

A Politico-Legal Approach To A Multi-Tiered, 21st Century Europe: The Example Of European Regional Development Policy

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1. Introduction

It is widely acknowledged that the largely economic Common Market that was conceived almost fifty years ago has evolved into a much more politically oriented European Union made up, not of six, but twenty-five Member States and whose reach spans the supranational, national and subnational levels. The disciplines of law and politics have attempted to explain how this integration has been achieved and how the resultant European construct is governed. However, while lawyers have tended to take quite a formalistic view of the integration process, emphasising the internal dynamics of E.C. law and Court of Justice jurisprudence, political scientists have tended to concentrate on more informal, external factors, that is to say the varying strengths of national governments, the Community institutions and sectoral, even subnational, interests. As Wincott points out, throughout the Community's history, legal and political science approaches to European integration have largely taken place in isolation from one another.¹ He follows this by affirming that, "any attempt to provide an overall account of the integration process...has to make sense of both the political and the legal character of the Community."² To be sure, given Cichowski and Börzel's claim that the Community has evolved as a "dynamic interaction" between law and politics and that the "intersection between law and politics remains at the heart of current and future developments in the Community"³ this article, is therefore part of the ongoing effort to show how the gap between them may be bridged. Upon the changing politico-legal-economic nature of the Community in the years since its inception, which has affected relations between all its territorial levels and given rise to different disciplinary research approaches, it questions the need for an overarching politico-legal theory, neo-intergovernmentalism, which is apt at explaining the causes of and reasons for the politico-economic integration process and equally adept at incorporating therein the multi-tiered nature of governance of the Community. In doing so, it takes as its example European Regional Development Policy because it encompasses formal and informal supranational-national-subnational relations in respect of its legal base and overall governance. After all, it was Snyder who stated over a decade ago that the European Community "represents...an intricate web of politics...and law. It...calls out to be understood by means of...an interdisciplinary, contextual or critical approach."⁴

2. The Failure of Lawyers and Political Scientists to Come Together: The Need for an Interdisciplinary Approach to the European Project

In the light of Wincott et al's contention, the aim of this section is draw together the differing political and legal theories which have been put forward in order to succinctly illustrate just how the two disciplines have mutually discounted or subordinated each other. Firstly, in respect of neofunctionalism, its essence, as expounded by the likes of Haas and Lindberg, was that national sectoral interests spilling over would lead to ever-deepening and irreversible levels of economic and political integration and to a reinforcing process of elite socialisation at the supranational level. It is notable that in their political accounts of the integration process no reference is made to the contribution of law. Indeed, it is submitted that by concentrating on functional integration and on the creation of a new techno-political elite, they failed to take account of how the "organisational, procedural, substantive and normative elements of law"⁵ could have instrumented and facilitated integration. As Armstrong recognises, the law could have been recognised to play a key role in creating a normative system to shape the overall process.⁶ From the same theoretical genus, Mattli and Slaughter (née Burley) have provided their neofunctionalist theory of legal integration; that is to say, a distinctly political theory as to how European Community law has penetrated the national legal orders and how such legal integration has led to deeper political integration. Situated within the overarching neofunctionalist framework, this approach, however, seemingly predicates legal integration and the integrative dimensions of law on a wider political dynamic – that being the self-interest of various incentivised national actors. It appears to put forward political explanations for the actions of the Court and the achievement of such integration, thereby implying a denial of any significant internal legal dynamic, the incapacity of law as an institution to shape the course of integration and the predominance of the political over the legal. When taken as a whole, the neofunctionalist approach, therefore, appears indicative of a certain inability to regard the two disciplines of law and political science as co-equals in explaining the course of European integration.

From the intergovernmentalist academy, Moravcsik has consistently advocated liberal intergovernmentalism which draws together insights on domestic preference formation and international relations perspectives on inter-State bargaining. Similar to Haas' neofunctionalism, although fluent in the political and economic dynamics of integration, it is lacking in a legal dimension; this self-evidently given its preoccupation with the degree of external control exercised by sovereign States. It is notable that such a well-reasoned theory of European integration apparently lacks an internal, normative organisational framework that provides a firm legal grounding and explanation for the process. This is again illustrative of a certain reticence to go beyond the bounds of one's own discipline to incorporate inherent aspects of others. Although most international relations scholars are reluctant to implant legal elements into their theses because of the perceived fluidity of international law, this should not dissuade them from attempting to incorporate cross-disciplinary factors, something that would more readily reflect the reality of politico-legal interaction. Concentrating more specifically on Moravcsik's intergovernmentalist and Garrett's neorationalist approaches to legal integration, as with Mattli and Slaughter's (née Burley) neofunctionalist theories, they appear to put forward political explanations for the achievements of the Court, arguing that the legal integration which has been achieved has been due to national interest calculations, thereby again subordinating the legal to the political. Quite rightly, according to Armstrong and Shaw, they "proclaim a dominance of politics over law which would have the Court of Justice merely slavishly tracking the preferences of the Member States and exercising no real autonomy of action derived from the nature or form of legal decisions."⁷ What is more is that they fail to acknowledge the self-determining – organisational, procedural, substantive and normative – dynamics of the law as an institution.⁸

Having considered what are deemed to be the principal political theories of European integration, it is now appropriate to recall the legal scholarship and how lawyers have treated the integration advanced by the Court of Justice as it has related to the integration of the legal orders and to broader politico-economic integration. From the legalist school of pure law, scholars such as Mancini¹ are hardened in their argument that it has, first and foremost, been the Court, acting within the framework of European Community law, through its legal duty

to interpret and implement the law, which has brought about the juridico-politico-economic integration of Europe. Indeed, they believe that there has been within the Community an internal dynamic of expansion catalysed by the Court, largely apolitical in nature, which has resulted from a teleology of constitutionalisation. Wincott, relying on the oft-cited words of Shapiro, critically sums up this approach in that it is "'constitutional law without politics'; the development of the Court's case law leaves no room for politics of any kind...[It embodies] the 'black letter' analysis of Community law."⁹ To be sure, commentators such as him argue that legalism is overly concerned with internal legal dimensions to the exclusion of equally germane external factors that relate more closely to the reasons underlying the creation of the European project.

Contrary to this somewhat rigid legal formalism, a number of lawyers have, nonetheless, sought to place legal analyses of integration within a wider political context. Prior to Weiler's conversion to the "pure theory of law" in 1991, he put forward a reasoned case according to which both "normative supranationalism" and "decisional supranationalism" were juxtaposed. The flaw in his "contextual" study was that the latter, instead of being the former's co-"ism", was in fact the former's subordinate.¹⁰ This was a clear prevalence of law over politics as opposed to a balanced account of the influence of both disciplines. Lenaerts, again a "contextualist", takes a different view. He argues that the great strides made by the Court have actually revitalised political processes of integration.¹¹ However, what links these two approaches is the primacy attributed to law, political progress merely being subordinate to it or, at least, dependent upon it. It follows that from a general point of view, notwithstanding the persuasion of the lawyer, whether he be pure legalist or contextualist, there appears to be over-emphasis on the internal, legal dynamics of integration – the constitutionalisation of the Treaty – to the expense of equally important external, political dimensions. As Armstrong and Shaw attest, "[legal] scholars have too often failed to present the law and legal institutions within the Union in ways which seemed relevant to the concerns of political scientists or other scholars of European integration. [They] have been too quick to proclaim the dominance of law over politics, suggesting an implicit disdain for the political difficulties of the Community."¹²

In the light of the above analysis, it would not be unreasonable to draw the conclusion that lawyers have largely approached European integration from a formal, legal perspective involving narrow and isolationist analyses of the Court's jurisprudence in "constitutionalising" the Treaty. In instances where they have dealt with political aspects, they have appeared to consider them secondary to its pronouncements. Conversely, political scientists have examined the same phenomenon mainly from a wider, positivist angle and have variously concentrated upon the contributions of interest group activity, the political motivations of the institutions and the relevance of international relations theses. Where they have considered law and legal reasoning, this has often been predicated on political explanations tied to the motivations of the Court of Justice and not on its own internal dynamic. The assertion that political scientists have, in the main, tended to be ignorant of the influence of the internal logic of the law while lawyers have largely downplayed the roles of the institutions, Member States and other factors external to the Community accords with Armstrong's synopsis that, "while political theories of the role of law have tended to construct law as contingent upon politics, the metaphor of a constitutionalised Treaty relies upon an image of politics under law. The reality is a more complex interaction of law and politics."¹³

In his view, there has been a political tendency to view the Union's existence as varyingly dependent on the nation-State and a converse legal affinity to regard it as a State-like constitutional order in itself. On the contrary, he believes that it is neither an agent of the nation-State nor a product of its displacement. He rightly sees it as a radical, new entity which has structures of governance which are both consonant with the nation-State paradigm but which also reflect a novel departure from it.¹⁴ In his own words, "Governance within the E.U. cannot...be reduced to simple dichotomies and oppositions between a supranational layer of decision-making and a national layer. Rather governance is differentiated and multi-level."¹⁵ Upon this, it is his surmise that the contemporary discourse of governance beyond the State which is growing in prominence, due to the changed politico-economic-social agenda of the Community (from the achievement of the Common Market to the accomplishment of the Lisbon Agenda), the introduction of European citizenship and subsequent enlargements, is important given that it stimulates a need for both political scientists and lawyers to come together, to move beyond the conventional nation-State-supranational debate and to explore the increasingly

loose and multi-tiered nature of the Union. With specific regard to the law, he argues that these new notions of governance pose great challenges to the discipline in that, as an institution, itself, it has to adapt from being largely positivistic and formal (manifesting itself in the Treaty and its legislation) to being capable of embracing informal channels and a multitude of different actors having different characteristics, interests and activities, such as the regional partners in regional policy.¹⁶

3. Historical Institutionalism as the Foundation for an Interdisciplinary Approach to the Contemporary Europe?

It is striking that perhaps the most apposite way of bridging the politico-legal divide is by referring to new institutionalist approaches. This is reinforced by scholars such as Wincott¹⁷ and Armstrong who believe that such approaches provide an adept framework for understanding the interaction between the two disciplines and the development of the Community polity. Shaw herself seemingly concurs by stating that, "the analysis of institutions within the broad framework of comparative politics and public policy, and in particular theories of 'new institutionalism', might currently offer the most fertile ground for understanding the roles of the respective actors within the legal and political processes."¹⁸ More affirmatively, Wincott argues that the new institutionalism provides the necessary "corrective" to the interdisciplinary divide and suggests that it acts as the best counterbalance, given its ability to effectively fuse together both internal, legal factors and more external, political aspects.¹⁹ Similarly, Armstrong, with his premise that "institutions" constitute not merely formal institutional actors but also the whole ambit of formal and informal "rules, norms, beliefs, rhetorics, ideologies and procedures" – which are able to determine the procedural and substantive dimensions of policy- and decision-making – is a strong advocate of the new institutionalism given his belief that it is innately apt at reconciling the politico-legal realities of evolutionary integration and governance taking place across the Euro-polity.²⁰

Historical institutionalism, in particular, is seen to capture contemporary politico-legal themes relating to European integration and governance by embodying the notion that political relationships must be viewed over a period of time and that the decisions of political actors, the Member States, are shaped by a combination of their long-term pre-existing legal-institutional choices and wider political processes. Indeed, those such as Pierson argue that, although Member State governments initially bargain in respect of the legal-institutional make-up of the Community, they, in pursuing their interests over the years, do so not freely but within the legal-institutional limits set down by their "predecessors and the micro-level reactions to those preceding decisions."²¹ In other words, from the time of their establishment and that of the Treaty framework, Community institutions are deemed to initiate policies that then follow a certain "path dependence" and "lock-in" upon the inflexibility of legal-institutional norms and the influence of the wider politico-socio-economic environment.²²

The crucial question, however, is what can historical institutionalism offer for the basis of an overarching interdisciplinary, theoretical framework? Firstly, at its heart is that the Member States, through inter-State bargaining, remain the primary actors in determining the nature and extent of integration and the make-up of the institutional framework of the Community. They, as the most competent decision-makers, ultimately define and refine its powers and are responsible for its policy outcomes. This is an acceptance of the central tenets of intergovernmentalist thinking and that the rudimentary politics of international relations theses underpin its basic existence. Historical institutionalism therefore provides a core theoretical explanation of the part played by the Member States in the creation of the Community and advancement of European integration.

Secondly, although admitting the influence of intergovernmentalism and predicated the relationship between the Member States and the Community institutions on that of principal-agent, proponents of new historical institutionalism acknowledge, nonetheless, that it can only be, at the very least, a partial influence. Contrary to its fundamental assumptions, they reason that the institutions have, autonomously and independently of the Member States, had a considerable impact in pushing forward the European project. Indeed, it is the Commission, the

Court and the European Parliament, the formal institutions, as well as the “informal institutions and conventions; the norms and symbols embedded in them; and policy instruments and procedures”²³ that have worked to reconfigure and reshape the preferences of the Member States in the Council, leading them in a one-way integrationist direction. Legal institutional rules have enabled the Commission to effectively set the legislative agenda; the Court to act with radical discretion in integrating the Community and Member State legal systems; and the Member States to be somewhat constrained by the imposition of qualified majority and unanimous voting in the Council – all of which have ensured the “lock-in” of many Community-bred policies. Decisional practices of a more informal, political nature – taking account of the development of policy networks involving both public and private national and sub-national actors, inter-actor negotiations in “smoke-filled” rooms and societal-level adaptations – have, likewise, assisted in initiating, structuring and sustaining path dependencies.

In short, it does appear that historical institutionalism is apt at laying the basis for a reliable interdisciplinary approach to the European construct. As Armstrong puts forward, writing from a dual politico-legal perspective, such literature incorporates the organisational structure of the Community, the “day-to-day” dynamics of policy-making, the increased autonomy of the institutions and the path dependencies that are created therefrom.²⁴ It appears able to successfully bring lawyers and political scientists together in contemporary European discourse precisely because it embraces the input of both formal and informal institutions owing to a combination of internal formal, legal organisational rules and more informal, external political practices and conventions. At its very heart, it can be said, is indeed a marriage between the legal and the political; a marriage which admits the political, that the nation-State is still the primary actor within the Community but one which also recognises that it may very well be influenced beyond its control by politico-legal forces ulterior to it. As is commonly expressed, the new institutionalism therefore accepts the continuity of the State within this radical, new construct but also acknowledges that it may be effectively constrained²⁵; a view which comes midway between those of political scientists who have traditionally stressed, albeit to varying degrees, the role of the Member State in the integration process and those of lawyers who have tended to view it as the product of normative, extra-State effects.

4. What about the Regions and the Multi-Level Governance Model?

Despite its relative merits, one must not lose sight that even though the historical institutionalism sees institutions, whether formal or informal, as acting quite independently and autonomously, they are, by definition, intervening variables between the inputs and outputs of the Community; acting essentially as vehicles to structure the ultimate choices and preferences of the principal actors, the Member States. The literature has proved itself to be greatly useful and credible insofar as it provides good explanations about the causal impact that they have on the Community’s policy outcomes, but it must be borne in mind that they do this by their influence – structuring and constraining – on the formation of statal preferences and pursuits of interest; the Member States remaining the key players in realising the Community’s decisional outcomes. It is telling, therefore, that Peterson believes that new institutionalist thinking “is part of a wider movement ‘to bring the State back in’ as a political actor in its own right”²⁶ and that it sees a kind of two-level game between the institutions and the Member States.

Given this, a crucial question remains as to the status of the “region” and other subnational authorities and thus to the relevance and validity of the recently developed literature on the concept of multi-level governance. Its principal advocates, Marks and Hooghe, argue that decision-making authority is dispersed non-hierarchically across multiple levels and sectors of government and that, from a regional perspective, therefore, subnational authorities are able to operate independently at the European and national levels and to engage effectively in the “day-to-day” politics of integration.²⁷ This is clearly a rejection of the traditional State-centric view that the Community is comprised of two distinct levels, their being the Member States and the Community, and certainly could be construed as a refutation of historical institutionalism given that it similarly views the Community as a two level game between the Member States and the “institutions”, whatever they may constitute.

There is no doubt that multi-level governance has made a valuable contribution in assisting to bridge the gap between the differing comparative and international relations approaches to the European project. However, it has not gone without considered criticism from contemporary scholars of European studies. The main contention, despite George's claim that it is "identical to neofunctionalism [without the functionalism] in the hypotheses it generates"²⁸, is that it merely provides a description of the characteristics of European governance without positing a testable and predictive theory explaining the underlying causes of and reasons for the political interconnectedness that it advocates. Even Marks and his co-writers themselves admit that, "the details remain murky and [that] apart from a generalised presumption of increasing mobilisation across levels, [multi-level governance] provide[s] no systematic set of expectations."²⁹ It is further claimed that it omits to properly explain the purported connection between the empowerment of the subnational level and concomitant disempowerment of the national level. All in all, as Adshead argues, "in the absence of organising concepts...and without a set of hypotheses about change, multi-level governance is only a statement of belief that is not susceptible to verification or falsification."³⁰ Rosamond reiterates her point by stating that it amounts to a "disordering framework."³¹ In the light of this, its claim to be an intellectually, fully thought-out alternative approach to the traditional theories of intergovernmentalism and neofunctionalism is called into question.

One of the other major criticisms of multi-level governance is that it exaggerates the autonomy that subnational actors have in policy-shaping and decision-making, even in those areas of European policy where it would be expected that they be strong. Indeed, it is striking that proponents of the approach appear not take into account legal-constitutional rules that are able to condition the extent to which they exercise decision-making powers within their own territorial limits and within the national and supranational arenas. Caporaso recognises that the principle of interconnectedness which is at its heart is by no means a formal one; it being more "sociology" than constitutional.³² Warleigh likewise argues that the approach seeks to represent a polity structured not by constitutional rules but "melded" by informal channels of interaction.³³ Indeed, as is affirmed by Anderson, "the image of strengthened regions breaking out of the orbit of weakened States with the assistance of the E.C. is too simplistic, since it fails to take account of the broad array of constitutional arrangements and policy-making practices among the Member States."³⁴ By accepting that regions still belong within national constitutional hierarchies, they admit that their capacity to act at the European level may vary from State to State, even from region to region within States, thereby implying the existence of varying degrees of multi-level governance across the European polity.

It is not surprising that much of the criticism has emanated from intergovernmentalists who maintain that Member State executives have retained their "gatekeeping" role and are able to act within legal-constitutional rules both at the European and national levels to empower or constrain the subnational level. To be sure, Pollack argues that "regions are...independent actors, but in a play – or institutional structure – laid down by the Member States."³⁵ With specific regard to the Structural Funds where the principle of partnership has been deemed to exemplify multi-level governance and strengthen the input of the regions in the preparation, implementation, monitoring and evaluation of the monies allocated to their areas, he claims that the Member States, acting both collectively in the Council and individually in designating regional partnerships, have been able to effectively "structure the conditions under which regional governments interact with each other and with the Commission."³⁶ Bache concurs by stating that, "the main obstacle to the creation of genuine partnerships [is] the continuing dominance of national governments."³⁷ The very existence of both supranational and national legal-constitutional rules therefore calls into question the assumptions of multi-level governance and the ability of the subnational level to unilaterally participate in policy-shaping and decision-making and is indicative that a distinction must be struck between engagement in formal and informal channels.

5. European Regional Development Policy: An Example of Neo-Intergovernmentalism

5.1. Neo-Intergovernmentalism and European Regional Development Policy

With regard to European regional development policy taken as a policy area as a whole, there is overall consensus that its creation, design and implementation up to 1988, even following minor reforms in 1979 and 1984, were dominated by State executives and intergovernmental bargains, with the Commission playing a supporting but gradually more influential role.³⁸ This is consonant with Pierson's historical institutionalism which puts forward that, initially, Member States are in a strong position in respect of their policy and institutional choices.³⁹ His model further posits, though, that significant divergences between these initial Member State preferences and the actual functioning of institutions and policies begin to emerge after sometime.⁴⁰ In 1988, fundamental and wide-ranging reform of regional policy was instituted, aiming to achieve overall socio-economic cohesion and to empower the Community and regional levels. It was based on four common principles guiding their use: concentration, allowing funds to be targeted in the areas of greatest economic need; programming, requiring focused, multi-annual programmes to be drawn up before any funding could be acquired; partnership, permitting subnational bodies, as well as national authorities, formal involvement in the design and administration of the funds; and additionality, ensuring that the funds would be strictly additional to existing public expenditure and not a substitute or reimbursement for it. Commission-controlled Community Initiative Programmes were also introduced, as well as procedures for effective monitoring and evaluation.⁴¹

The main observation here is that between 1975 and 1988 gaps clearly emerged in Member State control of European regional policy, thereby resulting in a policy sector boasting strengthened supranational and subnational elements and a correspondingly weakened national factor. By 1988, it was not a "virtual paragon of intergovernmentalism" as McAleavey had described the 1975 position.⁴² Applying Pierson's model⁴³, gaps appeared in national government control because of:

- a) a strengthened and more strategically-oriented Commission D.G. XVI with an important power of initiative under art. 130d E.C. (now art. 161) and with greater experience as a regional policy "process manager"⁴⁴;
- b) the largely unintended influence of subnational actors operating in informal channels, engaging with an increasingly influential Commission (Keating 2000: 165-83, Hooghe 1996b);
- c) the push post-1985 to complete the internal market (Bache 1998: 68-70); and
- d) the enlargements of 1981 and 1986 which led to a change in the policies of the richer Member States in favour of greater Commission control over the large sums flowing to the new, poorer Member States.⁴⁵

Gaps in Member State control certainly appeared between 1975 and 1988. Following Pierson's historical institutionalism through though, it can be said that with the reforms of 1993 and 1999, despite claims of a degree of renationalisation⁴⁶, they were further unable to regain the initial control that they held in 1975. This is evidenced by the main thrust of the 1988 reforms remaining unchanged. There was maintenance of the core principles of concentration, programming, partnership and additionality, a general strengthening of the monitoring and evaluation procedures and consistency with the application of the Community Initiative Programmes. Why were national governments unable to reassert their initial authority over the policy sector? The answer, applying Pierson's approach⁴⁷, is that:

- a) the Commission had accrued the necessary political and legal resources, through its agenda-setting role and power of initiative, to maintain control (Hooghe 1996b: 117-19);
- b) many of the national governments were more willing to see substantive policy gains for themselves on the existing principles rather than attempt to gain unanimity for new policy initiatives⁴⁸; and
- c) over time, various national and regional, political societal and economic actors had become so accustomed and self-adapted to the policy and its shape that any reversal would have resulted in sizeable sunk costs for them. In other words, the price of exiting from the 1988 principles was so high as to make substantial reform unattractive and consequently unachievable.

Pierson sums up his approach: "Whereas intergovernmentalists focus on the initial bargain

at time T^0 , historical institutionalists emphasise the need to analyse the consequences of that bargain over time. Doing so reveals the potential for considerable gaps in Member State control to emerge at time T^1 . When the time of the next bargain arrives at time T^2 , Member States will again be central actors, but in a considerably altered context. Member States may dominate decision-making in these intergovernmental bargains, but they do so within constraints created by their predecessors and the micro-level reactions to those preceding decisions."⁴⁹ With an adaptation of the timescale to encompass the three major rounds of State bargaining in European regional policy, while the national governments exercised initial control in 1975 at time T^0 , gaps emerged in their control between 1975 and 1988 at time T^1 , resulting in the 1988 reform. With the 1993 and 1999 reforms at time T^2 , they found themselves unable to close these gaps and reassert their initial control of 1975.

To be sure, in the light of this application of historical institutionalism to European regional policy, Pierson's approach could provide the necessary politico-legal basis to an overarching concept of neo-intergovernmentalism; a concept able to combine the main premise of multi-level governance, that power is dispersed across the subnational, national and supranational levels, with the politico-legal dynamics of historical institutionalism, which posits that the Member State governments are the primary actors in macro policy-making but that they may, all the same, be successfully conditioned, even constrained, by the inputs of and path dependencies created by other formal and informal politico-legal factors, including informal regional elements.

5.2. Neo-Intergovernmentalism and the Implementation of European Regional Development Policy

It was Marks who stated that European regional development policy was a two-sided process, "involving decentralisation to subnational levels of government as well as centralisation of new powers at the supranational level."⁵⁰ Indeed, partnership, which is at the heart of its implementation, underpinning the design and evaluation of assistance, was deemed to be at, "the leading edge of multi-level governance".⁵¹ It goes without saying that those such as Marks who advocate multi-level governance view the partnership principle as crucial to their theses of interconnected, overlapping and non-hierarchised policy flows. However, they seemingly omit to take account of the significance of Regulation 1260/1999 E.C. art.8 that governs the operation of partnership and the definition of the partners. It lays down that, as well as the Member State and the Commission, the partners shall be, "authorities and bodies designated by the Member State within the framework of its national rules and practices", including regional and local authorities and other competent public authorities, economic and social partners and other relevant competent bodies within this framework. It goes on to provide that, "in designating the most representative partnership at national, regional, local or other level, the Member State shall create a wide and effective association of all relevant bodies according to national rules and practices."

Upon this, it is evident that subnational participation in formal channels of European regional development policy is parasitic upon both Regulation 1260/1999 E.C. art.8, whose predecessor, Regulation 2052/88 E.C., was the first instrument to grant subnational actors a formal role in European policy-making, and also upon Member State sanction, according to pre-existing national constitutional structures, legal rules and administrative cultures. This suggests that regional authorities, agencies and bodies are in fact nested within the Member States and that the latter do still possess, albeit variegatingly, a certain control over the former. To be sure, the question arises, how can those who advocate multi-level governance justifiably claim that there is interconnectedness, territorial enmeshment and interdependence when subnational engagement within the formal arena of subnational policy is necessarily dependent upon a European framework Regulation and then upon national government will, exercised in accordance with national rules and practices? Paradoxically, it is important not to ignore the later findings of the principal exponents of multi-level governance, Hooghe and Marks, in 1996 that there was some variation in subnational participation through partnership across the Member States.⁵²

According to Marks, in his study exploring and explaining the variations in Community cohesion policy, the operation of partnership in itself was not hinged upon a clear and unambiguous Community distribution of power between the different levels but upon existing national rules and political cultures. Because there were differences in the formal, internal distributions of power

between the Member States and, within and across them, differing financial dependencies, informational asymmetries and other diverse pre-existing institutional norms, it was inevitable that different levels of participation among the regional actors would be manifest from one State to the next.⁵³ Following on, when one takes Hooghe's study as a whole, it appears that the general conclusion reached was that between 1989-1993 and thereafter there was variation between the Member States in terms of the operation of the partnership principle and the relative participatory strengths of their national and subnational players, and that the primary reason for this was variance in pre-existing territorial distributions of power. In centralised States, of which the vast majority are, national governments were deemed to retain a high degree of control over partnerships and the involvement of their local and regional levels, whereas in more decentralised States, notably Belgium and Germany, they were seen as unable to exercise such a level of control, yet were still able to exert at least some influence.

Hooghe and Marks' findings were confirmed by Kelleher et al in 1999 who found that, "the degree of decentralisation and the type of deconcentration occurring in the different Member States inevitably shapes the relations between key actors within partnerships and determines the competences and compositions of partnerships."⁵⁴ What they recognised was that central government authorities in many of the Member States played a dominant role in establishing and driving partnerships because national constitutional and administrative rules and traditions determined that they played such a role. They ultimately concluded that, "the question of who should be involved and when is largely determined by the Member States in accordance with the spirit of the Regulation, the institutional culture of the State and the realities on the ground."⁵⁵ These findings have recently been supported by Bache and Jones who state that, "the degree to which regions are empowered in both Spain and the U.K. remains heavily dependent on the position taken by central governments...The pre-existing balance of power between the centre and the regions within the Member States is crucial in explaining variations in the degree of regional engagement within Spain and the U.K."⁵⁶; Nay who puts forward that the French government and its representative bodies in the regions fulfil the role of intermediary between the European and subnational levels⁵⁷; Bache who argues that in the United Kingdom, despite new territorial settlements, the centre retains considerable powers in the implementation of the Structural Funds⁵⁸; and Gualini who contends that State actors have framed the Europeanisation of Italian domestic politics and "have developed a leading role in the management of a concerted approach to European regional programming, aiming at becoming the 'gatekeepers' of policy effectiveness."⁵⁹

Following all the empirical studies, it is possible to surmise that multi-level governance, of which partnership is a core element, does overstate the autonomy that it claims subnational authorities hold. This leads to the premise that the model fails to lend sufficient weight to the impact of both national and European laws which are able to condition, even constrain, regional engagement in European policy-making processes, at least insofar as formal channels are concerned. It is put forward here that the model should therefore be redefined with the recognition of multi-level interaction underpinned by the developing concept of neo-intergovernmentalism which, amongst other things, recognises that legislative acts emanating from the Community institutions and Member State governments acting within their constitutional and institutional limits are effectively able to regulate formal subnational participation.

As well as admitting that and explaining how both formal and informal institutions, over time, are able to determine the ultimate preferences of the Member States in policy sectors, It is put forward here that neo-intergovernmentalism could embrace the apparent ability of national governments, acting within their constitutional limits, to concurrently condition the formal engagement of the subnational level. Within its theoretical framework, it could indeed support the ability of Member States, and also the institutions of the Community, as demonstrated by the operation of the partnership principle in the implementation of European regional policy, to remain the gatekeepers to subnational engagement in formal channels of Community policy-making and implementation. After all, the evidence suggests that despite formal and informal institutions being able, over time, to determine Member State preferences at a macro-level (i.e. the shape of regional policy as a whole), the formal institutions and the Member States are able to control regional participation in formal policy-making and implementation at a micro-level (i.e. under the partnership principle in programming and the day-to-day implementation of the policy) albeit at varying degrees according to constitutional rules and cultures. It must be stated,

however, that such Member State control does not preclude the ability of the subnational level to engage with the Commission more independently, in informal channels, through vehicles such as interregional associations, for instance the Council of European Municipalities and Regions and the Assembly of European Regions, national networks, such as the Local Government International Bureau, and Brussels offices. After all, it is the Commission that holds the exclusive power of legislative initiative and that can be a useful ally in countering unfavourable national policies, socio-economic in particular. Such engagement has increased over the years with the growth of such channels but it does appear to vary in time from Member State to Member State, region to region according to political culture, governmental colour and economic positioning.

6. Conclusion

In the final analysis, this article has attempted to show the interdisciplinary divide between lawyers and political scientists when explaining the nature of European integration and governance. In the light of this, it is put forward that the new institutionalism is the most adept at laying the foundations for an overarching, interdisciplinary theoretical framework that is able to capture the nature of the European project at the beginning of the twenty-first century. It has been recognised, however, that any such theory must, of course, be able to embrace the multi-tiered nature of the Community, particularly the increasing mobilisation and engagement of the subnational level in European policy- and decision-making; something which is well described by advocates of multi-level governance but which apparently has not been the subject of any set of testable hypotheses able to provide a clear understanding of the underlying causes and basic dynamics of such territorial interconnectedness.

The analysis of the partnership principle under European regional development policy has confirmed that the aforementioned multi-level governance paradigm fails to take account of national and European laws and practices which effectively condition, even constrain, regional autonomy in formal European regional policy-making processes. On account of this, this article has demonstrated its need for refinement with the recognition of multi-level interaction taking place within a broader politico-legal framework. Indeed, a developing notion of neo-intergovernmentalism, inspired by the new institutionalism, could embody the notion that both constitutional rules and institutional structures of the Member States and of the Community effectively regulate subnational participation, at least in formal channels.

From a wider perspective, it is put forward that this notional framework is capable of embracing the theoretical intergovernmental foundations of the Community, that is to say its origins in inter-State bargaining, while accepting, in practice, that both formal rules – guaranteeing the Commission's power of legislative initiative, supranationalising the voting procedures in the Council and ensuring the supremacy and direct effect of Court of Justice jurisprudence – and informal institutions – notably societal adaptation and the high prices and sunk costs of policy change – are able to exert a determining or constraining influence on the ultimate policy choices of the Member State executives both at the macro-, or systemic, level. Insofar as the subnational level is concerned, as established, it indeed readily takes account of and explains how national governments, operating within the limits of national constitutional-legal rules, and the Community institutions – in the case of European regional development policy, Regulation 1260/1999 E.C. art.8 – are able to empower and constrain regional engagement in formal channels of European policy-making at the same time. It also, however, very well embraces a parallel regional involvement in informal policy networks that serve to influence the positions of the formal Community institutions. Surely, the overall conclusion to be made is that the multi-level governance model fails to accurately reflect and capture the workings and shape of the European project at the beginning of the twenty-first century, it over-embellishing the capacity and standing of the regional level, and that the politico-legal notion of neo-intergovernmentalism could, if developed further, be a more credible and theoretically sound alternative.

Notes

- ¹ pg.293., Wincott, Daniel (1995), "Political Theory, Law and the European Union" in Shaw, Jo and More, Gillian, *New Legal Dynamics of European Union*, pp.293-311, Oxford: Oxford University Press.
- ² pg.294, note 1.
- ³ pg.3. Cichowski, Rachel & Börzel, Tanja, "Law, Politics and Society in Europe" in Börzel, Tanja & Cichowaki, Rachel (2003), *The State of the European Union Volume 6: Law, Politics and Society*, pp.3-17, Oxford: Oxford University Press.
- ⁴ pg.167. Snyder, Francis (1987), "New Directions in European Community Law", *Journal of Law and Society* 14 (1): 167-82.
- ⁵ pg.156. Armstrong, Kenneth (1998), "Legal Integration: Theorising the Legal Dimension of European Integration", *Journal of Common Market Studies* 36 (2): 155-74.
- ⁶ pg.91. Armstrong, Kenneth (1998), "New Institutionalism and European Legal Studies" in Craig, Paul and Harlow, Carol, *The European Law-Making Process*, pp.89-110, Deventer: Kluwer.
- ⁶ Armstrong, Kenneth & Shaw, Jo (1998), "Integrating Law: An Introduction" *Journal of Common Market Studies* 36 (2): 147-54.
- ⁷ pg.156, note 5.
- ⁸ pg.249, note 1.
- ⁹ Weiler, Joseph (1981), "The Community System: The Dual Nature of Supranationalism" *Yearbook of European Law* 1: 268-306.
- ¹⁰ Lenaerts, Koen (1992), "Some Thoughts about the Interaction between Judges and Politicians" *University of Chicago Legal Forum*: 93.
- ¹¹ pg.148, note 7.
- ¹² pg.163, note 5.
- ¹³ pg.168, note 5.
- ¹⁴ pg.169, note 5.
- ¹⁵ pp.170-71, note 5.
- ¹⁶ pp.301-302, note 1.
- ¹⁷ pg.5. Shaw, Jo (1995), "Introduction" in Shaw, Jo & More, Gillian, *New Legal Dynamics of the European Union*, pp.1-14, Oxford: Oxford University Press.
- ¹⁹ pg.311, note 1.
- ²⁰ Armstrong, Kenneth. (1995), "Regulating the Free Movement of Goods: Institutions and Institutional Change" in Shaw, Jo & More, Gillian, *New Legal Dynamics of the European Union*, pp 165-91, Oxford: Oxford University Press.
- ¹⁸ pg.148. Pierson, Paul (1996), "The Path to European Integration: A Historical Institutional Analysis" *Comparative Political Studies* 29 (2): 123-63.
- ²² pg.156, note 21.
- ²³ pg.370. Bulmer, Simon (1998), "New Institutionalism and the Governance of the Single Market", *Journal of European Public Policy* 5 (3): 365-386.
- ¹⁹ pg.101, note 6.
- ²⁰ pg.168, note 5.
- ²¹ pg.81. Peterson, John, (1995), "Decision-Making in the European Union: Towards a Framework for Analysis", *Journal of European Public Policy* 2 (1): 69-93.
- ²⁷ Hooghe, Liesbet & Marks, Gary (2001), *Multi-Level Governance and European Integration*, Oxford: Rowman & Littlefield.
- ²² pg.116. George, Stephen (2004), "Multi-Level Governance and the European Union" in Bache, Ian & Flinders, Matthew, *Multi-Level Governance*, pp.107-26, Oxford: Oxford University Press.
- ²³ pg.41. Marks, Gary, Nielsen, Francois, Ray, Leonard & Salk, Jane (1996), "Competences, Cracks and Conflicts: Regional Mobilisation in the E.U." in Marks, Gary, Scharpf, Fritz, Schmitter, Philippe & Streeck, Wolfgang, *Governance in the European Union*, London: Sage.
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- ³¹ pg.111. Rosamond, Ben (2000), *Theories of European Integration*, Basingstoke: Palgrave.
- ³² pg.47. Caporaso, James (1996), "The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?", *Journal of Common Market Studies* 34 (1): 29-52.
- ³³ pg.11. Warleigh, Alex (1998), "Better the Devil You Know? Synthetic and Confederal Understandings of European Unification", *West European Politics* 21 (3): 1-18.
- ³⁴ pg.445. Anderson, Jeffery (1990), "Skeptical Reflections on a Europe of Regions: Britain, Germany and the E.R.D.F.", *Journal of Public Policy* 10 (4): 417-447.
- ³⁵ pg.376. Pollack, Mark (1995), "Regional Actors in an Intergovernmental Play: The Making and Implementation of E.C. Structural Policy" in Rhodes, Carolyn & Mazey, Sonia, *The State of the European Union III. Building a European Polity?*, pp.361-90, Harlow: Longman.
- ³⁶ pg.376, note 35.
- ³⁷ pg.37. Bache, Ian (1999), "The Extended Gatekeeper: Central Government and the Implementation of E.C. Regional Policy in the U.K.", *Journal of European Public Policy* 6 (1): 28-45.
- ³⁸ National governments "were...well placed to dominate the development of regional policy with the minimum of interference from 'above' or 'below'." - pg.47. Bache, Ian (1998), *The Politics of European Union Regional Policy: Multi-Level Governance or Flexible Gatekeeping*, Sheffield: Sheffield Academic Press.
- ³⁹ pg.126, note 21.

⁴⁰ pg.131, note 21.

²⁵ See Regulation 2052/88 E.C.

²⁶ pg.3. McAlevey, Paul (1992), "The Politics of European Regional Development Policy: The European Commission's R.E.C.H.A.R. Initiative and the Concept of Additionality" *Strathclyde Papers on Government and Politics*: 88, Glasgow: University of Strathclyde.

²⁷ "I focus first on the factors that are likely to create considerable gaps in Member State control. Four are of fundamental importance: the autonomous actions of European institutional actors, the restricted time horizons of decision-makers; the large potential for unintended consequences, and the likelihood of changes in [national government] preferences over time." – pp.132-40, note 21.

²⁸ Hooghe, Liesbet (1996), "Building a Europe with Regions: The Changing Role of the European Commission" in Hooghe, Liesbet, *Cohesion Policy and European Integration: Building Multi-Level Governance*, pp.89-126, Oxford: Oxford University Press – pg.100: "State executive preferences and intergovernmental bargains can adequately explain the initiation and evolution of the budgetary envelope, with the Commission as an observant agent. However, the European Commission emerges as a pivotal actor in designing the [1988] Regulations.. These different roles for the Commission can, to some extent, be explained by the different formal institutional rules (quasi-absence on the budgetary envelope, but monopoly of initiative on the institutional design)."

²⁹ "As the degree and direction of redistribution grew, the idea of greater Commission oversight seemed less like an intrusion into the internal affairs of one's own State, where E.C. spending was minimal, and more like a necessary oversight of the poor Member States where the bulk of E.C. money was being spent." Pollack: pg.372, note 35.

³⁰ Particularly, Pollack and, cautiously, Bache. Also, for an overview see Sutcliffe, John (2000), "The 1999 Reform of the Structural Fund Regulations: Multi-Level Governance or Renationalisation?" *Journal of European Public Policy* 7 (2): 290-309.

⁴⁷ "The next stage of the argument...is to consider why gaps, even when identified, might be hard to close. There are three broad reasons: the resistance of E.C. institutional actors, the institutional obstacles to reform within the E.C. and the sunk costs associated with previous actions. If these barriers are sufficiently high...Member State control will be constrained." – Pierson: pp.142-48, note 21.

⁴⁸ "Paradoxically, the decision rule of unanimity on the Council of Ministers was probably enough to thwart renationalisation because the Commission had the support of the Belgian government plus the governments of two countries that have done extremely well under the present system, Portugal and Ireland. Unanimity is usually regarded as a balk to European integration; but, more accurately, it makes any kind of policy innovation more difficult." – pp.397. Marks, Gary (1996), "Exploring and Explaining Variation in E.U. Cohesion Policy" in Hooghe, Liesbet, *Cohesion Policy and European Integration: Building Multi-Level Governance*, pp.388-422, Oxford: Oxford University Press.

⁴⁹ pg.148, note 21.

³¹ pg. 402. Marks, Gary (1993), "Structural Policy and Multi-Level Governance in the E.C." in Cafruny, Alan & Rosenthal, Glenda, *The State of the European Community II. The Maastricht Debates and Beyond*, pp.391-410, Harlow: Longmann.

³² pg.402, note 50.

³³ Hooghe, Liesbet (1996), *Cohesion Policy and European Integration: Building Multi-Level Governance*, Oxford: Oxford University Press. Also, see Marks at note 48.

³⁴ pp.417-18, note 48.

³⁵ Pg.iv. Kelleher, John, Batterbury, Sarah & Stern, Elliot (1999), *The Thematic Evaluation of the Partnership Principle: Final Synthesis Report*, London: The Tavistock Institute Evaluation Development and Review Unit.

⁵⁵ pg.183, note 54.

⁵⁶ pp.18-9. Bache, Ian & Jones, Rachael (2000), "Has E.U. Regional Policy Empowered the Regions? A Study of Spain and the United Kingdom?", *Regional and Federal Studies* 10 (3): 1-20.

⁵⁷ Nay, Olivier (2002), "European Community Policy in France: The State Bounces Back", *Journal of European Integration* 24 (2): 245-60.

⁵⁸ Bache, Ian (2004), "Multi-Level Governance and European Union Regional Policy" in Bache, Ian and Flinders, Matthew, *Multi-Level Governance*, pp.164-78, Oxford: Oxford University Press.

³⁶ Gualini, Enrico (2003), "Challenges to Multi-Level Governance: Contradictions and Conflicts in the Europeanisation of Italian Regional Policy", *Journal of European Public Policy* 10 (4): 616-36.

⁶⁰ pg.201. Jordan Andrew (2001), "The European Union: An Evolving System of Multi-Level Governance...or Government?", *Policy and Politics* 29 (2): 193-208.