Supra-National Governance and Constitutionalism: Lessons from the European Union’s Constitutional Conundrum*

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The European Union is often presented to non-European audiences as a model to be emulated. Its success is regarded as self evident and although no one suggests that non-European regions can copy the European model, many would suggest that the pragmatic focus of the Monnet method has much to teach aspiring supra-national entities in other parts of the globe. The recent crisis surrounding the failure of the European Constitutional Treaty suggests that such confidence is not necessarily justified. In this paper it is argued that pragmatic focus of the European method has allowed the functions of the Union to develop without concern for its constitutional structure. Creating such a constitutional structure fifty years after the establishment of the ECSC has proved exceptionally difficult particularly as Europe-wide accountability structures remain weak. The lesson for other supra-national regions is that the European model’s focus on functional cooperation has merely delayed, not avoided, the need for supra-national constitutional structures. The fate of Europe’s Constitutional Treaty suggests that successful supra-nationalism requires a much deeper consideration of “domestic” constitutional issues than currently occurs in supra-national governance practice.

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I. INTRODUCTION: EUROPE’S CONSTITUTIONAL CRISIS

2004 was intended to be a momentous year in the history of the European Union. The signing of the Treaty establishing a Constitution for Europe, at Rome on the 29th of October, was presented as a major milestone on the road to the ever

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closer Union envisaged by the Treaty of Maastricht. The signing of this document, amid much fanfare and symbolism, signalled the start of a new phase of the ‘European project’, a project, which was now to be undertaken within the framework of a Constitution.

The use of the phrase ‘Constitution’ in this context was largely symbolic as this document remained an international treaty like any other. However, the choice of such evocative language was not without meaning, signalling as it did the broader aims of this document and its wider significance. Yet, despite the outward confidence of Europe’s leaders in this bold initiative, the Constitutional Treaty was always something of a gamble. There was always concern such an approach would not find favour amongst the populations of some newer member states as well as some established and traditionally conservative Member States such as Denmark and UK. Nevertheless, it was hoped that such reservations could be overcome, particularly if popular referenda could be avoided. This was always a high risk strategy and one which failed disastrously after first the French and then the Dutch electorates rejected the treaty in the spring of 2006.

European Treaties had been rejected by referendum before (after both Maastricht and Nice) and in neither case had the results proved fatal to the treaties concerned so it could be argued that this rejection was a minor inconvenience for the future Union. However, the high ideals associated with the Constitutional Treaty meant that its rejection was more than just a rejection of another European Treaty. It was a snub to elements of the European project itself. The failure gave a significant jolt to the European regionalisation project and continues to raise serious questions for the future constitutional structure of the European Union.

The rejection of the Constitutional Treaty in two of only four states where referenda were held (and its almost certain rejection in at least one other had a referendum been held in the UK) marked a crisis not only in terms of this treaty but in the European project as a whole. For the first time since 1957, the onward march of Europe’s regionalisation process has been clearly and unmistakably halted by the populace of its Member States. There had been warnings before and the development of the European Union has always been something of a roller coaster ride but such a public rejection by two of the original six Member States could not be wished away by any amount of spin or political manoeuvring. The people had been allowed to speak and their answer was an unmistakable No.

The repercussions of this rejection continue to affect the Union. There is no doubt that the failure of the Constitutional Treaty created a political headache for Europe’s political leaders, as the Union creaked under structures agreed by the Nice compromise. Nevertheless, despite the limitations of the treaty amendments agreed at Nice, they have allowed the Union to function relatively effectively without the new constitution. This makes it clear that the Union itself therefore is not and never was in crisis as a result of the Constitutional Treaty’s failure. The European Union story continues to be one of success. The consequences of the

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1 It is likely that proposed referenda in Poland and Denmark would also have failed.
treaty's failure are thus more about the structure of the Union and its future development rather than its existence. To some extent these issues are exposed by the newly inked Treaty of Lisbon, a far less ambitious project than its ‘constitutional’ predecessor which makes no reference to the term ‘constitution’ at all. It is these broader issues which have relevance far beyond the borders of the European continent.

The success of the European Union has had an impact far beyond its borders. The same drivers that brought the European Union’s Member States together in 1957 increasingly apply to nation-states across the globe and for this reason there has been has growing interest in international regionalism more specifically, the European model. In more recent times this has been translated into practice with the creation of, international regional organisations in every populated continent. From ASEAN, to the CER via the Community of Andean Nations (CAN), nascent regional organisations are now the rule rather than the exception. The European Union’s influence in these developments has been extensive. Rather than merely convincing other regions of the advantages of co-operation, its success has led to the European model being seen, rightly or wrongly, as a reference for others.4

This article briefly examines the EU’s influential model and assesses its relevance to supra-national regionalism in the light of the Constitutional Treaty’s demise. It is the submission of this author that the main lesson to be learned from the failure of the Constitutional Treaty, as confirmed by the nature of its replacement, the Lisbon ‘Reform’ Treaty, is the continued importance of Member-States in regional governance structures. Future constitutional developments in Europe and elsewhere must accept this. The problem for the Union was that the Constitutional Treaty episode forgot this basic reality. The European Union remains a system of supra-national governance rather than European government and it is unlikely that his situation will change in the near future. The challenge for the future development of the European Union, and other regional organisations, is to create structures that can address the problems that governance brings. In putting a premium on pragmatic and limited points the European model failed to address constitutional issues as it developed leaving a huge constitutional ‘backlog’ for later generations to address. Given this failure, and the current constitutional crisis that has occurred as a result of it, is the European model of regionalism such a success after all?

II. THE EUROPEAN MODEL

The European model of regionalism, as every EU law student knows, owes its

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2 The Association of South Asian Nations.
3 The Closer Economic Relationship between Australia and New Zealand.
genesis to the ideas of Jean Monnet and the actions of Robert Schumann. Together, starting with the Coal and Steel Community in 1952 they put the ‘Monnet method’ into practice. The Monnet method is, in many ways, the European model of regionalism. It was certainly crucial to the early years of the success story that is the current European Union. Although it has become fashionable in recent years to suggest that these early drivers have been replaced by more sophisticated pressures towards European co-operation, the current crisis shows the continuing importance of these ideas to the European project.

Monnet’s idea was a simple one and was thus far better suited to the realities of the European political arena than the academic ideals of the European federalists. Rather than embarking on regional co-operation through the creation of a constitutional framework and then moving towards specific policy development, Monnet argued that the opposite approach was required. In a brilliant piece of real politic Monnet realised that co-operation on a ‘limited and decisive point’ would have a far greater chance of success in the real world than grand plans for Europe constitutions and co-operative mechanisms which lacked clear substantive benefits.

In essence, he believed that the sort of supra-national entity that he envisaged for the European continent had to be built in the opposite way from a traditional state structure. In the traditional domestic state building model, the constitutional basis is the foundation upon which the state is built. After a revolution, whether violent or otherwise, a new constitution, designed for general use, will form the foundation of the state. Specific policies are then developed within this wider generalist framework.

Such a method would not work at the supra-national level that Monnet wished to create. There were two reasons for this. Firstly, to ask European governments to give up power to a European governmental body with meaningful decision-making powers without a quid pro quo had little chance of success. Secondly, Monnet realised that the collapse of European national authority in the aftermath of the Second World War presented a very limited opportunity to launch a new form of co-operation before the old order re-established itself. Such a limited timescale did not lend itself to grand constitutional visions.

Although many may not have realised at the time, Monnet’s aim, and that of his co-conspirator Schumann, was to focus on a limited and decisive point, not just to deliver clear benefits to the peoples of Europe in specific areas and thus to encourage co-operation in other areas, but to create intentional spill-over effects requiring ever greater co-operation and regulation. Given the history of the past fifty years, the success of this model is difficult to challenge. Where various European co-operation schemes had faded into nothing, the European Coal and Steel Community, the European Community and later the Union were an astonishing success.\(^5\)

\(^5\) The truth of his assessment is confirmed by the fate of the Council of Europe. This institution was seen as the embryo of a European governance structure but with the notable exception of the European Convention of Human Rights, has proved to be a useful forum for the discussion of European Treaties but nothing more.

\(^6\) Such approaches were not without their limits, as the failure of the European Defence Community made clear.
In 1945 the European states were physically exhausted, saddled with debt and in colonial retreat. The European era seemed at an end. Yet the Union has seen the European continent re-invent itself as the world’s largest economic power. This is the enduring legacy of Monnet’s method and it is indeed an impressive one. For five decades it has served the Union well. From the ECSC to the Single European Act, each major revision of the Treaties focused on decisive points with tangible benefits to the economies and thus the populations of the Union. However, the success of Monnet’s method came at a price, one which although originally envisaged as small but which was to prove significant over time. By focussing on the tangible benefits that European co-operation could deliver, the constitutional requirements of the developing governance structure were never properly addressed. The conspicuous failure to address these issues has led to the growing crisis that culminated in the public rejection of the European Constitutional Treaty.

III. THE LIMITS OF THE EUROPEAN MODEL

Ironically, the seeds of later discontent and the constitutional problems that now face the Union were sown in the Monnet method itself, aided by the fact that the proponents of a federal Europe had underestimated the resilience of the European nation-state. The European Community as established in 1957 comprised, the by now familiar system, of an Executive Commission, a divided legislature (the Council and the Assembly) and a Court to resolve disputes arising from the implementation of the Treaties and subsequent European legislation (although the word was not used at this early stage). The architects of the system expected the indirectly elected Assembly to gradually assert its authority and over time become the main power at the European level. This was to prove a fundamental error as the Assembly languished as a forgotten and largely unloved institution while the Council along with the Commission became the key actors in the European drama. Successive improvements of the Assembly’s (now Parliament’s) status and the establishment of direct elections in 1979 have not altered this fundamental truth. The crucial decision-making power at the EU level continues to focus on the Member-States, albeit collectively exercised through the Council.

The strength of Monnet’s idea was that despite this fundamental miscalculation, the Community and later, the Union, continued to evolve. Although such developments were often made in fits and starts, the pragmatic nature of the European enterprise continued to drive it forward. Through successive crises the Community proved to be remarkably resilient. The reason for this was, just like Monnet’s idea, remarkably simple.

Although it is fair to say that some national leaders, particularly of the pre-war generation, had higher aspirations for the future of European governance, the majority had more parochial aims in their relationship with the European project, namely the benefits it promised for their own states and their own domestic chances of re-election. The key for the Union’s success was that rather than acting as a brake on its development, the pragmatic focus of the Monnet method ensured that such attitudes could actually be harnessed to drive the European supra-
There was no clearer example of this than the events surrounding the passing of the Single European Act of 1986. This act, which was actually a series of amendments to the Treaty of Rome, significantly reduced the power of individual member-states through the increase of qualified majority voting on the Council. The Single European Act, however, although producing some controversy and disquiet amongst the more Euro-sceptic Member-States (although the term was in its infancy) passed with little real opposition. It required no referenda and no grand gestures. It was a practical reform of the Community to introduce the Single Market within an accepted time frame. It should not be forgotten that this most fundamental of European reforms was enacted in the UK by the government of Margaret Thatcher, hardly a pro-European administration. The reason was simple, its practical benefits were clear. It still fitted Monnet’s model of supra-national co-operation being sold as necessary for pragmatic and specific gains. Monnet’s genius was to realise that states would come to the European party to benefit themselves, not for a greater European good. They came to praise the nation-state, not to bury it. That in the process what it meant to be a nation-state would be fundamentally altered was unimportant to Europe’s leaders, but understood by Monnet and his acolytes.

As time went on, however, and the European institutions grew in complexity and authority, the Monnet method began to become a victim of its own success. As ever greater decisions were taken at the European level, the disconnection between the European decision-making process and the population of Europe was becoming ever more obvious. The Monnet method’s focus on the pragmatic had neglected the constitutional to the extent that the Commission began to believe that it was unimportant. This would prove to be a serious mistake and merely meant that an ever growing list of problems was being stored up for the future.

IV. THE CONSTITUTIONAL CONUNDRUM

The lack of considered discussion of constitutional issues during the EU’s development was thus due in part to Monnet’s approach which in effect de-prioritised such questions. The incremental development of the European Union and its focus on pragmatic goals meant that classic constitutional issues were addressed only in passing, but this was not the only reason for the lack of interest in such matters. Debates on decision making processes in domestic systems take place within a well established constitutional discourse of accountability and legitimacy. There may be significant disagreement as to the nature and substance of such mechanisms but the overall parameters of the debate are largely established. However, the European Union, rooted in international law but caught in uncharted territory between traditional notions of the domestic and international spheres lacked such a framework.

7 A more developed and slightly different exposition of this thesis is to be found in the work of Alan Milward, notably, ‘The European Rescue of the Nation-State’, Routledge, 1992.
Since the Nineteenth Century, International Law has regarded domestic public law as irrelevant to the international sphere. It focussed on the international sphere alone and purposefully isolated itself from domestic constitutional questions. Increasingly, the globalisation of domestic law and the development of international institutions (such as the European Union) have made it impossible to maintain this division but in 1957 such ideas were very much in their infancy.\(^8\)

This combination of Monnet’s method and the traditional exclusion of constitutional questions from international law meant that constitutional discourse around the EC and the EU developed slowly in response to the growth of the organisation itself. In practical terms, considerations of accountability and legitimacy were ignored until the nature of the Union made such issues unavoidable. This state of affairs proved difficult, but not impossible to maintain for as long as the Community was able to develop without the need for popular support for its reforms. However, as the power of the Union/Community grew, the ratification of treaty amendments became an increasingly public and politicised affair. In particular, it began to require popular support, often through referenda for both constitutional and political reasons. After the success of the Single European Act, the Maastricht Treaty and its subsequent ratification referenda exposed the first real problems in the European project and its relationship with its citizens. The Danish rejection (and subsequent approval with opt-outs) and the subsequent narrow support for the Treaty in France, showed that all was not well with the constitutional future of the Union. For the first time a degree of doubt existed as to the long term future of the European project.

The problems continued in subsequent Treaty amendments at Amsterdam and Nice, where further referenda caused concerns, none more so than the Irish rejection of the latter in 2001. Although the Irish gave resounding support to the Treaty in a 2002 re-run, again the fragility of EU constitutional structure and the ease by which reforms could be derailed was made abundantly clear. This weakness in the EU’s constitutional structure can itself be traced back to the failure to consider constitutional questions in the early period of the Union’s existence. The nature of the limited constitutional structure of the Community has meant that all states need to ratify Treaty amendments, leaving the constitutional framework of the Union in a fragile state.

However, these rejections were nothing in comparison with the fundamental crisis of confidence that accompanied the French and Dutch rejections of the Constitutional Treaty, although they clearly presaged it. The rejection of the Constitutional Treaty in these referenda was a shock to the system for the European Union, one from which it has yet to recover but, as the above discussion has indicated its roots lie not in the events of the past three years but in the very European method of integration itself.

Ironically, the Constitutional conundrum that faces Europe today has actually proved Monnet’s thesis correct. The utilisation of a pragmatic programme has seen the successful development of a successful Union. However, it has also left the EU with a clumsy constitutional structure, disconnected from its populace.

and ill suited for the task. The need to create a suitable constitutional frame for European integration at this late stage creates a significant problem. Such reforms are, in the minds of the populace, dull, uninteresting and even threatening. Few people are interested in or understand the minutia of constitutionalism. It does not set the pulse racing. People care about jobs, health care, and the future of their children, amongst a myriad of other issues. Rarely do they have much interest in the name of the Ministerial Council of the European Union or the creation of a European Foreign Minister.

This was, of course, Monnet’s point, although he focussed on national elites rather than populations as a whole. In the Twenty-first century this underlying principle appears intact. The problem is that the EU, by focussing on the pragmatic and achieving such phenomenal success, is now left with a constitutional vacuum which requires back filling by a post-facto constitutional framework. By using Monnet’s method, the EU has not avoided the need to create a constitutional framework for its future success, but merely delayed it. The conundrum that the EU now faces is how to create a constitutional structure within which the Union can develop, in an atmosphere of apathy or even hostility towards constitutional reform.

V. CONSTITUTIONALISM AND THE GOVERNANCE TURN

The difficulties that are faced by the EU in its quest for a workable constitutional framework are compounded by the unique nature of the organisation. Although it is now abundantly clear that the constitutional issues facing supra-national organisations are very different from those which are faced by national governments, this was not so obvious to the founders of the European project. They could only guess as to how their project would develop and only now can we be sure that the regional supra-nationalism represented by the European Union is part of a much wider phenomenon that has swept the globe over the past century, namely the rise of the executive power and the ‘governance’ turn.

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

The modern development of executive decision making, particularly in the international field, and the increasing use of ‘informal networks’ in policy making was first recognised by political scientists in the 1980s as a recognisable phenomenon and given the term ‘governance’ to describe it. Particularly important amongst these works were those of Rhodes, Marks and Hooghe.9 These recog-

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

Executive empowerment, the expansion of the nature of the ‘public’ and the need for constitutional structures to deal with this reality, has long been recognised in the field of Public Law. For many Public lawyers this is now the very essence of the subject. However, the issue has only rarely been dealt with in the international context. There is no reason why this should be the case. The rise of international executive ‘governance’ means that these issues can no longer be ignored at the international level.

However, to address these issues at the international level and thus resolve the EU’s constitutional conundrum will require a new approach to constitutionalism. The EU is a new type of confederal structure and it should come as no surprise that it needs a new form of constitutionalism to govern it.

The traditional approach to constitutional accountability is to combine affirmative democratic processes, (which legitimise the actions of the government) and accountable democratic processes, (which ensure that the government is practically accountable for its actions) in the same institutions. In most democracies, the institution charged with such tasks is the Parliament. However, at the supra-national level this approach is ineffective, probably impossible to achieve and largely unnecessary.

The problem for Europe and other emerging supra-national entities is that although the practicality of globalisation and the realities of our globalised world means that supra-national institutions are a necessity, populations do not identify with the institutions themselves and largely remain loyal to national or sub-national entities. In effect the results of supra-national co-operation are enjoyed, but not the institutions that deliver them. The supra-national level may be a necessary development, but it is not a desire pursued out of passion. It is a pragmatic development geared to delivering specific goals for the citizens of individual states (or their elites).

For this reason, attempts to create European-wide identity and Europe-wide accountability structures have always proved elusive. The clearest example of this is the fate of the European Parliament. This body is the democratic heart of the Union and is the only entity directly elected by its people, although still along national lines. One would therefore expect such an institution to be popular, and the original architects of the European model certainly envisaged this. However, the voting figures suggest otherwise, with a steady decline in voter turnout to less than 50% of the electorate in 2004. In some countries, notably the UK, the turnout was even lower, numbering less than 40% in 2004 (but a significant increase on the 27% for 1999).

As Chris Shore has emphasised in his work the failure of Europe’s institutions to create a ‘European identity’ is not through want of trying. Despite their best efforts, the purely European institutions of the Union have not gained support and people continue to view politics in national terms. People do not identify with the European Parliament, perhaps partly due to its complex procedures and powers but also, to a significant extent, due to the lack of a European identity itself. Instead, political identity in the European Union remains rooted in the national and sub-national levels. In practical terms these are represented by the Council of the European Union which remains the key to affirmative democracy in the system.

This situation is unlikely to change in the near future as people remain wedded to the nation-state or their regions for their political identities. There is little reason to think that populations in Asia or elsewhere would be any different, particularly as the cultural differences between potential regional partners are often greater. The unpopularity and eventual failure of the Constitutional Treaty is further evidence of this reality, as is the state-centric approach of the new Reform Treaty. The legitimacy of European law-making will therefore continue to be rooted in those entities. The institutions that represent these sources of legitimacy, particularly the Council, will therefore remain crucial to the legitimacy of European decision-making. That the affirmative elements of democracy will continue to have their roots in national representation therefore seems clear. However, such executive dominated mechanisms cannot deliver truly accountable democratic government. How is this to be achieved in a supra-national structure?

VI. DEALING WITH THE GOVERNANCE TURN

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

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

The growth of Executive power itself is not the problem and attempts to make it so are presenting a misguided approach to the problem. The modern world

11 To a much lesser extent, the Committee of the Regions could also be included in this category, but its fundamentally flawed structure means it is largely irrelevant.; see W. J. Hopkins, Devolution in Context, Cavendish Publishing, 2002.
12 For an excellent overview and discussion of the merits of ‘Green Light’ versus ‘Red Light’ approaches
cannot function without such governance structures. In effect we have already decided this issue by creating supra-national institutions. This takes us back to Monnet’s point. We create these bodies, or more generally grant power to executives, because we wish to see the tangible benefits that such governance delivers. We want to travel across borders without difficulty, we want to buy goods from across the world and we want to speak to relatives across the globe with the touch of a mouse. On a more prosaic level, we want hospitals, and schools and safe communities—these things are possible because we have created structures that deliver them. Invariably this means the creation of executive institutions that have the discretion to deliver these benefits.

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

The issue to be addressed, therefore, is not how to limit European or international decision-making, but to ensure that we recognise the significant consequences for domestic legal structures that supra-nationalism creates. This requires a re-assessment at both the domestic and international levels of how executive power and the discretion they exercise can be held to account in an increasingly complex system.

VII. GOVERNANCE AND SUPRA-NATIONAL CONSTITUTIONALISM

Monnet’s method has proved astonishingly successful in its ability to deliver a workable supra-national institution in the European continent. Yet its success has obscured a continued reality. Reports of the death of the nation-state have been greatly exaggerated. This has been confirmed by the constitutional problems that currently beset the European Union. The failure of the European Constitutional Treaty confirms that, for now at least, Europe is not ready for such grand gestures.

to this issue see C Harlow and R Rawlings, Law and Administration (2nd Edition), Butterworths, London, 1997.


14 The consequences of legal internationalisation have long been recognised in federal states where the internationalisation of traditionally domestic subjects has weakened the constituent states to the benefit of the national executive. Possibly due to the fact that the constituent states have a political voice and have lost autonomy as a result of this, these developments have taken on more of a political significance in such countries. In Canada and Germany, for example, debates surrounding the internationalisation of domestic law continue to be a significant issue in domestic inter-governmental relations. The issues recognised in the federal states have echoes across all states however, as the internationalisation of domestic law brings with it the bypassing of domestic constitutional safeguards, through what the German Länder refer to as the ‘Open Flank’.
but it does not mean that European supra-nationalism is under threat. The EU will continue to function but, to develop effectively, it has to recognise the very different nature of supra-national constitutionalism and develop its constitutional framework accordingly. This is the lesson that can be drawn from the constitutional crisis of the Union.

As the non-European world embarks upon variations of the supra-national regional project, Monnet’s legacy lives on. In each instance the drivers are not high ideals about co-operation and peace, but rather more prosaic issues such as trade, energy and the environment. It seems unlikely that this situation will change in the near future and such organisations will continue to be practical in focus. However, the lesson from Europe is that such a pragmatic focus should not stop attempts to create a wider constitutional frame. Failure to do so may lead to the current impasse in the EU where constitutional reform is now essential, but difficult to deliver.

This requires us to think differently about supra-national constitutionalism. The question that faces all supra-national regional institutions is how to ensure the institutions of governance are held to account and operate effectively and efficiently? In essence, how can they be designed to deliver good governance? In the European example this will require greater openness of decision-making, a strengthening of the Parliament’s scrutiny role, and further empowerment of institutions such as the Ombudsman and national Parliaments.

How such a constitutional frame should be developed is beyond the limits of this chapter, limited as we are by the tyranny of space, but the EU does offer us pointers in this direction. Predictions of the demise of the nation-state have proved premature and its survival as the key unit of affirmative democracy is likely to be repeated in other examples. One cannot imagine, for example, the growth of a East Asian identity or Pacific identity, except at a relatively superficial level.

At present, Europe appears to have a fundamental character flaw. It wants to be loved and it has yet to come to grips with the idea that it never will be. It is unlikely that there will ever be a European demos and Shore’s assessment of this is probably correct, but this doesn’t mean there is no need for a European system of government. People don’t want to have a ‘European’ government in the traditional sense but they do want the benefits of co-operation. We must therefore separate the concept of identity and legitimacy from the practical reality of governing. In effect we must abandon the nation-state myth of the past two centuries once and for all. The nature of the international governance turn means that we may never truly identify with the practical seat of government. To put it simply, supra-national regions do not have be loved, they just have to work.

The tentative conclusions of this article are that the European experience has much to offer supra-national projects in other regions and the recent Constitutional crisis, in particular, has exposed both the advantages and weakness of the European model. In one sense it confirms the continued relevance of the Monnet method. The Constitution failed because it was not focussed on a limited point. It was not going to bring jobs or improve education or improve our environment. It was going to increase European co-operation, clarify powers and re-organise the

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15 C. Shore, *op cit* nt 12.
operation of the Union. This Treaty was neither fish nor fowl. It was not a technical document focussing on delivering better governance (which would not have been suitable fare for a referendum) and neither was it clearly focussed on the extension of European power.

This is the first lesson that should be taken on board, that in following the pragmatic approach of Monnet, we should not neglect the need to create institutions that ensure good governance. The EU has developed some of these but they have always been the poor cousins. This leads us to a second point that governance at the supra-national level is not like the nation-state, although many of the issues it faces are the same. We must realise that supra-national institutions are unlikely to enjoy the legitimacy that their Member-States counterparts do and thus reliance on supra-national representative institutions to ensure legitimacy is doomed to fail. We need to accept the continued role of Member-State governments in providing this legitimacy and their continued role in decision-making as part of the governance structure. However, we must also develop as a matter of priority institutions that ensure that the collective discretion that will inevitably result from such procedures is, as K.C. Davis famously said structured, confined and checked. This is the greatest challenge that faces modern supra-national institutions. To address it requires robust institutions, openness and above all adherence to the Rule of Law.

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KC Davis op cit at 15.