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Michael Longo

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

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

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

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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

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,

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 EU 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

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

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.

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.

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

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