



THE UNIVERSITY OF
MELBOURNE

CERC WORKING PAPERS SERIES

No. 1 / 2006

Michael Longo

**THE GLOBAL
CHALLENGE OF
EUROPE'S
CONSTITUTIONAL
EVOLUTION:**

**What's in it for
us?**

CERC WORKING PAPERS SERIES

INTERNATIONAL ADVISORY BOARD

Philomena Murray (CERC Director)
Leslie Holmes (CERC Deputy Director)
Peter Shearman (CERC Principal Fellow) (**Editors**)

Wladimir Andreff (University Paris 1 Panthéon Sorbonne)
Michael Bradshaw (University of Leicester / University of Birmingham)
Renaud Dehousse (Institute of Political Science, Paris / European University Institute, Florence)
Maurizio Ferrera (University of Pavia / Università Bocconi)
Stephen Fortescue (University of New South Wales)
Graeme Gill (University of Sydney)
Paul Hainsworth (University of Ulster)
Simon Hix (London School of Economics)
Robert Horvath (University of Melbourne)
Elizabeth Meehan (Queen's University of Belfast)
Andrew Moravcsik (Harvard University)
Kirill Nourzhanov (Australian National University)
Marko Pavlyshyn (Monash University)
William Tompson (University of London)
J. H. H. Weiler (New York University)
Stephen Wheatcroft (University of Melbourne)

The Contemporary Europe Research Centre (CERC) was established in 1997 as an interdisciplinary centre located within the University of Melbourne's Faculty of Arts. The Centre draws upon a broad pool of expertise from the University of Melbourne and beyond, bringing together specialists on all aspects of contemporary Europe, east, central and west. The Centre produces and coordinates quality academic and applied research, with a particular focus on interdisciplinary, comparative and transnational projects.

The CERC Working Papers Series is peer-reviewed.

Copyright © 2006 by the Contemporary Europe Research Centre

All rights reserved. No reproduction, copy or transmission of this publication may be made without written permission from the Contemporary Europe Research Centre, Level 2, 234 Queensberry Street, The University of Melbourne, Victoria 3010, Australia.

ISSN 1447-0071

Published by the Contemporary Europe Research Centre in June 2006

The global challenge of Europe's constitutional evolution: What's in it for us?

Michael Longo

About the Author:

Michael Longo (LLB/BA Melb, LLM Monash, PhD Melb.) Senior Lecturer, School of Law and Research Associate, Centre for Strategic Economic Studies, Victoria University; Fellow, Contemporary Europe Research Centre, The University of Melbourne.

The global challenge of Europe's constitutional evolution: What's in it for us?

Abstract: In this paper I examine the potential impact of doctrines, principles and experiences of European constitutional development on the global and Australian political/legal landscape from interdisciplinary perspectives. I identify and discuss four interrelated constitutional investigations concerning primarily the reception of international/supranational law within domestic legal orders and conclude that the conceptual underpinnings of EU constitutional development have the capacity both to inform constitutional insights in Australia and influence the direction of international governance.

1. Introduction

The subtitle of this paper, couched in terms that may perhaps attract vague interest from policymakers and an academic community well versed in the language of national benefit suggests that constitutional developments in Europe may be of consequence for Australia. This proposition may not be immediately evident but demands to be understood within an historical, sociological, political and philosophical framework rather than the contemporary milieu of predominantly pecuniary advantage. Although not mutually exclusive, the focus of this paper is on the ideational rather than the material. It examines the potential impact of doctrines, principles and practices of European constitutional development on the Australian political and constitutional landscape from an interdisciplinary perspective.

1.1. The Backdrop

Australia/European Union (EU) relations may be framed in terms of a relationship fortified by common interests but also diminished by the occasional misunderstanding. Desire for contact and collaboration is matched by a lack of understanding of an unfamiliar entity which threatens to bypass Australia's long established bilateral relations with individual member states of the EU; to detrimentally affect Australian trade in agricultural products; and to diminish adherence to cherished values such as national sovereignty.

It seems that decades of governmental engagement and, sometimes, disengagement have produced a certain degree of ambivalence towards the EU both on the part of government and certain sections of the community. This ambivalence is

to a very large extent founded on evidence and perceptions of economic disadvantage to Australian interests flowing from EU agricultural policies. Needless to say that government in this country has occupied itself with redressing the problem. Academic investigation has largely responded to the official agenda to the extent that predominantly economic research on trade issues between Australia and the EU (including the vexed area of agricultural trade) has been the mainstay of comparative research. Murray's recent monograph 'Australia and the European Superpower' (Murray, 2005) is a notable exception. Comparative research has also been undertaken in specific areas such as labour law (Vanachter and Vranken, 2004).

While economy and trade (and increasingly scientific and technological collaboration) with the EU are clearly matters of national importance and interest, issues relating to constitution, polity and legitimacy, are often considered of marginal relevance if relevant at all. Yet, I wish to make the case that these matters are of relevance to Australia and the world because the EU's constitutional development can potentially influence the direction of international governance.

This paper will focus on a fresh approach to comparative analysis that emphasises the power of ideas in constituting a polity itself. The EU is by its very nature a socialising force and thus invites discussion of what it might represent in terms of ideology and promise if not current approach.

In 2004 the EU enlarged its membership to 25 states. The Constitutional Treaty that emerged from the Convention on the Future of Europe is likely to impact on Europe's constitutional development even if current ratification processes fail. At the very least, the treaty will be an important step or 'episode' within the broader process of constitution building in the EU (Longo 2006). The relevance for the EU and wider Europe of the adoption of a European constitution is self-evident. This has been the subject of much scholarly investigation. It does not warrant further elaboration here. Rather, the argument conveyed by the title of this contribution is that the EU's path toward constitutionalism is pertinent to an understanding of on-going constitutional developments in Australia and elsewhere. Indeed, the principles that underpin EU constitutional development (direct effect, supremacy of EU law, fundamental rights) may be conceptually germane to constitutional law and policy

within state polities, including Australia, and within the wider international community. Further, the reception of EU constitutional principles within the domestic orders of the member states demands scrutiny and assessment of their practical relevance within other polities, be they state or global. This paper will demonstrate that there is something in it for us.

The ease with which these assertions are made belies their contentiousness. They are unlikely to be met with universal acceptance. That there are significant asymmetries between the EU and Australia is evident. That the EU differs from any global entity is equally clear. This would appear to preclude an interchange of constitutional perspectives to any mutual benefit. In particular, it may be argued that Australia is a nation state and that the EU is not, which would render a direct comparison otiose. Further, the relationship between Australian law and international law is not akin to that between the member states and supranational European law. Accordingly, a wider comparison drawing on the respective methods by which international/supranational law is received within the domestic legal system, for example, would be equally useless. This logic should be resisted for various reasons. First, the EU discourse is largely, though not exclusively, a constitutional one. It is a constitutional discourse because the EU functions as a federation in many key respects and is shaped by judicially enhanced theories of 'direct effect' and 'supremacy' of EU legal instruments. It is constitutional because the contestation of political values is played out within an endogenous legal system, which views national and supranational institutions as belonging to the same system. Though EU constitutional developments have unfolded in a unique institutional setting, the values and principles underpinning the EU system (e.g. equality, solidarity, non-discrimination) are shared by many constitutional systems. Further, as a product of international law, the EU has recourse to the principles and methods of international law. For instance, the doctrine of direct effect is not unique to the EU although its application and scope differ as between EU and international law. Ultimately, policy-makers everywhere may be informed by shared experiences with, potentially, beneficial consequences. Members of the judiciary and academics may also identify similar methodology, judicial reasoning or purpose in judgments from national, supranational and international systems respectively. If this is so, comparative study is validated. Existing approaches may be fortified or diminished in recognition of the

complementarity of methodology or purpose. It is argued that the EU discourse on a range of issues from ‘democracy beyond the state’ to ‘fundamental rights’ has something to offer the global community and Australia respectively if we are prepared to locate the EU within a broad theoretical matrix that includes the diverse expressions of *polity* in the contemporary world (thereby maximising the benefits of comparative study) and if we accept a core hypothesis of social constructivism that knowledge, ideas and learning are *constructive*.

It is probable that the major premises upon which the arguments in this paper are based – international cooperation and cross fertilisation – will be labelled idealistic. However, rather than perpetuate the fruitless debate between idealism and realism, this paper takes up the potential of ‘social constructivism’ to shed new light on the analysis. As noted by Christiansen, Jørgensen and Wiener (1999, 538) ‘the constructivist project ... [directs] research at the origin and reconstruction of identities, the impact of rules and norms, the role of language and of political discourses.’ This perspective recognises the constitutive role that norms, rules, discourse, learning, deliberative processes and other social ontologies play in the formation of actors’ identities and interests. Describing the scope of norms, Katzenstein (1996, 5) has stated that ‘[i]n some situations norms operate like rules that define the identity of an actor, thus having “constitutive effects” that specify what actions will cause relevant others to recognize a particular identity’. Law and legal analysis have an important role to play in this discourse. Legal analysis, displaying a strong sociological orientation, would ‘envisage law as an integrated part of the social order’ (Heimanson 1967). It would attempt to understand the ways in which social ethics and socialisation have shaped administrative and legal processes of decision-making (Everson 1998), as well as the social effects of legal doctrines such as direct effect, or norms generally (Longo 2006).

Social constructivism invites theoretical input in the academic debate about Europe’s long-term future and, indeed, demands the analysis of the societal, political, legal and economic consequences of Europe’s constitutional endeavours. Thus, social constructivism, directed to research on EU constitutionalism, enables theoretical examination of the *transformative* effects that European institutional interactions and practices have on the processes of preference and identity formation in the EU,

promoting a comprehensive understanding of the processes and practices that generate constitutional change (Longo 2006). Without in any way suggesting that the conclusions drawn from a social constructivist account of the EU's constitutional development may be employed directly to an analysis of the global polity, a basic tenet of social constructivism is that ideas are constructive. Accordingly, this paper will examine certain emblems and ideas associated with EU constitutional development for long-term relevance and potential application within a global context and within Australia.

I have intimated that there may be obstacles in the Australian consciousness to the achievement of a comprehensive understanding of what the EU represents and what it can offer. The 'relevance' of the EU to Australia may not be judged against contemporary criteria but rather against a backdrop of a predetermined, negative disposition that concentrates inordinately on three things: Europe's geographical distance from Australia; its historically protective Common Agricultural Policy and the presumed 'uniqueness' of the European integration (EI) experience on a global scale that defies application elsewhere. In the result, even if the EU is not quite seen as a distant, idiosyncratic rival, a lack of understanding and engagement may translate into caginess and consequential loss of opportunity. Therefore, this paper calls for further research to be conducted in the social sciences (particularly politics, law, sociology and history), a point repeatedly made by Murray and others, to complement the research that is being conducted in the fields of economy, science and technology. The underlying assumption is that knowledge is 'constructive' and that opportunities will be maximised from a position of knowledge.

2. The academic agenda

In the light of the above observations, this paper will now identify and discuss four interrelated constitutional investigations to which Australia can contribute, or from which it may benefit, leading to the conclusion that the conceptual underpinnings of EU constitutional development have the capacity to inform constitutional insights in Australia and elsewhere. The issues may be presented in the following terms.

2.1. EU constitutionalism and polity building: matters of global significance

Whatever constitutional direction Europe may take, its significance will be global. At an internal level, the pertinent questions of EU constitutionalism focus on the need for institutional innovation. Thus, can a European constitution be designed that adequately describes the dynamic, norm-producing interactions between different units of organisation (supranational, national and sub-national) and institutions in the EI process? Can a constitution provide security and guarantee citizens' fundamental freedoms and rights, including liberty, in a meaningful way, that is, in a way that does not simply duplicate national protections or mimic nation state norms of legitimacy unthinkingly or mechanically? It so happens that these questions relating to internal organisation also encapsulate the terms of reference of a wider scientific enquiry into the nature and dimensions of democracy and legitimacy beyond the state. Put simply, can a new theory of democracy *beyond the state* be developed and how can this be given constitutional status, legitimacy and meaning? On this issue of global significance, Australian scholars – including constitutional lawyers and political scientists – can (and do) contribute. The EU, being something between a state and an international organisation (approximating one or the other depending on the policy issue in question) can be a point of reference for both. In this light, EU constitutional development is viewed in a global context, with the resolution of specific EU problems of governance a potential forerunner to the solution of related questions of state and global governance. To know the EU may be to glimpse the future.

2.1.1. Constitutional definition

As a hybrid entity – neither a state nor merely an international organisation – the study of the EU is important in its own right but also for its potential to contribute to a better understanding of the perimeters of global governance which presupposes the melding of supranational and national institutions and laws. Paradoxically, the qualities that give the EU this wide-ranging potential are also responsible for the indeterminacy of definition to which the EU is subject.

EU constitutionalism is 'often seen in normative terms as being about the challenge of designing good institutions for the future Euro-polity' (Shaw and Wiener 1999, 16) measured against national benchmarks. Such analysis has been criticised for its state-centric approach, pursuant to which the concept of 'stateness' is the primary focus for the study of a 'non-state' polity (Shaw and Wiener 1999, 1-2). While this

point of reference has undoubted theoretical and practical application to the EU (which resembles a state in some respects, most notably in the nature and range of policies over which it has some competence) this is not always and necessarily the case. In spite of this, the solutions proposed to the problems of EU governance are usually tainted by what has been described 'a touch of stateness' (Shaw and Wiener 1999, 2). The theories and approaches employed to explicate the EU have assumed a predominantly normative character, guiding an untrammelled course toward a final, albeit unknown, destination. Given the level and persistence of contestation both as to the EU's definition and its legitimate objects, one might be justified in calling for new theoretical approaches to classification. An objective, contextual definition of the EU is required (Murray 2000) with the view to gaining a comprehensive understanding of the processes and practices that generate constitutional change as a prelude to addressing the question of the EU's further constitutional development. This already lofty task is complicated by the oft-recognised fact that the EU is still evolving; by the sheer range of possibilities and, thus, the potential for divergence. Is it (or is it likely to become) a supranational polity, a regional economic unit, a multi-level governance (MLG) system, an international organisation, globalisation agent, a federal or a confederal union of states? Or is it amenable to each of these possibilities to some and varying degree, consistent with post-modernist patterns of identification? Scholars have posited that the EU's experimental nature has enabled it to respond to multiple agendas and diversity in a flexible way (Laffan *et al* 2000). Further, the 'EU can be seen as the harbinger of radically different trends in the world economy' (Laffan *et al* 2000, 67) stemming from the significant ambiguities, tensions and contradictions that characterise it (Laffan *et al* 2000, 52).

The endeavor of definition is by no means of interest to Europeans or Europeanists alone. From Hass to Moravcsik to Pinder, political scientists the world over have been concerned to situate the European venture within mainstream political theories, ostensibly to validate one theory or another in recognition that a mainstream political theory must account for the European experience in order to be properly designated a theory as such. Agreement seems to have eluded contemporary analysts of the EI process. Notably, the main political theories upon which the attempts at classification have been based - neo-functionalism, liberal intergovernmentalism, federalism - are equally open to contestation in terms of process and outcome, perhaps

inevitably. Jørgensen (2000, 3) has pointed out that ‘any attempt to capture the essence of the EU is likely to be partial’. There is, therefore, a significant tension between the objectives of definition and development which cannot be ignored. The continuing appeal of the EU lies in its momentum, its capacity to accommodate change through innovation, its relevance to the times and the promise it holds within its borders and beyond for delivering its objectives through governmental and non-governmental cooperation across various levels of authority. By virtue of its adaptable institutional machinery and the frameworks of negotiation and compromise that have flourished in an environment of ‘pooled’ sovereignty, the constitutional mechanisms for dealing with change as well as bringing about change have been safeguarded against homogenisation or *naturalisation*, thereby encouraging wide-ranging relevance. From this viewpoint, to pin down the EU’s nature and scope against an established theoretical template could reduce its relevance and effect by clipping and shaping its boundaries to a predetermined form. The EU is important for its internal dynamics, but perhaps no less so for its *potential* (based on values such as respect for human rights, participation, equality and non-discrimination) to contribute positively and significantly towards the construction of a functioning, democratic and legitimate global polity.

2.1.2. Legitimacy enhancement

The EU’s openness to the form of the state and of the international organisation arguably expands its legitimisation potential (Longo 2006). That is, the EU has available to it at least two potential sources of legitimacy: the sources of legitimacy that nation-states rely on (‘common values and culture’, ‘real and imagined community’, ‘citizenship’ and ‘the will of the people’) in combination with the rational legitimating sources available to international entities (‘an agreed scope of competence, fairness of procedures, and justice of outcomes’ (Steffek 2000, 28)). Whether this opportunistic approach to legitimacy is enough to bestow legitimacy on EU governance, cumulatively, or whether a tailored EU theory of legitimacy will have to evolve mirrors the topical question whether democracy can be constituted beyond the state as a matter of theory or alternatively as an ad hoc assembly of legitimacy principles and values. This ‘oldest task of both normative and empirically oriented political science’ (Steffek 2000, 5) is clearly of universal significance. Without

labouring the point, research to this end will potentially benefit an international community concerned with enhancing the legitimacy of international institutions (such as the WTO) and decision-making, not because the EU has found solutions (or will necessarily find solutions) to these issues, but rather because it is at the forefront of these investigations. However such research and its findings may also potentially assist federal states including Australia, where shifts in Commonwealth legislation and policy have sparked debate on whether the federal government has breached its international obligations and more generally, whether the ideal of democratic control of domestic legislation may be reconciled with the development of an autonomous international legal system (Longo, 2004).

Thus, the broadening of the legitimacy discourse to encompass not only the 'objective', normatively-oriented conception of legitimacy that focuses on structures of governance but also the 'subjective', empirically-oriented conception that sees legitimacy as a social fact, introduces a strongly discursive dimension (drawing on the language of Habermas 1996) to EU legitimacy discourse. This dimension permits recourse to rational argumentation to justify non-institutionalised governance arrangements as legitimate. The Commission, in particular, has expressed the greater part of EU activity in these terms.¹ Ultimately, a system that derives its constitutionality from, *inter alia*, the interactions between supranational and national institutions can also derive legitimacy from the range of possibilities for representation and recognition in the multi-level system, that is, from a mix of normative and empirical standards across the broad spectrum of polity legitimisation (Longo 2006).

Despite the possibility of legitimising the EU by numerous means, it is perhaps unsurprising that democracy still dominates the discourse. As the EU functions as an autonomous political system within the range of expanding capabilities, whose legal instruments impact on the lives of ordinary citizens, popular participation and approval are considered necessary to authorise its interventions. Article 1-46 and 47 of the Draft Constitutional Treaty confirms the EU's commitment to representative and participatory democracy, the latter seeking to contribute to the

¹ See for example, European Commission White Paper on European Governance, Brussels, COM (2001) 428 final, 25 July 2001.

functional development of democracy beyond an institutionalised conception of representative democracy. The provisions in Article 1-47 invite the public exchange of views between citizens and EU institutions in all areas of Union action (para 1) and direct the maintenance of open, transparent and regular dialogue and consultation with civil society in the interests of coherent and transparent institutional action (paras 2 and 3). Paragraph 4 mandates direct action in the form of a ‘citizens’ initiative’, whereby ‘no less than one million citizens coming from a significant number of member states may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution.’ Although imperfect,² the provisions may be seen to encourage new forms of dialogue and citizen participation within the political structures of the EU.

Whether the provisions of the Constitutional Treaty impacting on the EU’s democratic life will ever come into force is still uncertain, and whether they will contribute to the functional development of democracy (and its legitimacy) beyond the state is open to debate. However, the constitutional debate is itself formative. By ‘bring[ing] the alternatives of constitutional evolution into the open’ (Kohler-Koch 1999, 9) the constitutional debate and even dissenting voices (See Lord and Magnette 2004, 199; note 6 herein) enrich the process of constitutional development.

2.2. Constitutional interpretation: upholding compliance with international/supranational law

Even if the EI experience is not transplantable, there are certain constitutional principles associated with EI that can inform the development of a global polity. The dichotomy between the international and the constitutional diminishes in the EU context. The traditional principle concerning the application of international treaties within states is that this is, without exception, a matter of domestic constitutional law. The European Court of Justice (ECJ) has unequivocally altered this mainstream approach. Direct effect was, in *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, taken to mean that Community law (assuming it fulfils certain conditions) gives rights to individuals who are then entitled to invoke such

² The provisions are restricted to citizens of the EU which by definition excludes third country nationals resident in EU member states.

rights before the national courts of the member states, without the need for national legislation. Accordingly, it is Community law that determines whether EU legal instruments are directly effective and such instruments will be directly effective irrespective of a member state's constitutional tradition in terms of the reception of international law within the domestic sphere. The construction of an 'EC legal order', distinct from that operating at international law, was augmented by rulings of the ECJ declaring provisions of EC law supreme over conflicting national laws (e.g. *Costa v Enel* [1964] ECR 585) even national constitutional law (*Italian Finance Administration v Simmenthal* [1978] ECR 629). Again, the foundation for this principle was to be found in Community law rather than national constitutional law, although this interpretation was far from conceded within the member states. Nonetheless, the immediate effect of the establishment of a new legal order in international law was to put Community law beyond the reach of national constitutional law.

The ECJ has, through relevant case law, transformed the relations between the European Community (EC) legal order and the national legal orders into those pertaining to 'monist' states. This is despite the fact that not all the member states are monist by constitutional tradition. A monist state is one whose constitution provides that an international treaty may be binding on the state without incorporation into domestic law. According to this view, an international rule that is agreed to by a monist state will automatically be considered part of the law of that state and national courts will apply the rule as such. Here direct effect is possible in principle (Hartley 1999, fn.33, 31) as an international obligation may be invoked before a national court. In the case of a 'dualist' state, such as Australia, treaty obligations are incorporated into domestic law (assuming that a change in national law is necessary to give effect to an international obligation) usually by a specific act of legislative transformation. At this point the rule may be invoked before a national court, but it will only apply as part of national law. The international treaty will have been transformed into national law. Being subject to domestic intercession, the direct effect of treaty obligations is not possible under the dualist tradition. The monist approach differs in its conception of international law and domestic law as part of a greater unity, but it operates pursuant to an identical constitutional rule. Thus, even if a monist state permits the application of treaties nationally without incorporation into domestic law, this still

occurs pursuant to a rule of domestic constitutional law. Hence, the traditional principle as far as the application of treaties within states is concerned is that this is, without exception, a matter of domestic law.

The traditional approach is certainly reflected in the actions of successive Australian governments, as highlighted by the governmental response to the High Court judgment in *Minister for Immigration v Teoh* (1995) 183 CLR 273. The then Minister for Foreign Affairs and Attorney-General acted in 1995 to reverse the High Court's ruling that an international treaty signed and ratified by Australia but not implemented in Australian law, nonetheless raised a legitimate expectation that the executive will act in accordance with the convention.³ This political response serves to demonstrate Australia's adherence to national sovereignty as an organising principle and its refusal to sanction any judicial moderation of the dualist precepts that distinguish us from 'less democratic' polities. Subsequent events, including the Howard government's hardheaded attitude to the United Nations and its Committees, have reinforced this perception (see Longo, 2004).

Recent High Court of Australia judgments concerning, *inter alia*, the reception of international norms within the Australian legal system (*Al-Kateb v Godwin* (2004) 219 CLR 562; *Singh v Commonwealth* (2004) 209 ALR 355) confirm the traditional approach, although the minority judgment of Kirby J in *Al Kateb* may be distinguished for its insistence on the availability of international norms to constitutional interpretation. If *Teoh* was strictly speaking a case concerning administrative law, *Al Kateb* falls squarely in the realm of constitutional law. In deciding against the indefinite detention of a stateless person at the will of the Executive, Kirby J referred to the need to:

... add a reference [in the Constitution] to one of the most important legal developments that is occurring and to which national constitutions must adapt, namely the growing role of international law, including the law relating to human rights and fundamental freedoms [626].

Adopting a constructive approach, Kirby J declared:

³ See Joint Statement of 10 May 1995 and the Administrative Decisions (Effect of International Instruments) Bill 1995, which has now lapsed. The Howard Government introduced Bills with the same title in 1997 and 1999, but both these Bills have also now lapsed. For further general discussion see generally: Charlesworth, 1998.

The understanding of the Constitution in this Court is constantly evolving. The interpretive principle that I have expressed is but another step in the process of evolution [623].

He went on to say that ‘opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail. They will be seen in the future ... with a mixture of curiosity and embarrassment [629]’.

Quite simply, the Kirby J approach (which is not shared by other Justices of the High Court) demands that the Constitution be read consistently with the international law of human rights and the common law presumption in favour of liberty. Recognising the connections between this and the purposive approach to statutory interpretation, Kirby J states: ‘[t]he purposive approach accommodates itself readily to an interpretive principle upholding compliance with international law, specifically the international law of human rights [622].’ This general interpretive approach has an affinity with the teleological approach adopted by the ECJ to the questions of ‘direct effect’ and supremacy of EU law over conflicting national law. The objectives of the EC Treaty would not have been achieved were it not for the ECJ’s rulings that demanded compliance by national institutions with supranational law. The teleological/purposive approach offers much in terms of *actually* protecting the civil and political rights upon which a contemporary, western constitutional discourse is founded by interpreting the constitutional text according to the spirit (rather than the letter) of the law.

Whilst ‘direct effect’ is not an innovation of the ECJ, the ECJ’s approach (it is *Community law* which decides whether a treaty provision is directly effective in the member states) represents a departure from the traditional principle that the application of treaties within the legal order of a state is always a matter of domestic constitutional law. This has facilitated the direct application of certain EC Treaty provisions and provisions of secondary legislation within the domestic legal orders of the member states, with strong implications for individuals. An individual is most obviously able to enforce his or her state’s obligations under Community law. However, one is drawn to the broader implications of such an approach. Does the EU ‘constitutional’ approach to the reception of directly effective supranational law within the member state domestic legal systems suggest new ways of enhancing international

law and its enforcement within the international community? The ‘new legal order’ may suggest new possibilities (canvassed in Longo, 2002) for the future development of international law along the lines of an alternative international system capable of producing laws which are consistently applied and more easily enforced within the domestic legal orders of the states. Specifically, ‘the new legal order’ that exemplifies the EU qualifies the reliance of international law on domestic acceptance and implementation while at the same time privileging the individual. Individual empowerment, through the medium of direct effect, as conceived by the ECJ, invites discussion on how the individual’s interests might be reconceptualised, protected or enhanced within a global framework. Interestingly, the Kirby J approach in *Al Kateb* appears to share the same DNA as the ECJ’s rulings on direct effect and supremacy, although the approaches are distinctive. Both approaches represent tailored constitutional responses to the overarching question of how international or supranational laws are received within domestic legal orders. By de-territorialising international norms and making them available to judges in interpreting the national constitution, Kirby J has reinforced the role of national courts in protecting human rights confirming the view that national and international law are complementary. There is a need to undertake further comparative research to draw out the connections and distinctions between the two approaches but also to understand that they are indeed comparable judicial solutions to a universal problem.

2.3. Human rights protection

The EU is taking a leading role in what may be termed the complementarity of domestic and international (*viz.* Community) law. The adoption of the ‘new legal order’ constitutional approach by the ECJ has facilitated this process, notwithstanding occasional disapproval by national institutions. Like the EU, Australia is also tackling questions raised by the internationalisation of law, particularly in the international trade and human rights areas. In both polities, the question of the validity of supranational decision-making inspires heated debate. Europe’s humanitarian traditions and recent EU measures in respect of asylum seekers,⁴ refugees and discrimination generally, suggest that comparison with Australia may be fruitful. Europe has had direct and prolonged exposure to human rights conventions and

jurisprudence, specifically through working with the European Court of Human Rights (Triggs, 2001). The protection of fundamental human rights was originally incorporated into Community law as a general principle of law.⁵ The position was subsequently strengthened by the Treaty on European Union 1992 (TEU) which states that the EU is founded on respect for human rights (as guaranteed by the European Convention on Human Rights) as a general principle of law. The Charter of Fundamental Rights of the European Union was proclaimed on 7 December 2000 and, though not yet binding, constitutes Part II of the Constitutional Treaty. The Constitutional Treaty also provides that the EC will accede to the European Convention on Human Rights. The EU is working towards a common asylum and migration policy pursuant to which requests for asylum would be examined according to a single set of principles across the EU. The Commission has competence to monitor human rights situations in the member states. These provisions attest to the collaboration between supranational and national institutions to uphold human rights at the national level, giving credence to Franck's vision of 'national governance validated by international standards and systematic monitoring of compliance' (Franck, 1992, p.91).

It would be reasonable to presume that if a member state of the EU were to adopt measures leading to serious and persistent breach of human rights, its EU membership rights would be called into question. It must be said, however, that EU developments in the area of migration are still evolving and that EU member states are neither immune from bigotry nor from the excesses of nationalism. While the EU does not present a ready-made solution to the complex problems that arise, Europe's geographical position, its sometimes difficult experiences with migration (both incoming and outgoing), the fallout from human rights abuses that have taken place on European soil over the centuries and the latterly development of a strong

⁴ See Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

⁵ General principles of law (equality, proportionality, legitimate expectations and fundamental human rights) have been recognised by the ECJ. The general principles of law derive mainly from the legal systems of the member states or from international law and may be invoked to assist in the interpretation of Treaty provisions as well as secondary legislation. Fundamental human rights were first recognised as a general principle of Community law in *Stauder v Ulm* [1969] ECR 419. In *Internationale Handelsgesellschaft* [1970] ECR 1125, the ECJ held that '... respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community (para 4 Judgment)'.

commitment to human rights protection (i.e. since the middle of the last century) guarantee that the issue will receive sustained attention. Similarly, no one would doubt the contemporary salience of issues concerning asylum seekers, migration and protection of minorities in Australia and elsewhere. In April 2006, the Australian government revealed yet another policy shift in its immigration program, which threatens to further undermine Australia's commitment to international norms, including the UN Refugee Convention. In its so-called Pacific Solution II, the Howard government proposed denying resettlement to persons arriving on Australia's shores whether or not they are genuine refugees (Baker, 2006). Without suggesting that benefits of comparative study may be one-sided only, numerous questions arise: Against a backdrop of the EU's innovative constitutional approach to the reception of supranational law within the member states, can the 'emblematic' EU principles of *direct effect* and *supremacy* suggest new possibilities for effective implementation of international humanitarian law? Are there lessons to be learnt from reviewing the different ways in which the objective of human rights protection may be advanced? As the leading example of successful supranational cooperation in the world today, might comparative study of the EU not operate to fortify judgments such as those of Kirby J or suggest answers to questions relating to the legitimacy of supranational decision-making? While the legitimacy of Europe's court inspired renovation of constitutional/supranational relations has been questioned for reasons associated with traditional arguments of democratic deficiency (such questioning is justifiable and may even have legitimacy enhancing effects⁶), the arguments lose some of their force in the face of the EU's official agenda of human rights protection (e.g. human rights incorporated into Community law; requirement of human rights clause in trade agreements with third states), international aid⁷ and defence of the environment.

2.3.1. Recontextualising Direct Effect, Human Rights and Democracy

It has been argued elsewhere (e.g. Longo, 2002) that the ECJ's establishment of 'a new legal order' through its rulings in *Van Gend* and *Costa* represents a significant

⁶ Lord and Magnette state that 'the EU illustrates the spirit of contemporary constitutionalism which sees conflict on the basis of rules as a source of civic education and legitimation (Lord and Magnette 2004, p.199)'.
⁷ 'Europeans collectively give 3 times more development assistance to poor countries than the US and provide 10 times the number of peacekeepers to UN operations': P. Khanna, 'US could Learn From EU's Old World Charm in Foreign Policy', *Los Angeles Times*, 30 April 2004

innovation: *it is Community law rather than domestic constitutional law that designates an EC Treaty provision as directly effective in the member states.* This innovation represents a break from established international law principles. The effect is twofold. First it establishes that a member states's ratification of a treaty brings about fundamental change in the relations between that state and the supranational organisation. Secondly, by granting the right to individual applicants to bring an action before their national courts to enforce their states' directly effective Community obligations, the ECJ has granted individuals the important role of supervising member state compliance with Community law.

The resulting individual empowerment may be seen as an important step towards human rights protection. The ECJ's insistence that the supervision of Community law be entrusted to the individual may be viewed as the constitutional and administrative law equivalent of self-rule and fundamental rights in international law. This 'new legal order' version of individual participation (a bastion of 'liberal' ideology) as the key to the effectiveness of the legal and constitutional regimes transcends, perhaps more than any other notion in EU law, the jurisdictional boundaries of the EU. The novelty with this approach is that it qualifies, if not severs, the reliance of international law on domestic acceptance and implementation. The ECJ's pronouncements on direct effect and supremacy of EC law over conflicting national law hint at the principles and values that resonate with the privileging of the individual in the EU. These, incidentally, are the principles and values that are informing current developments in international law, illustrated principally by the establishment of an International Criminal Court,⁸ of which Australia is a member.

Direct effect is founded on the same values of participation and liberalism that underpin democracy. The furtherance of human rights, democracy and the 'normative status of a democratic entitlement' (Fox and Nolte, 2000, pp.389, 390) have for some time been the subject of vigorous debate in the public sphere (see e.g. Franck, 1992; Fox and Nolte, 2000; Reisman, 2000; Marks, 2000; Roth, 2000). Franck articulated a 'symbiotic linkage among democracy, human rights and peace' (Franck, 1992, p.89), and even if not yet practised or pursued universally, increasingly, human rights and

<http://www.brookings.edu/views/op-ed/20040430khanna.htm>

democracy are being viewed as mutually supportive ‘international standards’ (Sampford and Round, 2001, p.2). It is argued that direct effect is an important means by which human rights and democracy are advanced in the international arena. Challenges by individuals or groups representing individuals are a potent means of drawing attention to alleged breaches of human rights and ultimately of securing compliance with international instruments.⁹ Already, there has been significant development of the individual as a subject of international law, most notably by way of the individual complaint mechanisms under United Nations (UN) human rights treaties including the *Optional Protocol to the International Covenant on Civil and Political Rights*.¹⁰ This suggests increasing relevance and applicability of the EU emblematic principle of direct effect to the emerging global polity. Conversely, there is ample scope for global organisations and international norms to continue to influence the EU system, confirming the conception of Europeanisation and globalisation as ‘complementary’, and ‘mutually reinforcing’ but perhaps also ‘competing processes’ (Snyder, 1999, p.4).

2.3.2. Unbounded human rights

There is growing scholarly attention to the already observable norm of human rights not bounded by the state (Soysal, 1996, p.17; Douzinas, 2000). Soysal speaks of the emergence of the individual that transcends the citizen; of a human rights discourse that transcends national membership (Soysal, 1996, p.23). The ‘increasing intensification of the global discourse and instruments on individual rights’ (Soysal, 1996, p.19) is expressed through:

a codification of “human rights” as a world-level organizing principle in legal, scientific and popular conventions. As legitimised and celebrated by various international codes and laws,

⁸ A new International Criminal Court to try persons charged with genocide, or other crimes of similar gravity against humanity, came into force on 1 July 2002 with the deposit of the 60th ratification of the *Rome Statute of the International Criminal Court*.

⁹ The effect of Article 230 of the EC Treaty must, however, be noted. Pursuant to this provision, the individual’s right to challenge a ‘decision’ of the Community is restricted. A citizen’s recourse to the jurisdiction of the ECJ when the decision contested is a decision of the Commission or the Council is dependent upon the institution of proceedings within two months of publication of the measure or its notification to the plaintiff, and furthermore the decision must be of ‘direct and individual concern’ to the person addressed. Whereas the member states are subject to the supervision of the Commission, other member states and, importantly, individuals (in so far as their compliance with Community law is concerned), the decisions of EU institutions are not subject to the same degree of scrutiny.

¹⁰ The UN Human Rights Committee (established under article 28 of the *International Covenant on Civil and Political Rights 1966 (ICCPR)*) hears cases under the Optional Protocol only when the state party to the *ICCPR*

the discourse of human rights ascribes universal rights to the person, independent of membership status in a particular nation state. Even though they are frequently violated as a political practice, human rights increasingly constitute a world-level index of legitimate action and provide a hegemonic language for formulating claims to rights above and beyond national belonging (Soysal, 1996, p.19).

The de-territorialisation of human rights as *universal* human rights is paradoxically accompanied by the principle of national sovereignty, which ‘reinforces national boundaries and invents new ones’ (Soysal, 1996, p.24). Thus:

. . . while nation states and their boundaries are reified through assertions of border controls and appeals to nationhood, a new mode of membership, anchored in the universalistic rights of personhood, transgresses the national order of things (Soysal, 1996, p.25).

The ECJ’s recontextualisation of direct effect and individual empowerment, the creation of a constitution (over and above the Constitutional Treaty that emerged from the Convention on the Future of Europe) which privileges the individual and embodies potentially innovative conceptions of citizenship and belonging, offers hope that the contradictory normative principles characterising the global system might eventually be neutralised in favour of universalistic and directly effective human rights. Douzinas explores ‘the powerful promises and disturbing paradoxes of human rights’ (Douzinas, 2000; 2002). He states that ‘[h]uman rights are the necessary and impossible claim of law to justice’ and concludes that the ‘end of human rights comes when they lose their utopian end’ (Douzinas, 2000, p.380). Douzinas argues for the need to re-invent the utopian ideal of human rights if they are to maintain their force in the modern world. If the function of human rights lies in the endless process of redefinition and ‘human rights construct humans’ (Douzinas, 2000, p.371), then the human endeavour shirks finality. This claim evokes the image of the EU in constant motion, calling to mind the tension identified earlier between development and definition and suggesting an inclination towards *development* over *definition*. The utopian question inevitably arises: can the EU contribute to the development of an understanding of human rights that transcends the institutional processes that reify nation-state sovereignty and recognises the claims of non-citizens, independent of their membership status in a particular nation state? Drawing again on Douzinas’ analysis, can human rights fulfil the ‘[e]nlightenment promise of emancipation and

also becomes a party to the Protocol, thereby enabling its citizens to bring individual petitions involving alleged

self-realisation' (Douzinas, 2000, p.1), and transcend the 'graded and ranked status' (Douzinas, 2000, p.372) of humanity that sees the privileged western individual at one end and the 'concentration camp inmates or the fleeing refugee' (Douzinas, 2000, p.372) at the other? Davidson has suggested that the regional globalising polities of the 21st century, in order to be inclusive, will need to 'give up the notion that belonging to a pre-existing national family is what entitles a person to act as a democratic citizen' (Davidson, 1997, p.4). By extension, meaningful international governance in the future may include all people and exclude no one.

Evidently 'the transition from dream to reality and from imagination to institutional design' (Douzinas, 2000, p.377) is never easy. Mass immigration and threats to national security inflame nationalist sentiment everywhere and reprioritise claims for social justice based on the utopian element behind human rights.¹¹ Australia, among other states (many in the EU), has suffered from this phenomenon. The enactment of national security legislation in Australia has challenged long-established liberal principles and reignited calls for a statutory or constitutionally embedded Bill of Rights. Australia, with its inheritance of western traditions including egalitarianism, and its history of recent clashes with supranationalism,¹² may contribute to, and benefit from, a broad ideational discussion on human rights and their constitutional protection. The EU's constitutional deliberations have provided opportunities for discussion and learning. Moreover, a EU-type discourse has the potential to influence Australian (and indeed European) perceptions of human rights protection, leading to reaffirmation of the fundamental principle that individual states may complement universal protections, but never replace them with their own national versions.

2.4. Federal perspectives

violations of any of the rights set forth in the *ICCPR*.

¹¹ Third-country nationals (non-citizens) in the EU are still denied certain political rights. The EU currently provides no legal basis for the enfranchisement of non-citizens residing in the EU. Indeed, the EU has taken a restrictive approach to the question of alien suffrage, committing EU member states to establishing voting rights only as regards municipal and European elections and *only for citizens of the Union*. Citizenship and nationality are matters reserved to the member states and there is extreme heterogeneity of non-national resident voting rights among the member states of the EU.

¹² Over its position in respect of aboriginal land rights, mandatory sentencing laws, the treatment and detention of asylum seekers, conditions within detention centres and the stolen generation issue.

With the EU, the world may be witnessing the emergence of a variation of the federal idea. In this non-state polity, member states (some federations, others unitarian) have agreed to share or pool their sovereignty in a structure that in many respects resembles a federation and functions like a federation (Longo, 1997; 2001 pp.1-26). The emergence of the EU federal polity (unlike any other) suggests new possibilities for conceptualising democracy and democratic participation generally as observed in section 2.1 of this paper.

Galligan's characterisation of federalism as 'a diffusion of power centres' (Galligan, 1995, p.242), echoing the sentiments of Elazar (Elazar, 1993 p.193) and MacCormick (MacCormick, 1993), brings to light the potential of federal organisation in the development of a post-sovereign polity. He states:

The sovereign state and national sovereignty are being eroded through international forces and transnational associations of a political kind, as with the European Union, or standard-setting kind, as for Australia. But this can be seen as moving at the international or transnational level to approximate what federalism already entails within federal nations ... Federal nations might be more compatible with increasing internationalisation than are unitary states with over-blown traditions of national sovereignty such as the United Kingdom (Galligan, 1995, p.243).

Increasingly, nation states are subject to international norm setting, which makes redundant the idea of absolute national sovereignty. Over an increasing range of issue arenas (e.g. human rights, international trade, the environment, international aid) the nation state is no longer sovereign. These policy areas, among many others, are thought to be within the legitimate scope of EU supranational authority, taking the form of human rights, the single market, the environment and cohesion-structural funding policy respectively. These matters are said to require EU level activity because state and local governments are apt to act in a self-interested manner (for instance, often making concessions to industry that impact adversely on the environment (Longo, 1997, pp.155-157)) or because the objectives of the proposed action cannot be sufficiently achieved by the member states acting alone, to use the phraseology of the subsidiarity principle,¹³ as stated in Article 5 of the EC Treaty. There is clear (EU) legitimating potential in such claims.

¹³ Subsidiarity is a constitutional, distributive doctrine, which, though somewhat opaque, appears to mandate Community action only in those areas where common action by the member states would be more efficient than

Additionally, EU governance, even if legitimated by non-democratic means, exerts a socialising impulse that enhances legitimacy. Over some issues the nation state is not sovereign having transferred sovereignty to international institutions, which is itself an exercise of sovereignty (Burmester, 1995) and serves also to legitimise the EU (Lord and Magnette, 2004, p.189). While a federation may be theoretically better able to understand and give effect to the process of internationalisation, domestic rhetoric, policies and approaches may prove inimical to internationalisation.

It is frequently observed that federal states face a complexity in their foreign relations, which is not shared by unitary states (e.g. Opeskin, 1994). As in the EU, Australian central/state relations are often tense and conflict-laden. State Governments have occasionally been at odds with Federal policy on foreign relations (eg. the Victorian Government's proposed ban in 1982 on nuclear warships entering its ports threatened to unravel Australia's defence relations with the USA under the ANZUS Treaty). Moreover, the ratification and implementation of international conventions on human rights by the federal executive and legislature respectively, a subject matter traditionally within the purview of national state authority, have on occasion undermined the delicate balance of power between Canberra and the States. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, the High Court of Australia upheld the Racial Discrimination Act 1975 (Cth), which implemented the International Convention on the Elimination of all Forms of Racial Discrimination as a valid exercise of the external affairs power contained in s.51 (xxix) of the Constitution. The refusal by the Queensland Minister for Lands to give his consent to the transfer of a Crown lease of a pastoral property because of government policy, which was opposed to the acquisition by Aborigines of large areas of land in the State, was held to be in breach of the Racial Discrimination Act.

The reluctance on the part of the Commonwealth to intervene to override mandatory sentencing laws in Western Australia and the Northern Territory, allegedly in contravention of international conventions to which Australia is a party, provoked a negative report and censure by the UN's Committee on the Elimination of Racial

separate action. Elevated to a principle of general application under the Treaty on European Union (TEU) 1992, in practical terms the member states retain responsibility for areas which they are capable of managing more effectively themselves: 'Commission communication on the principle of subsidiarity' (1992) 25 *Bull EC* 10, 116.

Discrimination (CERD). It prompted accusations that the government ‘hides behind federalism’ (Taylor, 2000) in its failure to override state legislation, a stance not permissible in international law.¹⁴ The UN’s censure of Australia’s treatment of Aborigines was in turn condemned by the Australian Government, which viewed the UN’s stance as an intrusion on Australia’s domestic political affairs. Ultimately, the EU constitutional discourse focusing on the theoretical underpinnings of democracy, legitimacy and federalism may contribute to a better appreciation of the synergies between the international and domestic legal orders.

3. Conclusion

The study of EU constitutionalism may provide useful insights into how a regional or global polity (and perhaps also a state polity¹⁵) might be organised to maximise the benefits of cooperation and autonomy according to emerging re-conceptions of federalism. Further, the ECJ’s pronouncements on direct effect and related constitutional innovations that foreshadow greater individual powers of participation and enforcement, provide a background to discussion on how democracy may be reconstituted beyond the state and human rights more effectively protected – issues of relevance to Australians and the international community as a whole.

Comparative study performs a didactic function. It variously offers insights into common problems, forewarns, and informs the student that certain problems may be dealt with adequately in different ways or that a uniform response may be warranted on some matters. I have attempted to demonstrate the relevance of EU constitutionalism and its potential to inform developments elsewhere. The benefits of comparative analysis are by no means unilateral. Fleiner-Gerster has suggested that the Australian model of federalism might serve international federal structures such as the EU (Fleiner-Gerster, 1992, p.18). The pragmatism of the Australian colonies (as they were before federation) in remaining ‘partly dependent upon Westminster after the creation of the federation’ while asserting the claim ‘that their relationship with the sovereign and the Privy Council was within their exclusive jurisdiction’ (Fleiner-Gerster, 1992, p.18) offers, first, an insight into the openness of federalism in

¹⁴ Article 27 of the Vienna Convention on the Law of Treaties states that ‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’

¹⁵ Acknowledging of course that the EU is not a state.

providing for several and diverse kinds of constitutional arrangements and, second, a practical illustration of the sharing of sovereign power between different governmental authorities. This historical example of federation may prove a useful reference point in the process of constitutionalising a multi-level governance system where sovereignty (even in respect of issues such as foreign relations) is shared among member state and supranational governing structures. Vanachter and Vranken note that:

Parallels can even be drawn between the reluctance displayed by the framers of the Australian constitution in yielding power to a new national government and the current ambivalence in the various EC member states about how best to complete this grand work-in-progress called the European Union (Vanachter and Vranken, 2004, p. 1).

It may be opportune to restate what social constructivists take for granted: that knowledge, ideas and learning are 'constructive' of identities and interests. It is hoped that the EU's constitutional development may be better understood for its potential to contribute to the empowerment of the individual, to the improvement of the enforcement of law, to the building of consensus and polity and to the advancement of the theoretical underpinnings of democracy, legitimacy and federalism.

References

- Baker, M. (2006) 'Australia leads the world in trashing the rights of refugees', *The Age*, Opinion, 14-15 April 2006.
- Burmester, H. (1995) 'National Sovereignty, Independence and the Impact of Treaties and International Standards' 17 *Sydney Law Review* 127.
- Charlesworth, H. (1998) 'Dangerous Liaisons: Globalisation and Australian Public Law' 20 *Adel LR* 57.
- Christiansen, T., Jørgensen K.E. and Wiener, A. (1999) 'The Social Construction of Europe', *Journal of European Public Policy* 6/4, Special Issue, 528.
- Davidson, A. (1997) *From Subject to Citizen, Australian Citizenship in the Twentieth Century*, Cambridge University Press, Melbourne.
- Douzinas, C. (2000) *The end of human Rights: critical legal thought at the turn of the century*, Hart, Oxford.
- Douzinas, C. (2002) 'The Ends of Human Rights', seminar delivered at the University of Melbourne, 23 April 2002.
- Elazar, D.J. (1993) 'International and Comparative federalism' Vol. 26, No.2, *PS: Political Science and Politics*, 190.
- Everson, M. (1998) 'Beyond the *Bundesverfassungsgericht*: On the Necessary Cunning of Constitutional Reasoning', *European Law Journal* Vol.4, No. 4, 389.

- Fleiner-Gerster, T. (1992) 'Federalism in Australia and in other Nations' in G. Craven (ed) *Australian Federation Towards the Second Century*, Melbourne University Press, Carlton.
- Fox, G.H. and Nolte, G. (2000) 'Intolerant democracies' in G. H. Fox and B. R. Roth, (eds) *Democratic Governance and International Law*, Cambridge University Press, Cambridge.
- Franck, T. (1992) 'The emerging right to democratic governance' 86 *American Journal of International Law* 46.
- Galligan, B. (1995) *A Federal Republic: Australia's Constitutional System of Government*, Cambridge University Press, Cambridge.
- Habermas, J. (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Polity Press, Cambridge.
- Hartley, T.C. (1999) *Constitutional Problems of the European Union*, Hart Publishing, Oxford.
- Heimanson, R. (1967) *Dictionary of Political Science and Law*, Oceana Publications, Dobbs Ferry, New York.
- Jørgensen, K.E. (2000) 'Europe: Regional Laboratory for a Global Polity?', Robert Schuman Centre for Advanced Studies (RSC) Paper, presented at European University Institute, Florence, 23 November, 2000.
- Katzenstein, P.J (1996) 'Introduction: Alternative perspectives on national security', in P. J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics*, Columbia University Press, New York.
- P. Khanna, 'US could Learn From EU's Old World Charm in Foreign Policy', *Los Angeles Times*, 30 April 2004
<http://www.brookings.edu/views/op-ed/20040430khanna.htm>
- Kohler-Koch, B. (1999) 'A Constitution for Europe?', Arbeitspapiere – Mannheimer Zentrum für Europäische Sozialforschung; 8, Mannheim.
- Laffan, B., O'Donnell, R. and Smith, M. (2000) *Europe's Experimental Union Rethinking integration*, Routledge, London and New York.
- Longo, M. (1997) 'Co-operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal' 25 *FL Rev* 127.
- Longo, M. (2001) 'The European Union's search for a constitutional future', *CERC Working Papers Series No.3/2001*.
- Longo, M. (2002) 'Reconceptualising Public International Law: Convergence with the European Union Model?' 25 (1) *UNSWLJ* 71.
- Longo, M. (2004) 'Hostile Receptions: Dilemmas of Democracy, Legitimacy and Supranational Law', Volume 50 Issue 2 *Australian Journal of Politics and History* 211.
- Longo, M. (2006) *Constitutionalising Europe: Processes and Practices*, Ashgate Publishing, Aldershot.
- Lord, C. and Maignette, P. (2004) 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU', *Journal of Common Market Studies* Vol. 42 Number 1, 183.
- MacCormick, N. (1993) 'Beyond the Sovereign State' 56 *MLR* 1.
- Marks, S. (2000) 'International law, democracy, and the end of history' in G. H. Fox and B. R. Roth (eds) *Democratic Governance and International Law*, Cambridge University Press, Cambridge.
- Murray, P. (2000) 'European Integration Studies: the search for synthesis', *Contemporary Politics* Volume 6, No. 1, 19.
- Murray, P. (2005) *Australia and the European Superpower*, Melbourne University Press, Carlton.

- Opeskin, B (1994) 'The Role of Government in the Conduct of Australia's Foreign Affairs' Vol. 15, *The Australian Year Book of International Law* 129.
- Reisman, W.M. (2000) 'Sovereignty and human rights in contemporary international law' in G. H. Fox and B. R. Roth, (eds) *Democratic Governance and International Law* Cambridge University Press, Cambridge.
- Roth, B.R. (2000) *Governmental Illegitimacy in International Law*, Oxford University Press, Oxford.
- Sampford, C. and Round, T. (eds) (2001) *Beyond the Republic: Meeting the Global Challenges to Constitutionalism*, The Federation Press, Sydney.
- Shaw, J. and Wiener, A. (1999) 'The Paradox of the "European Polity"', *Jean Monnet Working Paper* 10/99 <http://www.jeanmonnetprogram.org/papers/99/991001.html>
- Snyder, F. (1999) 'Globalisation and Europeanisation as Friends and Rivals: European Union Law in Global Economic Networks', *EUI Working Paper*, Law 99/8, European University Institute, Florence.
- Soysal, Y. N. (1996) 'Changing Citizenship in Europe: Remarks on Postnational membership and the national state', in D. Cesarini and M. Fulbrook, (eds) *Citizenship, Nationality and Migration in Europe*, Routledge, London and New York.
- Steffek, J. (2000) 'The Power of Rational Discourse and the Legitimacy of International Governance', *EUI Working Paper*, RSC 2000/46, European University Institute, Florence.
- Taylor, K. (2000) *UN rebuke on black rights*, The Age, 29 July 2000.
- Triggs, G. (2001) 'Asylum Seekers and the MV Tampa', Radio National, The Law Report with Damien Carrick on 4/9/01.
- Vanachter, O. and Vranken, M. (eds) (2004) *Federalism and Labour Law: Comparative Perspectives*, Intersentia, Antwerpen/Oxford/New York.

Cases, Statutes, Treaties and other Legal Instruments

- Al-Kateb v Godwin* (2004) 219 CLR 562
- Costa v Enel* [1964] ECR 585
- Internationale Handelsgesellschaft* [1970] ECR 1125
- Italian Finance Administration v Simmenthal* [1978] ECR 629
- Koowarta v Bjelke-Petersen* (1982) 153 CLR 168
- Minister for Immigration v Teoh* (1995) 183 CLR 273
- Singh v Commonwealth* (2004) 209 ALR 355
- Stauder v Ulm* [1969] ECR 419
- Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1
- Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth)
- Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth)
- Administrative Decisions (Effect of International Instruments) Bill 1999 (Cth)
- Commonwealth of Australia Constitution Act 1900
- Racial Discrimination Act 1975 (Cth)

- Constitutional Treaty (not in force)
- European Convention for the Protection of Human Rights and Fundamental Freedoms
- International Convention on the Elimination of all Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- Rome Statute of the International Criminal Court
- Treaty Establishing the European Community (EC Treaty)
- Treaty on European Union (TEU)
- Vienna Convention on the Law of Treaties

Commission communication on the principle of subsidiarity (1992) 25 *Bull EC* 10, 116

Commission White Paper on European Governance, Brussels, COM (2001) 428 final, 25 July 2001.

Council Directive 2001/55/EC of 20 July 2001

CERC PUBLICATIONS

	Price (AUD, Incl CST)	+ postage within Australia	International orders (airmail postage)
2005			
Jonathan Clarke, 'Language and the Construction of Identity in Russia'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Peter Lentini, 'Campaigning Under the Shadow of Martyrdom? The 2004 Chechen Presidential Elections and the Cult of Kadyrov'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Thomas Bamforth, 'Bely and the Mongols: Geopolitical Visions in Andrey Bely's <i>Petersburg</i> '	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
2004			
Dietmer Braun, 'Delegation in Territorially Divided Polities: Lessons for the European Union?'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Cas Mudde, 'Globalisation: The Multi-Faced Enemy'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Natalie Chaban and Jessica Bain, 'Peripheral and Invisible? The European Union in the New Zealand Media 2000-2002'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Richard Sakwa, 'The Australiasian Contribution to Soviet, East European and Russian Studies'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
2003			
Zoe Knox, 'Russian Orthodoxy and Religious Pluralism: Post-Soviet Challenges'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Yuri Tsyganov, 'Russian Policy Toward Northeast Asia: In Search of a New Approach'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Andrea Benvenuti, 'Australia's Policy towards Britain's Second Application to the European Economic Community, 1966-67'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Stefanie Kleimeier and Harald Sander, 'Towards a Single European Banking Market? New Evidence from Euroland on the Role of the Euro'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00

2002			
Jan Teorell, 'Political Culture and Democracy in Post-Communist Russia: A Tale of Three Regions'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Greg Burgess, 'The Human Rights Dilemma in Anti-Nazi Protest: The Bernheim Petition, Minorities Protection, and the 1933 Sessions of the League of Nations'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Axel Hadenius, 'The Development of Political Parties: Russia in Perspective'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
2001			
Rosella Dossi, 'Italy's Invisible Government'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
David Lockwood, 'Border Economics Versus Border Mentality: The Politics of Russia/China Border Trade'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Michael Longo, 'The European Union's Search for a Constitutional Future'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
2000			
Martine Piquet, 'Cold War in Warm Waters: Reflections on Australian and French Mutual Misunderstandings in the Pacific'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Remi Davidson, 'Re-evaluating EU Integration: An Economic Assessment of the Impact of the Single European Market'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Annemarie Elijah, Philomena Murray and Carolyn o'Brien, 'Divergence and Convergence: The Development of European Union–Australia Relations'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00
Rafis Abazov, 'Foreign Policy Formation in Kazakhstan, Kyrgyzstan and Uzbekistan'	<input type="checkbox"/> \$10.00	<input type="checkbox"/> \$11.50	<input type="checkbox"/> \$13.00

* All prices are in Australian dollars and are GST-inclusive.

PERSONAL DETAILS:

Title: _____ Name _____

Company/Institution: _____

Postal
address: _____

Telephone: _____ Email: _____

PAYMENT DETAILS:

I enclose a cheque for \$ _____ made payable to 'The University of Melbourne'.

Please invoice me/my company/institution

Please charge \$ _____ to my credit card.

Type (Visa/Mastercard/Bankcard only): _____

Account No _____

Exp: _____

Signature: _____

CERC Working Papers Series

The CERC Working Papers Series aims to provide a forum for the publication of high quality original research, based on work in progress, on issues relating to Europe. The Series is fully refereed.

Guidelines for contributors

1. Papers should be approximately 8,000 - 12,000 words long.
2. Papers should be typed and double-spaced on A4.
3. Endnotes rather than footnotes should be used.
4. Authors' names and affiliations should appear only on the cover of the manuscript.
5. Each manuscript should be accompanied by an abstract of 150-200 words.
6. Endnotes should be kept to a minimum.
7. Please indicate word length and inclusion of any diagrams or tables.
8. All references should be listed alphabetically at the end of the paper.
9. For journal articles, the volume and issue number, and month and year of publication should be provided.
10. Please submit 3 copies of your paper with a disk in Word or convertible format.
11. The Working Paper may be work in progress, which you are considering submitting elsewhere at a later stage (though you should refer to this earlier version in your finalised paper).
12. All papers will be evaluated by two anonymous referees. The Editors act on the basis of the referees' reports, but retain final discretion in the decision to publish.
13. Authors receive 4 free copies of the Working Paper. Further copies may be purchased by authors for half price.

For more information, please contact the Editors:

A/Prof. Philomena Murray

Director
Contemporary Europe Research Centre
The University of Melbourne
Victoria 3010, Australia
Tel: (61-3) 8344 5151
Fax: (61-3) 8344 9507
e-mail: pbmurray@unimelb.edu.au

Prof. Leslie Holmes

Deputy Director
Contemporary Europe Research Centre
University of Melbourne
Victoria 3010, Australia
Tel: (61-3) 8344 7293
Fax: (61-3) 8344 9507
e-mail: leslieth@unimelb.edu.au

A/Prof. Peter Shearman

Department of Political Science
The University of Melbourne
Victoria 3010, Australia
Tel: (61-3) 8344 6559
Fax: (61-3) 8344 7906
e-mail: shearman@unimelb.edu.au

Contemporary Europe Research Centre
The University of Melbourne
Level 2, 234 Queensberry Street
The University of Melbourne, VIC 3010,
Australia
Tel: (61 3) 8344 9502
Fax: (61 3) 8344 9507
E-mail: cerc@cerc.unimelb.edu.au
Website: <http://www.cerc.unimelb.edu.au>