of international regional organisations in every populated continent. From the NAFTA agreement, to the CER via the Andes Community, nascent regional organisations are now the rule rather than the exception. Such developments are now to be seen taking shape in East Asia. The European Union, however, has had more of a role than merely convincing other regions of the advantages of regional co-operation, its success has led to its development being seen as a model for others.

This paper examines this phenomenon in the light of the crisis that currently affects the Union in the wake of the TCE’s demise. The crisis of confidence that now afflicts the EU gives significant food for thought to those countries considering regional co-operation in their own corners of the world. What does the failure of the ECT mean for European model of regionalism? Is the European model such a success after all?

2 The Monnet Method

The European model of regionalism owes its genesis to the ideas of Jean Monnet and the actions of Robert Schumann. Together, starting with the Coal and Steel Community in 1952 they put the, ‘Monnet method’ into practice. The Monnet method is the European model of regionalism and has been crucial to success story that is the current European Union.

The idea was a simple one, rather than embarking on regional co-operation through the creation of a constitutional framework and then embarking upon policy development, Monnet argued that the opposite approach was required. In a brilliant piece of real politic Monnet realised that co-operation on a ‘limited and decisive point’ would have a far greater chance of success in the real world than grand plans for Europe constitutions and co-operative mechanisms which lacked clear substantive benefits.

In essence he argued that the sort of supra-national federal entity that he envisaged in Europe had to be built in the opposite way from a traditional state structure. In the domestic model the constitutional basis is the foundation upon which the state is built. After a revolution, whether violent or otherwise, a new constitution will form the foundation of the state. Only then will policy-making commence, within the limits of the wider constitutional structure.

Such a method would not work at the supra-national level that Monnet wished to create. There were two reasons for this. Turkeys do not generally vote for Christmas and to ask European governments to give up power to a European governmental body with meaningful decision-making powers had little chance of success. In addition, the collapse of European national authority in the aftermath of the Second World War presented a limited opportunity to launch a new form of co-operation before the old order re-established itself.

Although many may not have realised at the time, Monnet’s aim and that of his co-conspirator Schumann was to focus on a limited and decisive point, not just to deliver clear benefits to the peoples of Europe in specific areas and thus to encourage co-
operation in other areas, but to create intentional spillover effects requiring ever
greater co-operation and regulation. The success of this model is difficult to challenge,
where various European co-operation schemes had faded into nothing, the European
Coal and Steel Community, the European Community and later the Union were an
astonishing success. The European states at the end of World War Two were in dire
straits, physically exhausted, saddled with debt and in colonial retreat the European
era seemed at an end. For better or worse, the Union has seen the European continent
re-invent itself as a world largest economic power with its biggest economy. This is
the enduring legacy of Monnet’s method.

Monnet’s legacy is therefore an impressive one and for decades it has served the
Union well, from ECSC to the Single European Act, each revision of the Treaties
focussed on decisive points with tangible benefits to the economies and population of
the Union. However, the success of the Monnet’s method came at a high price. By
focussing on the tangible benefits that European co-operation could deliver, the
constitutional requirements of the developing governance structure were never
properly addressed. The conspicuous failure to address this led to the growing crisis
that has culminated in the rejection of the European Constitutional Treaty.

3 The Crisis of Legitimacy

The seeds of later discontent and constitutional problems were sown in the Monnet
method itself, particularly as the proponents of a federal Europe had underestimated
the resilience of the European nation-state. The European Community as established
in 1957 comprised the by now familiar system of an Executive Commission, a divided
legislature (the Council and the Assembly) and a Court to resolve disputes arising
from the implementation of the Treaties and subsequent European legislation
(although the word was not used at this early stage).

This original institutional structure had created institutions that were wedded to the
success of the European project. The Commission was the obvious example, but of far
more practical importance was the ECJ. The embedded linkage between this
institution and the national judiciaries allowed it to quickly develop respect for its
judgments to be upheld in national courts with few arguments.

The architects of the system expected the in-directly elected Assembly to assert its
authority and over time become the main power at the European level. This was to
prove a fundamental error as the Assembly languished as a forgotten and largely
unloved institution while the Council along with the Commission became the key
actors in the European drama. Successive improvements of the Assembly’s (now
Parliament’s) status have not altered this fundamental truth. The formal power at the
EU level continues to lie with the Member-States, albeit collectively exercised
through the Council.

The strength of Monnet’s idea was that despite this fundamental miscalculation, the
Community and later Union continued to evolve, often in fits and starts but
nevertheless the pragmatic nature of the European enterprise continued to drive it
forward. Through successive crises the Community proved to be remarkably resilient.
The reason for this was simple. Although it is fair to say that some national leaders,
particularly of the pre-war generation had higher aspirations for the future of
European governance, the majority had more parochial aims in their relationship with
the European project, namely benefits for their own states and their own re-election. Such is the nature of politics.

The pragmatic focus of the Monnet method provided the means by which such attitudes could be harnessed to ensure the advancement of European supra-national government. There was no clearer example of this than the events surrounding the passing of the Single European Act of 1986. This act, which was actually a series of amendments to the Treaty of Rome significantly reduced the power of individual Member-States in the Council in areas through a significant increase in qualified majority voting. The SEA, however, although producing some controversy and disquiet amongst the more Euro-sceptic Members (although the term was in its infancy) passed with little real opposition. It required no referenda and no grand gestures. It was a practical reform of the Community to introduce the Single Market within an accepted time frame. It should not be forgotten that this most fundamental of European reforms was enacted in the UK by the government of Margaret Thatcher. The reason was simple, its practical benefits were clear. It still fitted Monnet’s model of supra-national co-operation being sold as necessary for pragmatic and specific gains.

Monnet’s genius was to realise that states would come to the European party to benefit themselves, not for a greater European good. They came to praise the nation-state, not to bury it. That in the process what it meant to be a nation-state would be fundamentally altered was unimportant to Europe’s leaders, but understood by Monnet and his acolytes.

But the Monnet method was becoming a victim of its own success and storing up problems for the future. As ever greater decisions were taken at the European level, the disconnection between the European decision-making process and the population of Europe was becoming ever more obvious. The most celebrated example of this was the ‘democratic deficit’ which saw decisions taken in the hidden meetings of the Council.

4 The Constitutional Debacle

The rejection of the European Constitutional Treaty at the hands of the French and Dutch electorate should not be seen in isolation. In fact it reflects the culmination of decades of simmering resentment with the European Union decision making process and perhaps with European political leaders as a whole.

The incremental development of the European Union and its focus on pragmatic goals meant that classic constitutional issues were addressed only in passing. Debates on decision making processes in domestic system take place within a well established constitutional discourse of accountability and legitimacy, but the development of the EU, lacked such a framework. This was due to the two factors. Firstly, the pragmatic nature of Monnet’s method de-prioritised constitutional questions and secondly, the establishment of the European Community began in the realms of international law. International Law by its very nature has until recently avoided constitutional questions and operated in a highly pragmatic way, isolated from domestic constitutional questions. Increasingly, and in no small part this has been due to the development of the EU itself, this separation has proved impossible to maintain, but in 1957 such ideas were very much in their infancy.
This combination of Monnet’s method and the traditional exclusion of constitutional questions from international law (which had been seen as irrelevant to Public International Law since the nineteenth century and confined to the domestic sphere) meant that constitutional discourse around the EC and the EU developed incrementally as the organisation itself did. In practical terms, issues surrounding the delivery of accountable government were left un-developed until the growth of the Community and the Union made such issues unavoidable.

The problems for the Community began as soon as it began to require popular support for its reforms, either for constitutional or political reasons. The nature of the limited constitutional structure of the Community meant that all states had to ratify Treaty amendments, leaving the constitutional framework of the Union in a fragile state. This was exposed in the ratification process of the Maastricht Treaty. After the success of the Single European Act, the Maastricht Treaty and the subsequent ratification referenda exposed the first real doubts as to the long term future of the European project. The Danish rejection (and subsequent approval with opt-outs) and the subsequent narrow support for the Treaty in France, showed that all was not well with the constitutional future of the Union.

The problems continued in subsequent Treaty amendments at Amsterdam and Nice, where further referenda caused concerns, none more so than the Irish rejection of the latter in 2001. Although the Irish gave resounding support to the Treaty in a 2002 re-run, again the fragility of EU constitutional structure and the ease by which reforms could be derailed was exposed.

These rejections were nothing in comparison with the fundamental crisis of confidence that has accompanied the French and Dutch rejections of the Constitutional Treaty, but they clearly presaged it. The rejection in these referenda was a shock to the system for the European Union, one from which it has yet to recover, yet its roots lie not in the events on the past year or so but in the concept Monnet method itself.

5 The Constitutional Conundrum

The problem that faces Europe now is that the failure of the Constitutional Treaty in many ways proved Monnet’s thesis correct. Much as it pains me to say this as a constitutional lawyer, few people are interested in the minutia of constitutionalism. It does not set the pulse racing. People care about jobs, health care, and the future of their children, amongst a myriad of other issues rarely do they have much interest in the name of the Ministerial Council of the European Union or the splitting of the General Affairs Council into a separate Foreign Affairs Council.

This was, of course, Monnet’s point although he focussed on national elites rather than populations as a whole, although the principle appears intact. The problem is that the EU by focussing on the pragmatic and achieving such phenomenal success is now left with a constitutional vacuum which requires back filling by a constitutional framework. By using Monnet’s method, the EU has not avoided the need to create a constitutional framework for its future success, but merely delayed it. The conundrum that the EU now faces is creating a constitutional structure within which the Union can develop, in an atmosphere of apathy and hostility.
The problem for the Constitutional Treaty was its confusion between expanding the powers of the Union, clearly issues that need to support of the population and reforming the constitutional structures of the Union. These latter reforms did not need ratification by referendum and were actually quite boring in nature as far as the populace are concerned, although fundamental to the operation of the Union. The decision to put the reforms before the populations of France, Spain and the Netherlands was to allow them to be hijacked by other domestic political events, as in the case of the Dutch and French referenda.

So how to solve the constitutional conundrum that faces the EU at the present time and could other developing regional organisations avoid it?

6 Solving the Conundrum – Reassessing International Constitutionalism

The advantage for those organisations that follow the European model is that they can learn from the success and failures of this successful entity. They can also enter the world of the supra-national government with the benefit of a degree of hindsight gained from the European example.

This was not the case in the European example where the founders of the European project had little to work on and could only guess as to how their project would develop. The institutions they put in place in 1952 and reformed in 1957 have survived remarkably well and this structure remains at the heart of the European system, but they have begun to creak and groan under the pressure of the expanding Community/Union.

7 Legitimacy, Accountability and Efficiency

The traditional understanding of constitutionalism is to place democratic legitimacy, and accountability in the same institutions. It is the submission of this paper that at the supra-national level this is not necessary and is potentially impossible to achieve.

The problem for Europe and other emerging supra-national entities is that although the practicality of globalisation and the realities of our globalised world means that supra-national institutions are a necessity, in the main populations remain loyal to national or sub-national entities. In effect the results of supra-national co-operation are enjoyed, but not the institutions that deliver them.

There are many reasons for this, not least of which is the dominance of the nation-state model over the past two centuries and the active attempts by nation-states to create national identities at the expense of most others over several generations. These attempts have not always been successful and there remain challenges to the nation-state level in several states. In almost all cases these alternative identities are beneath the nation-state or with another nation-states rather than at a supra-national level.

Put simply the supra-national level may be a necessary development, but it is not a desire pursued out of passion. It is a pragmatic development geared to delivering specific goals for the citizens of individual states (or their elites).

For this reason, attempts to create European-wide identity have always proved elusive. They have not failed through want of trying. Indeed, as Chris Shore has emphasised in
his work, the development of ‘European’ identities, presented at a previous NESCA workshop.¹

But despite this emphasis the purely European institutions of the Union have not gained support and people continue to view politics in national terms. The clearest example of this is the fate of the European Parliament. This body, is the democratic heart of the Union and is the only entity directly elected by its people, although still along national lines. One would therefore expect a popular institution, but the voting figures say otherwise, with less than 50% of the electorate turning out in 2004. In some countries, notably the UK, the turnout was even lower, numbering less than 40% (but a significant increase on the 27% for 1999).

People do not identify with the European Parliament, perhaps due to its complex procedures and powers but certainly to a significant extent due the lack of a European identity itself.

Instead, political identity in the European Union, remains rooted in the national and sub-national levels. In practical terms these are represented by the Council of the European and the Europe of the Regions. The flawed nature of the latter institution has been discussed elsewhere but the Council remains the key institutional player in the Union.

It is the submission of this paper that this situation is unlikely to change in the near future as people remain wedded to the nation-state or the regions for their political identities. The legitimacy of European law making must therefore continue to be rooted in those institutions that represent these sources of legitimacy, particularly the Council, but this is not to suggest that supra-nationalism is not possible of desirable merely that it will not operate in a way seen as ‘normal’ in a national structure.

8 The Governance Turn and the Rise of the Executives

Supra-nationalism represents an example of a general phenomenon that has swept the globe over the past century, namely the rise of executives in the role of government.

This ‘rise of the executives’ has been one of the major changes in government practice over the past fifty years. It is a feature not just of international law but of governance in general as the complexities of the modern world require ever greater discretion be granted to the executive branch but a key driver of the process has been the internationalisation of ‘domestic’ law. International law making is traditionally the exclusive preserve of the executive branch and as such the internationalisation of domestic law leads to its empowerment.

The modern development of executive decision making, particularly in the international field was recognised by political scientists in the 1980s as a recognisable phenomenon and given the term ‘governance’ to describe it. Particularly important amongst these works were those of Rhodes, Marks and Hooghe.² These recognised

¹ Shore NESCA workshop, ELJ
that policy decisions are increasingly being taken by networks of decision makers outside the traditional institutions of government. These works, particularly those of Rhodes recognised the dangers of such developments without suitable safeguards. However, such warnings were largely ignored by those who utilised these writings to describe and promote the phenomenon of international regulation that emerged strongly in this period, particularly in Western Europe.

Executive empowerment and the need to deal with it, has long been recognised in the field of Public Law, and in its modern form it is arguably the main focus of the subject. However, the issue has only rarely been dealt with in the international context. There is no reason why this should be the case. The rise of international executive ‘governance’ means that these can no longer be ignored at the international level.

9  Dealing with the Governance Turn

The growth of the executives and the governance turn is the real issue that must be addressed in the development of supra-national governance model. And for this we must look take a sideways look at governance itself and look outside our traditional models, borrowed as they are from the nation-state.

For the reasons I have listed above, the development of the executive governance model is a necessary development and it should not surprise us. The development of powerful executives has been an issue at the heart of domestic constitutionalism over the past half century or more. In general, the focus has been on restricting the powers of executives with reference to Parliaments. At the supra-national level this is not always possible as not all the states involved are democracies and at the international level a democratic body may not exist. In any event this is a misguided approach to the problem.

It is important at this point to make clear that Executive power itself is not the problem. The modern world cannot function without such governance structures. In effect we have already decided this issue by creating supra-national institutions. This takes us back to Monnet’s point. We create these bodies, or more generally grant powers to executives because we wish to see the tangible benefits that such governance delivers. We want to travel across borders without difficulty, we want to buy goods from across the world, we want to speak to relatives across the globe with the touch of a mouse. On a more prosaic level we want hospitals, and schools and safe communities – these things are possible because we have created structures that deliver them. Invariably this means the creation of institutions that have the discretion to deliver these benefits.

To put this idea very simply, John Locke was fundamentally wrong in his analysis. Where law ends tyranny does not begin. Were this the case the dominance of executive decision making in most societies would suggest that we live in such a tyrannical world. The reality is that, as Davis succinctly put it, where law ends, discretion, not tyranny, begins. To continue with Davis’ theme, the challenge of the law is not to restrain the executive’s use of discretion but to ensure that such power is confined, checked and controlled if it is to avoid the dangers of ineffectiveness and

11 Conclusions

The tentative conclusions of this paper is that the European experience has much to offer supra-national projects in other regions. The recent Constitutional crisis, in particular has exposed both the advances and weakness of the European model. On the one hand it confirms the truth of the Monnet model as well as its limitations. The Constitution failed because it was not a limited decisive point — it was not going to bring jobs or improve education or improve our environment. It was going to increase European co-operation, clarify powers and re-organise the operation of the Union. This Treaty was neither fish nor foul — it was not a technical document focussing on delivering better governance (which would not have been suitable fare for a referendum) and neither was it clearly focussed on the extension of European power.

This is the first lesson that should be taken on board, that in following the pragmatic approach of Monnet, we should not neglect the need to create institutions that ensure good governance. The EU has developed some of these but they have always been the poor cousins. This leads us to the second point that the supra-national level is not like the nation-state although many of the issues is faces are the same. We must realise that supra-national institutions are unlikely to enjoy the legitimacy that their Member-States enjoy at the present time and thus reliance on supra-national representative institutions to ensure legitimacy is doomed to fail. We need to accept the continued role of Member-State governments in providing this legitimacy and their continued role in decision-making as part of the governance structure. However, we must also develop as a matter of priority institutions that ensure that the collective discretion that will inevitably result from such procedures is structured, controlled and confined. This is the greatest constitutional challenge that faces the European Union and by extension every modern supra-national institution.