



Justice, only justice shalt thou pursue...(Deut.XVI:20)

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## MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW

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Antje Wiener

#### **Towards a Transnational Nomos The Role of Institutions in the Process of Constitutionalization**

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## **Abstract**

Constitutional law – *nomos* - entails two sets of social practices, including on the one hand, the agreement about principles, norms and procedures which guide and regulate politics, and, day-to-day interaction in the social, cultural, political, economic contexts of a community, on the other. Both constitute an expression of the universally derived yet particularly established set of institutions of a constitution. This paper argues that once constitutional norms are dealt with outside their sociocultural context of origin, a potentially conflictive situation emerges. The potential for conflict caused by this process lies in the decoupling of the two sets of social practices, *i.e.* the customary and the organizational. Through the transfer between contexts the meaning of norms becomes contested as differently socialized actors apply them and scholars of different legal tradition analyze them. The analytical challenge is to provide a methodological link between these practices. To that end, the chapter focuses on approaches to institutions. It proceeds in three steps. First three general political science approaches to institutions are distinguished. In a second step institutional analysis in the process of European integration is summarized based on three phases; first, *integration* through supranational institution-building, second, *Europeanization* through domestic institutional adaptation and third, *late politicization* as the complex process of sociocultural and legal institutional adaptation in vertical and horizontal dimension. The third step critically discusses the impact of institutions on political behavior. Two cases, citizenship and the finality debate, briefly illustrate the role of soft institutions in the process of constitutionalization.

## Towards a Transnational Nomos

### The Role of Institutions in the Process of Constitutionalization

*Antje Wiener*

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## INTRODUCTION<sup>1</sup>

As *James Tully* summarizes, “[T]he Greek term for constitutional law, *nomos*, means both what is agreed to by the people and what is customary.”<sup>2</sup> Constitutional law therefore entails two sets of social practices which are at the core of any organized polity. The first entails the social practice of arguing and bargaining over the principles, norms and procedures which guide and regulate politics within a polity. This set of social practices is constitutive for norms that guide behavior. Secondly, *nomos* also entails the social practices of day-to-day interaction in the social, cultural, political, economic environments that are part of a political community. This set of social practices represents the norms which reflect behavior. They build on and reconstruct the customary aspect of constitutional law. Together, both sets of social practices are constitutive for the dual quality of norms which finds expression in the universally derived yet particularly established set of institutions of a constitution. Tully’s work focuses on the political and legal adaptation of the “Janus faced” constitutional quality in multicultural societies. His research seeks to develop a constitutional principle which is able to incorporate the Janus faced quality of “looking back to an already constituted order under one aspect and looking forward to an imposed order under the other” (Tully 1995, 60-61). In turn, while keeping with the focus on constitutional norms, with this chapter I extend the focus from the domestic towards the transnational environment of constitutional politics. According to his research focus on fair and just constitutional expression and political organization of cultural diversity within a given political community Tully’s reconstructive approach follows a normative goal of representation within multicultural polities. The question is how to establish and practice the principle of constitutional recognition in such a way that it is able to reflect the customary practices of the past and the principled expectations for the future based on equal access to participation in a constitutional dialogue in the present.

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<sup>1</sup> For comments on previous versions of this paper I would like to thank the participants of the workshop series conducted within the European Constitutional Law project directed by Armin von Bogdandy at Frankfurt/Main and Heidelberg, particular thanks go to Armin von Bogdandy and Neil Walker and – as always – to Uwe Puetter and Guido Schweltnus. The responsibility for this version is the author’s. An earlier version of this paper has been published as ‘Institutionen’, in: *Europäisches Verfassungsrecht*, ed. Armin von Bogdandy, Heidelberg: Springer, pp. 121-147.

<sup>2</sup> See, J. Tully, *Strange multiplicity: constitutionalism in an age of diversity*, 1995, 60.

This chapter's focus on the role of institutions in the process of constitution building in a transnational context argues that once constitutional norms are dealt with outside their sociocultural context of origin, a potentially conflictive situation emerges. The conflict is based on de-linking the two sets of social practices that form the agreed political and the evolved customary aspect of a constitution. I argue that the potential for conflict caused by this process which might be helpfully dubbed moving constitutional norms *outside the box* (i.e. outside the domestic polity and away from the inevitable link with methodological nationalism) lies in the decoupling of the customary from the organizational. It is through this transfer between contexts, that the meaning of norms becomes contested as differently socialized actors as well as lawyers trained in different legal traditions seek to interpret them. In other words, while in supranational contexts actors might well agree on the importance of a particular norm, say e.g. human rights, the agreed facticity does not allow for a deduction of the norm's meaning according to the respective domestic contexts in which actors have developed their understanding of that particular norm. Both aspects of norms – organizational and customary – contribute to the interpretation of meanings that are entailed in constitutional norms. For example, the interpretation of the meaning of human rights or the right to human dignity differs in countries which accept the death-penalty and those which oppose it; less dramatically, the interpretation of the meaning of citizenship rights differs in countries which require identity cards and those which don't.

This chapter's intention is to facilitate an understanding of the flexible and contested role of institutions in relation to context and social practices. I elaborate on the potentially conflictive removal of constitutional norms from domestic into international contexts with a view to assessing evolving norms of constitutionalism in the realm of transnational orders. While the title of this chapter suggests the discussion of the most important organs of the Union, I do however raise more substantial questions, focusing on the phenomenon of European constitutional law as such from a political science perspective. The respective organs of the Union are treated as 'hard' institutions elsewhere in this book. In turn, the emergence of so-called 'soft' institutions such as ideas, social and cultural norms, rules and/or routinized practices and their respective intersubjective relation with the emergence

and resonance of the institutions of constitutional law are at the centre of this chapter. To that end first different basic assumptions in political science are identified. Thus, the difference between role and understanding of institutions in analytical approaches offered by political science and law, respectively, is highlighted. In a second step the chapter focuses on the analysis of institutions in the process of European integration emphasizing on the development of institutions until today's European constitutional debate from the changing political science perspective. Three phases can be distinguished, first, integration through supranational institution-building, second Europeanization through domestic institutional adaptation and third, late politicization (*nachholende Politisierung*) as the more complex process of sociocultural and legal institutional adaptation in vertical and horizontal dimensions. A third step will then critically discuss the impact of institutions in the constitutional process. Two case studies of citizenship policy and constitutional politics in the EU are introduced as examples that illustrate the role of soft institutions which is central to this chapter. The case of the European constitutional debate with a view to preparing the EU for massive enlargement in the year 2004 has been chosen to demonstrate the dual quality of norms. It is argued that this dual quality has two potential impacts on the organization of transnational order. On the one hand, it functions as a potential spanner-in-the-works for negotiation and agreements within the transnational realm.<sup>3</sup> That is, it causes *conflict* about meaning (validity) despite agreement on terms (facticity). On the other hand, bringing this conflict to the fore offers the opportunity to establish institutions that warrant flexible adaptation to diversity based on the *principle of contestedness*.

The sociological premise which defines the constitution as the institution of institutions forms the basis for the following argument which will bring to the fore the step-by-step and sometimes fluid process in which institutions emerge and stabilize during the process of European integration, thus offering a distinct perspective on their constitutional relevance. Starting point is hence a concept, which includes both

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<sup>3</sup> This phrase offers a fitting metaphor for the intangible yet potentially conflictive dimension of the constructed quality of norms. It “refers to the adverse effects of throwing a spanner into the gears and pistons of an engine.” Politically it has been used in the meaning of “deliberately causing mayhem. John Lennon used a play on this in his book ‘A Spaniard in the Works’. Like most of those growing up in Britain in the 1950s, Lennon was a fan of ‘Professor’ Stanley Unwin – a comic turn who spoke in a stream of inspired Spooneristic gobbledegook. The title owes much to Unwin's influence.” See, The

societal norm generation and institution building on the one hand, and legal practices, on the other. It draws less on the narrow concept of constitutionalization that is offered by constitutional law<sup>4</sup> than on a sociological concept of constitutionalization which is based on a culturally embedded understanding of constitutional dynamics.<sup>5</sup> While the gradual and rather long-lasting process of constitutionalization in its interchange with the advancing process of European integration entails both types of constitutionalization,<sup>6</sup> this chapter's usage of the broader sociological understanding of constitutionalization understands the concept as involving a twofold process of institutionalization. Thus constitutions institutionalize the political community as a whole, yet they consist of an aggregation of institutions themselves.<sup>7</sup> The societal approach to the process of European constitutionalization facilitates an understanding of institutions as constituted through social practices within particular contexts. Absent social interaction, rules and norms do not exist. In addition, legal and social institutions are interrelated insofar, as the former require the latter in order to be meaningfully implemented, or for that matter, in order to resonate with their respective context of implementation. This approach allows for the analytical inclusion of the multiple socio-cultural trajectories as they produce and transform the meaning of 'European' ways and structures in analyses of things constitutional, possibly – and crucially – even before a constitutional text is identified and labeled 'a constitution.' The Aristotelian meaning of the constitution understood as institution of institutions is based on the fact that "[I]nstitutions also protect rules from changes in

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Phrase Finder, <<http://phrases.shu.ac.uk/meanings/292200.html>> (10 June 2003).

<sup>4</sup> See for a helpful overview P. Craig, Constitutions, Constitutionalism, and the European Union, *ELJ* 7 (2001), 125-150.

<sup>5</sup> J. Habermas, *Faktizität und Geltung*, 1992, 629; for an elaboration of this approach, see also the contributions in *The Evolving Norms of Constitutionalism*, A. Wiener and J. Shaw (eds.), *ELJ*, Special Issue 9 (2003), 1. See also contributions to the 'new legal dynamics' strand of British European lawyers, i.e. N. Walker, The Idea of Constitutional Pluralism, *MLR* 65 (2002) 317 et seq. as well as the contributions in G. De Burca/J. Scott (eds.) *Constitutional Change in the EU: From Uniformity to Flexibility?* 2000; and in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence & Divergence in European Public Law*, 2002.

<sup>6</sup> See for example E. Stein, Lawyers, Judges and the Making of a Transnational Constitution, *American Journal of International Law* 75 (1981), 1; explicitly Case 294/83, *Les Verts/Parliament*, [1986] ECR 1339 (1365); Op. 1/91, *First EEA Case*, [1991] ECR I-6079 (6102); Advocate General M. Lagrange speaks already of a 'genuine constitutions' of the European Communities in Case 6/64, *Costa/E.N.E.L.*, [1964] ECR 1255 (1289).

<sup>7</sup> As Nicholas Onuf writes, for example, "[C]onstitutions institutionalize the whole even as, they themselves consist of an aggregate of institutions." N. Onuf, Institutions, intentions and international relations, *Review of International Studies* 28 (2002), 218 et seq., with reference to F. Lieber, *On civil liberty and self-government*, 1859, 343-346.



society *and* make it possible for rules to change with such changes.’<sup>8</sup>

Within the framework of a volume which includes exclusively German approaches to European constitutional law, this chapter stresses the flexibility of political science analysis compared with the often dogmatically restricted interpretations of German law in particular. At the same time, it will also be stressed that the flexibility of political science analysis lies less in the discipline’s general favorable attitude and readiness towards questioning theoretical assumptions of specific approaches and more in the constant contestation of approaches in national and international discussions and debates between different schools of thought. This contestedness of political science approaches is demonstrated particularly well in the discussion about ‘hard’ and ‘soft’ institutions within the framework of neoinstitutional approaches<sup>9</sup> in particular and most recently, in relation with the debate on constructivism in theories of international relations.<sup>10</sup>

## I. POLITICAL BEHAVIOR AND THE ROLE OF INSTITUTIONS

“It always forms a prominent element in the idea of an institution, whether the term be taken in the strictest sense or not, that it is a group of laws, usages and operations standing in close relation to one another, and forming an independent whole with a united and distinguishing character of its own. [...]

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<sup>8</sup> Onuf, see note 7, 222, with reference to H. Bull, *The Anarchical Society: A Study of Order in World Politics*, 1977, 56 (emphasis added).

<sup>9</sup> A. Stone Sweet, *Judicialization and the Construction of Governance*, European University Institute, Robert Schuman Centre, RSC Working Paper, 1996; J. G. March/J. P. Olsen, The Institutional Dynamics of International Political Orders, *International Organization* 52 (1998), 943 et seq.; W. W. Powell/P. DiMaggio, *The new institutionalism in organizational analysis*, 1991; K. Thelen/S. Steinmo, Historical Institutionalism in Comparative Politics, in: S. Steinmo/K. Thelen/F. Longstreth (eds.), *Structuring Politics - Historical Institutionalism in Comparative Analysis*, 1992; P. Hall/R. Taylor, Political Science and the Three New Institutionalisms, *Political Studies* 44 (1996), 936 et seq.; P. Pierson, The Path to European Integration: A Historical Institutional Analysis, *Comparative Political Studies* 29 (1996), 123 et seq.; M. A. Pollack, The New Institutionalism and EC Governance: The Promise and Limits of Institutional Analysis in Governance, *International Journal of Policy and Administration* 9 (1996), 429-458; G. Schneider/M. Aspinwall (eds.), *The Rules of Integration. Institutional Approaches to the Study of Europe*, 2001.

<sup>10</sup> F. Kratochwil/J. G. Ruggie, International Organization: A State of the Art on an Art of the State, *International Organization* 40 (1986), 753-775. B. Zangl/M. Z. Zürn, Argumentatives Handeln bei internationalen Verhandlungen. Moderate Anmerkungen zur post-realistischen Debatte, *Zeitschrift für Internationale Beziehungen* 3 (1995), 341-366; P. Katzenstein (ed.), *The Culture of National Security*, 1996; T. Risse, ‘Let’s Argue!’: Communicative Action in World Politics, *International Organization* 54 (2000), 1 et seq.

Even today, it would be difficult to improve on this definition, which makes rules working together ‘through human agents’ the central feature of any institution.”<sup>11</sup>

Different from law, political science can not begin from a general systemic approach entailing clearly defined rules for interpretation. Instead, it observes regularities or laws that allow for the analysis of political behavior. A range of differing – and often not only contravening but heatedly debated – assumptions about legitimate research questions (epistemological focus) and/or convincing approaches and research objects (ontological focus) set the framework for debate. In the field of institutional analysis, it is helpful to roughly distinguish among agency oriented rational actor models, structural approaches and interactive approaches. Usually, agency oriented approaches work with the assumption that the actor’s interests which define behavior are created independently from exogenous societal or cultural factors. Political scientists who share this assumption work with the basic assumption that individual interest in increasing, stabilizing or at the least, maintaining power motivates behavior, based on the law that *A*’s behavior is motivated by her interest in power over *B*. The central research question posed by this approach is therefore directed towards identifying the condition *X* under which that interest can be most effectively pursued. By contrast, structural approaches see actors as influenced by additional – structural – context conditions created by social, institutional and/or cultural environments and/or mechanisms. Structures, they argue, exert additional constitutive and/or regulative impact on behavior. Actors thus behave in a power oriented and rational way, however, the additional variable of structure needs to be considered as influential for interest and preference formation. This approach seeks to identify the structures that are relevant for action, recognizing their stability on the one hand, and critical junctures that are likely to induce possibilities for changing them, on the other. Yet another approach works with the assumption that interrelation between structure and agency is the key element. This approach emphasizes the role of social interaction and cautions against the valuation of structure over agency, or vice versa, focusing on the concept of intersubjectivity. The key issue here is the additional consideration of changing identities and their influence on preference formation.

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<sup>11</sup> Onuf, see note 7, 218 with reference to F. Lieber, 305.

The important insight conveyed by these approaches is that institutions are assigned different roles according to different academic perceptions of political behavior. Different approaches to institutions thus develop significantly diverging arguments. While institutions are viewed as enabling, *i.e.* entailing an extension of behavioral options, they are also considered as in principle hard to control and therefore constraining. According to the respective basic assumptions, analytical framework, research questions and research design demonstrate considerable variation, a conceptual starting point which might come as a surprise to dogmatic lawyers. In European integration research institutional analysis has gained in importance not only since the Europolity's design depends crucially on supranationally constructed and evolving institutions, but also as a theoretical spill-over from the elaboration of institutional analysis in international relations theory and sociology as disciplines which share an interest in the expanding processes of governance beyond that nation-state. Nonetheless, European integration crucially challenged the realist assumption of an international society of states that involves independent sovereign states governed by the principle of anarchy.<sup>12</sup> It raises questions about states' interest in institution building and cooperation, and in the influence exerted by these new institutions on structural constraints and opportunities for state behavior.<sup>13</sup> Before I turn to the analysis of European integration and constitutional change in the EU more in detail, the following section offers a brief summary of the three main perspectives on institutional analysis.

## **1. Actor oriented Approaches: Logic of Consequentialism**

Actor oriented approaches<sup>14</sup> like the rational choice approach work with the assumption that political institutions like international organizations, conventions,

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<sup>12</sup> See Hobbes' "state of nature" as "an institution that cannot become something else", Onuf, see note 7, 216. According to Hobbes it follows that "deliberate action is the only hope", cf. Onuf, note 7, *ibid.*

<sup>13</sup> Theoretical discussions in political science integration research present the basic controversy entailed in these respective questions. See for example L. Cram, *Integration Theory and the Study of the European Policy Process*, in: J. Richardson (ed.), *European Union - Power and Policymaking*, 1996.

<sup>14</sup> For approaches on agency oriented institutionalism, see in particular work by Scharpf and Mayntz, F. W. Scharpf, *Regieren in Europa. Effektiv und demokratisch?*, 1999, 10 et seq.

cooperation agreements, treaties or committees are established in order to provide controllable information for political actors in decision making process. In other words, institutions are understood as providing a monitoring role. This view is based on the assumption that institution building is initiated as a consequence of actors' interests. It is therefore considered as potentially reversible.<sup>15</sup> Examples for this approach in political science, and to some extent, economics, are game theory and negotiation theory.<sup>16</sup> The approach has been challenged by work which identified path-dependent institution building. Thus, a key problem has emerged, for example, from the routinization of institutions beyond the time period in which they were considered appropriate and desirable. That is, while institution building at a point in time ( $t1$ ) might reflect the interest of particular actors, it is likely that at another point in time ( $t2$ ) interests, resources and power constellations have changed.<sup>17</sup> Subsequently, institutions may turn out as having a constraining impact on behavior. Importantly then, the reversibility of institution building cannot be assumed as a given factor in institutional analysis.<sup>18</sup> The logic of action guiding actor oriented approaches is the logic of consequentialism<sup>19</sup> European integration research has documented this particular aspect of institutions most convincingly during the second and third phase of European integration (see for details on the three distinct phases of integration, *section II*).

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<sup>15</sup> J. E. Alt/K. A. Shepsle, *Perspectives on positive political economy*, 1990; G. Garrett, International Cooperation and Institutional Choice: The European Community's Internal Market, *International Organization* 46 (1992), 533 et seq.; G. Garrett/G. Tsebelis, An Institutional Critique of Intergovernmentalism, *International Organization* 50 (1996), 269 et seq.; G. Garrett/B. R. Weingast, Ideas, Interests, and Institutions: Constructing the European Community's Internal Market, in: J. Goldstein and R. O. Keohane (eds.), *Ideas & Foreign Policy. Beliefs, Institutions and Political Change*, 1993, 173 et seq.

<sup>16</sup> R. M. Axelrod, *The evolution of cooperation*, 1984; M. Zürn, Jenseits der Staatlichkeit: Über die Folgen der ungleichzeitigen Denationalisierung, *Leviathan* 20 (1992), 490 et seq.; F. Scharpf, see note 14.

<sup>17</sup> D. C. North, The path of institutional change, in: D. C. North (ed.), *Institutions, Institutional Change and Economic Performance*, 1990; Pierson, see note 9.

<sup>18</sup> As Onuf writes "[T]he alternative to institutions by design are those that arise as the unintended consequences of self-interested human action." Onuf, see note 7, 212.

<sup>19</sup> See for example J. G. March/J. P. Olsen, *Rediscovering Institutions. The Organizational Basis of Politics*, 1989; T. A. Börzel/T. Risse, When Europe Hits Home: Europeanization and Domestic Change, *European Integration online Papers (EIoP)* 4 (2000), No. 15, 29 November 2000, <<http://eiop.or.at/eiop/texte/2000-015a.htm>> (10 June 2003); H. Müller, *Arguing, Bargaining, and All That. Reflections on the Relationship of Communicative Action and Rationalist Theory in Analyzing International Negotiation*, in print.

## 2. Structure Oriented Approaches: Logic of Appropriateness

As opposed to the primacy of agency in actor oriented institutional analysis, structure oriented approaches analyze institutions as structures with guiding and/or prescriptive impact on behavior. These approaches are based on macro-sociological and organization sociology<sup>20</sup> which consider institutions as aggregated “behavioral rules” or, as sociological constructivists put it, as “single standards of behavior.”<sup>21</sup> The chapter turns to this difference more in detail later on, at this point it is important to note that structural and socio-culturally caused factors matter for behavior, even in the absence of legal or formal political organs. International relations theorists are particularly interested in those institutions which have a significant impact on actors’ interests. Empirical research seeks to identify the role and function of specific institutions in this process.<sup>22</sup> Accordingly, two types of institutions and their respective impact can be differentiated. On the one hand, international institutions are assigned the role of creating interactive spaces for elites who take an active role in diffusing norms, ideas and values through their interactions back into their respective domestic contexts. On the other hand, norms such as human rights norms are assigned regulative and constitutive influence themselves. For example, drawing on organizational theory March and Olsen argued convincingly that under specific conditions actors behave according to the “logic of appropriateness.”<sup>23</sup> Institutions are considered as emerging within a particular socio-cultural environment; they are labeled as ‘soft institutions’ or ‘social facts’ (ideas, principled beliefs, social facts).<sup>24</sup>

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<sup>20</sup> Powell/DiMaggio, see note 9; A. Kieser, *Organisationstheorien*, 1993.

<sup>21</sup> M. Finnemore/K. Sikkink, International Norm Dynamics and Political Change, *International Organization* 52 (1998), 891.

<sup>22</sup> So far this work has mainly focused on the role and function of institutions without putting much emphasis on their emergences. Thus, Ruggie writes for example that “the origins of identities and other normative factors need to be better theorized.” See J. G. Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 1998, 16; see also the critical question “[I]f norms are important, a second question naturally emerges: Where do norms themselves come from? While the preceding essays devote considerable effort to answering the first question, they rarely address the second one” raised by P. Kowert/J. Legro, Norms, Identity, and Their Limits: A Theoretical Reprise, in: P. J. Katzenstein, see note 10, 468; R. A. Payne, Persuasion, Frames and Norm Construction, *European Journal of International Relations* 7/1 (2001), 37 et seq..

<sup>23</sup> March/Olsen, see note 19.

<sup>24</sup> Katzenstein, see note 10; J. G. Ruggie, *Constructing the World Polity*, 1998; F. V. Kratochwil, *Rules, Norms, and Decisions. On the conditions of practical and legal reasoning in international relations and domestic affairs*, 1989; A. Wendt, *Social Theory of International Politics*, 1999. See the original application of the concept of ‘fait social’ (sociological facts) and the discussion about diverting opinions on this central term in Durkheim’s ‘Les règles de la méthode sociologique’, see E. Durkheim, *Die Regeln der soziologischen Methode*, edited and introduced by Rene König, Frankfurt/Main, 1999,

Examples for the impact of such institutions have been provided by sociological constructivist work in international relations, international law as well as, more recently, by research on European integration. This work pursues the basic question of why actors obey the rules set by such soft institutions in the absence of legally binding rules and without decisive material push factors.<sup>25</sup> They demonstrate the diffusion of types of norms and cultures of behavior such as for example administrative culture and cooperation on the one hand and the acceptance of a leading role of norms such as human rights norms, environmental and labor standards on the other.<sup>26</sup> Thus John Meyer and his colleagues were able to demonstrate that the types of public administration, constitutional practices, educational institutions, welfare-state policies and even the role of particular branches of defense ministries were diffused into the domestic context of a number of states despite an absence of a plausible necessity for the implementation of these norms and practices.<sup>27</sup> For scholars who study institutional change in the context of European integration questions about the role of supranational institutions in diffusing and stabilizing the emergence of norms and routinized practices are of particular interest. For example, studies on the “Europeanization” of norms such as citizenship, water directives and environmental standards have demonstrated that norms that entail prescriptive rules emerge through processes of learning and diffusion in supranational institutions, and how these norms are diffused often with the additional pressure of advocacy groups. In sum, norms are found to exert policy changing pressure in domestic contexts of the EU member states.<sup>28</sup>

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<sup>25</sup> A. Chayes and A. H. Chayes, *The New Sovereignty. Compliance with International Regulatory Regimes*, 1995; H. H. Koh, Why do Nations Obey International Law? Review Essay, *Yale Law Journal* 106 (1997), 2599 et seq.; J. T. Checkel, The Constructivist Turn in International Relations Theory, *World Politics* 50 (1998), 324 et seq.

<sup>26</sup> On the effect of norm diffusion through international organizations see in particular the world-polity approach of the Stanford School around John Meyer, for example the work of Y. N. Soysal, *The Limits of Citizenship. Migrants and Postnational Membership in France*, 1994; D. Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship*, 1996; M. Finnemore, Norms, Culture and World Politics: Insights from Sociology's Institutionalism, *International Organization* 50 (1996), 325-347; M. Finnemore, *National Interests in International Society*, 1996; for an excellent overview in German see T. Wobbe, *Weltgesellschaft*, 2000.

<sup>27</sup> The establishment of “constitutional forms, educational institutions, welfare policies, human rights conventions, defense ministries in states that face no threat (including navies for landlocked states)” as well as “science ministries in countries that have no scientific capability” offers evidence of this type of norm diffusion as Ruggie points out, see note 24, 15.

<sup>28</sup> For an overview see the introduction of M. G. Cowles/J. A. Caporaso/T. Risse-Kappen,

### 3. Intersubjective Approaches: Logic of Arguing

Intersubjective approaches to institution building have been further developed as part of the literature that evolved around the ‘constructivist turn’<sup>29</sup> in international relations theories. These constructivist approaches proceed from the assumption that political action, identities and institutions are mutually constitutive. Institutions are not only assigned a regulative role in relation to behavior, they are also considered as constitutive for actors’ identities. Different from the rational actor approach which perceives institutions as exogenous factors that are mobilized according to actor’s interests in decision making processes, the intersubjective approach questions that analytical separation of institutions, interests and identities. Instead all three are considered as interrelated through, if strategic, communicative action.<sup>30</sup> The conceptual framework is offered by an, albeit selective reference to *Habermas’s* theory of communicative action, based exclusively on communication as strategic action – not as a societal theory.<sup>31</sup> Communication, these approaches argue, is particularly important for exploring the impact of soft institutions. On the one hand, they demonstrate the complex framework of implementation and compliance with

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*Transforming Europe: Europeanization and domestic change*, 2001. For the focus on behavioral prescriptions see in the case of European citizenship see e.g. Checkel’s work on the extension of citizenship rights in Germany towards the inclusion of dual citizenship, J. T. Checkel, The Europeanization of Citizenship? in: M. G. Cowles/J. Caporaso/T. Risse, *ibid.* On the role of advocacy groups see in particular the work of A. Klotz, Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa, *International Organization* 49 (1995), 451 et seq.; K. Sikkink, The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe, in: J. Goldstein/R. O. Keohane (Fn. 15), 161; M. E. Keck/K. Sikkink, *Activities Beyond Borders*, 1998; B. Locher, *Trafficking in Women in the European Union. A Norm-based Constructivist Approach*, 2002.

<sup>29</sup> A. E. Wendt, The agent-structure problem in international relations theory, *International Organization* 41 (1987), 335 et seq.; A. E. Wendt, Anarchy Is What States Make of It: The Social Construction of Power Politics, *International Organization* 46 (1992), 391 et seq.; Katzenstein, see note 10; E. Adler, Seizing the Middle Ground: Constructivism in World Politics, *European Journal of International Relations* 3 (1997), 319 et seq.; Checkel, see note 25. For a recent overview see E. Adler, Constructivism in International Relations, in: W. Carlsnaes/T. Risse/B. A. Simmons (eds.), *Handbook of International Relations*, 2002; for a critical perspective see S. Guzzini, A Reconstruction of Constructivism in International Relations, *European Journal of International Relations* 5/6 (2000), 147 et seq.; as well as S. Guzzini/A. Leander, Alexander Wendt’s Social Theory for International Relations, Special Issue, *Journal of International Relations and Development* 4 (2001).

<sup>30</sup> F. Schimmelfennig, Rhetorisches Handeln in der internationalen Politik, *Zeitschrift für internationale Beziehungen* 4 (1997), 219 et seq.; und F. Schimmelfennig, The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union, *International Organization* 55 (2001), 47 et seq.; as well as Risse (Fn. 10).

<sup>31</sup> J. Habermas, *Theorie des kommunikativen Handelns*, Frankfurt a.M., 1981.

supranational norms;<sup>32</sup> on the other hand, they try to demonstrate the construction of shared reference frames through arguments in bargaining situations. As *Thomas Risse* points out, following Habermas, it is assumed that the negotiators are ready to be persuaded by the better argument brought to the fore through controversial debate. The rationale for behavior then is considered as the logic of argumentation.<sup>33</sup> This approach offers a helpful research platform especially with a view to analyzing the ongoing and potentially long-lasting discussions about a European constitution. In principle, and at its best, this approach could be developed towards a societal approach to norms. After all, the full “constructivist ethic and politics relies on argumentative behavior according to the dialogue model: conflicting goals and norms are clarified through communicative action, guiding norms are agreed. The *Grundnorm* (morale and/or principle of reason) works along the lines of the Kantian moral reasoning. In reconstructing the Kantian principle of moral reason, the principle of trans-subjectivity makes it possible to avoid subjective and arbitrary norm-setting.”<sup>34</sup> However, the thrust of argumentative approaches to intersubjectivity, despite the inclusion of speech, language, and controversy in the form of a principled yet open-ended argument, tends to leave the impact of sociocultural origin and generation of norms in relation to time to one side. Norms therefore remain analytically disconnected from the constitutive impact of deliberation on the identification and change of the *meaning* of norms.<sup>35</sup> Thus the societal embeddedness of arguing processes about norm validity and facticity and hence the normative philosophical dimension of communicative action that is stressed by Habermas, is paid little attention. Yet, it is precisely this embeddedness which offers considerable information as to the role and change of soft institutions in the process of constitutionalization (see more in detail *Section III*).

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<sup>32</sup> For a general perspective on rule following within the context of international law, see Chayes/Chayes (Fn. 25); and with reference to the growing legalization of environmental policy, see M. Zürn, The Rise of International Environmental Politics, *World Politics* 50July (1998), 617 et seq.; C. Joerges/M. Zürn (eds.), *Compliance in Modern Political Systems*, (in print).

<sup>33</sup> Risse (Fn. 10)

<sup>34</sup> D. Nohlen/R.-O. Schultze/S. S. Schüttemeyer, Keyword 'Verfassungsgerichtsbarkeit', in: D. Nohlen (ed.), *Lexikon der Politik*, Vol. 7, Politische Begriffe, 1998, 274 et seq., (Translation from German original quotation and emphasis).

<sup>35</sup> For an elaboration of this critical assessment of the logic of arguing, see Guzzini, see note 29; Payne, see note 22; A. Wiener, *The Dual Quality of Norms: Stability and Flexibility*, Ms, Belfast, 2002.



## II. THREE PHASES OF CONSTITUTIONALIZATION

The following proposes to distinguish between different phases in the overall and ongoing process of European constitutionalization, before turning to elaborate on selected examples and then focus more in detail on the current constitutional debate (*Section III*). The goal of this section is to offer an understanding about basic considerations raised by political scientists' work on the role of institutions in the process of European integration. In particular, questions about the characteristics of institutional roles, definitions and performance are raised. These perspectives on institutions have an impact beyond the EU, to be sure. They contribute to a more precise and systematic assessment of massive institutional change in the supranational realm that is traditionally assumed to be governed by the principle of anarchy in the absence of global government. The following summarizes distinctive and related research goals of different phases of integration thus reflecting significant changes of research questions, and often, the related shift of emphasis in major integration research from one sub-discipline to another. For example, during the first 'integration' phase institutional change on the supranational European level, *i.e.* the establishment of European political organs and treaties, mattered most to researchers. In turn, during the second 'Europeanization' phase institutional change in domestic contexts such as adaptation, harmonization and regulation mattered most. Finally the current the 'late politicization' phase brings constitutional debate in relation with the impending massive enlargement process including finality, enlargement, fundamental rights and democracy to the fore, thus raising questions about the robustness of theoretical assumptions generated to study institutional change during the first two phases, especially regarding the post cold war changes and the massive eastern enlargement.

Table 1: Three Phases of European Constitutionalization

Phase	Type	Place	Dynamic	Institutions
<b>I</b>	<i>Integration</i> (more/less)	Supranational Level	<i>bottom-up</i>	hard
<b>II</b>	<i>Europeanization</i>	Domestic, regional level in	<i>top-down</i>	hard

	(more/less)	member and candidate countries		
<b>III</b>	<i>Politicization</i> (more/less)	Euro-polity; transnational spaces	<i>trickle-across, bottom-up, top-down</i>	hard/soft

According to **table 1** the integration process is assessed as entailing three phases in which different research questions dominated the field. The phases are distinguished with reference to significant changes in *type, place* and *dynamics* of integration that caused institutional change within the European multi-level governance system. Accordingly the first phase is characterized by bottom-up institutional building, the central research interest being about more or less integration; the core theories involved the debate over ‘grand theory’ among neo-functionalist and intergovernmentalist approaches in international relations theories. The second phase is distinguished by a top-down research perspective on institutional adaptation. Here research interest focused on the question of more or less Europeanization. Theoretical reference for this perspective is provided by the potpourri of the descriptive and increasingly all-encompassing multi-level governance approach, organization theory, the various neo-institutionalisms, and regime theory as well as constructivist research; theoretically this phase brought a shift from international relations towards comparative governance and public administration. The third phase is coined by the increasingly complex challenge of reintegrating bottom-up institution building, *i.e.* the changing institutional basis of the European political organs, as well as the parallel and interrelated process of top-down Europeanization of formal institutions in politics, the market, and the legal and administrative structures in the respective candidate countries. Furthermore, in the face of massive enlargement this third phase also involves the necessity to reconsider, evaluate and define the role and meaning of values and norms that lie at the core of European governance and – most importantly – the possibilities of their eventual expression within a distinctly defined constitutional framework. The characterization of ‘late politicization’ stresses the often conflictive and controversial processes and the lack of shared instruments or values to guide conflict solution and set shared standards of behavior. During this phase, interdisciplinary theoretical work bringing together law, political science and

sociology and, if still much less established, cultural studies has begun to tackle the more substantial normative, functional, legal and political questions of European integration as a process that might have surpassed its dynamics of institution-building and expansive potential as a process of consolidation both in domestic and world political matters. An expected outcome of this phase are feed-back loops which are produced by the lack of norm resonance between different sociocultural contexts, and unintended consequences of institution-building, *i.e.* following strategic norm setting within the accession *acquis* e.g. norms such as for example minority rights that have been added on the *acquis communautaire* for security reasons are expected to develop a meaning that will loop back into the previously western normative structure of the EU producing a ‘boomerang effect.’<sup>36</sup>

According to these three phases it is possible to distinguish between patterns of motivation for the involved actors considering the push and pull factors of institution building. While push factors are constituted by structures or path-dependency such as decisions about institutional change made in the past which evolve towards exerting influence on present and future decision-making processes, pull factors develop through interest constellations of dominant actors with influence on the direction and development of the integration process. Controversies among political science approaches, in particular among the North American variety, have focused on the role and impact of these different factors early on as the ongoing debate among neo-functionalists and intergovernmentalists about interest formation and decision-making in the process of integration demonstrates.<sup>37</sup> While the empirical focus of theoretical

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<sup>36</sup> See for example work on human rights and minority rights implementation in the enlargement process, G. Schweltnus, *Much ado about nothing? – Minority Protection and the EU Charter of Fundamental Rights*, Constitutionalism Web-Papers (ConWEB), No. 5/2001, <<http://www.les1.man.ac.uk/conweb/papers/conweb5-2001.pdf>> (10 June 2003) as well as work on the adaptation of administrative practices, A. L. Dimitrova, *Governance by Enlargement? The case of the administrative capacity requirement in the EU’s Eastern enlargement*, Paper prepared for presented at the ECPR General Conference, 6-8 September 2001, University of Kent at Canterbury, (2001). On problems with interpreting the accession *acquis* see H. Grabbe, *How does Europeanization affect CEE governance? Conditionality, diffusion and diversity*, *Journal of European Public Policy* 8 (2001), 1013 et seq. On the boomerang effect, see T. Risse and K. Sikkink, *The socialization of international human rights norms into domestic practices: Introduction*, Thomas Risse et al. (eds.), *The Power of Human Rights*, 1999, 1 et seq. (19); with particular reference to the boomerang effect of minority rights norms in the enlargement process in Europe, see A. Wiener and T. Wobbe, *Norm Resonance in Global Governance - Contested Norms in the Process of EU Enlargement*, Paper prepared for presentation at the Annual Meeting of the International Studies Association, New Orleans, 24-27 March 2002, New Orleans Archive, <[http://www.isanet.org/noarchive/wiener\\_wobbe.html](http://www.isanet.org/noarchive/wiener_wobbe.html)> (10 June 2003).

<sup>37</sup> For most recent contributions to this ongoing debate, see E. B. Haas, *Does Constructivism Subsume*

debates among political scientists has been adapted over time according to the phases of integration, the central issue of dispute remains the difference in analytical perception of the structure/agency relation. While neo-functional, constructivist and historical approaches understand actors as socially embedded,<sup>38</sup> intergovernmentalists and rational choice institutionalists work with the assumption that actors are in principle socially isolated, and operate accordingly based on individual rationally perceived interests which may or may not involve the choice of reference to institutions as monitoring or, in any case, information providing elements in the decision-making process.<sup>39</sup> The following elaboration on the three phases of integration is intended to summarize research interests which cumulated at particular times. It is not meant to work as an exclusive pattern. Instead it seeks to offer a reference frame for assessing the key questions raised about the integration process and which coined the respective phase. The distinction according to phases does not necessarily preclude overlapping research issues and *foci*. The overlap is particularly relevant with a view to the sequence of the second and third phases of Europeanization and late politicization, respectively.

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Neofunctionalism? A “Soft Rationalist” Solution, in: Christiansen, T., K. E. Joergensen and A. Wiener (eds.), *The Social Construction of Europe*, 2001; P. C. Schmitter, Neo-Neo Functionalism, in: A. Wiener and T. Diez (eds.), *European Integration Theories: Past, Present and Future*, 2003 (forthcoming) and F. Schimmelfennig, Liberal Intergovernmentalism, in: A. Wiener and T. Diez (eds.) Ibid. On the analysis of ‘push’ and ‘pull’ factors in the implementation of European legal norms in domestic contexts, see in particular A. Sbragia, Environmental Policy: The ‘Push-Pull’ of Policy-making, in: H. Wallace and W. Wallace (eds.), *Policy-Making in the European Union*, 1996, 235-255, as well as A. Lenschow, Variation in EC environmental policy integration: agency push within complex institutional structures, *Journal of European Public Policy* 4 (1997), 109 et seq.

<sup>38</sup> E. B. Haas, The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing, *International Organization* 24 (1970), 607 et seq.; A. Sbragia (ed.), *Euro-politics: Institutions and Policymaking in the ‘New’ European Community*, 1992; J. A. Caporaso, Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty, in: J. A. Caporaso (ed.), *International Studies Review: Continuity and Change in the Westphalian Order*, 2000; Pierson, see note 9; J. Peterson, Decision-Making in the European Union: Towards a Framework of Analysis, *Journal of European Public Policy*, 2/1 (1995), 69 et seq.; S. J. Bulmer, New Institutionalism, The Single Market and EU Governance, Working Paper, *ARENA*, 25, (1997); S. Bulmer/M. Burch, The ‘Europeanisation’ of central government: the UK and Germany in historical institutionalist perspective, in: M. Aspinwall/G. Schneider (eds.), *The rules of integration. Institutional approaches to the study of Europe*, 2001; T. Christiansen/K. E. Jørgensen/A. Wiener, The Social Construction of Europe, *Journal of European Public Policy* 6 Special Issue (1999), 528 et seq.; M. Jachtenfuchs, Theoretical Perspectives on European Governance, *ELJ* 1 (1995), 115 et seq.; B. Kohler-Koch/M. Jachtenfuchs (eds.), *Regieren in der Europäischen Union*, 1996; C. Joerges/J. Neyer, From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology, *ELJ* 3 (1997), 273 et seq.; Checkel, see note 28.

<sup>39</sup> S. Hoffmann, Reflections on the Nation-State in Western Europe Today, *Journal of Common Market Studies* 21 (1982-83), 21 et seq.; A. Moravcsik, Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community, *International Organization* 45/ 1 (1991), 19 et seq.; Garrett, see note 15; Garrett/Tsebelis, see note 15; Pollack, see note 7; Schimmelfennig, see note 30.

## 1. Integration (1960-1985)

During the first two decades the integration process raised questions about the motivation for building supranational institutions in a Hobbesian world, *i.e.* about European integration as such. Motives and rationale behind the process were identified on the level of national governments based on security and economic interests, *i.e.* establishing institutions which would stabilize peace based on integrated coal and steel industries and the Euratom Treaty.<sup>40</sup> Yet, neo-functionalists such as *Ernst Haas*, *Karl Deutsch*, *Leon Lindberg* and *Philippe Schmitter* stressed transnational and supranational interest formation by elites and their impact on the integration process.<sup>41</sup> While, as *Andrew Moravcsik* pointed out later on, the state interests are informed by societal preference formation, e.g. domestic interest groups, the key decisions were always located on the level of intergovernmental negotiations, *i.e.* at state level, none the less.<sup>42</sup> The question about more or less of integration is hence ultimately pinned down on state interests according to the traditional neorealist perception of states as the only influential political actors in world politics. These interests were informed by interstate relations and bargaining, yet, institutions were considered as thus enabling, not constraining actors' behavior (actor oriented approach). Contrary to this rather clear cut perception of interest formation, role and input, neo-functionalists took the theoretical challenge of regional complexity on board, understanding the integration process as pushed and informed by elites, yet as a process which was not exclusively subject to change according to strategic interests. Instead, integration was pushed by the dynamic of spill-overs between policy areas that complicated parsimonious theorizing considerably. Integration is understood as pushed by the interests of societal and business elites which are able to strategically use the new supranational institutions and, in doing so, at times unintendedly cause

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<sup>40</sup> See e.g. the intergovernmentalists that followed and expanded on the seminal work by S. Hofmann, see note 39.

<sup>41</sup> Haas, see note 38; L. Lindberg/S. Scheingold (eds.), *Europe's Would-Be Polity: Patterns of Change in the European Community*, 1970.

<sup>42</sup> Moravcsik, see note 39; A. Moravcsik, Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach, *Journal of Common Market Studies* 31 (1993), 473 et seq.; A. Moravcsik, *The Choice for Europe*, 1998.

further integration due to the spill-over effect that linked different policy areas with one another.

## 2. Europeanization (since 1985)

While during the integration phase the influence of international relations theory was particularly salient, especially in the context of US-American work, the relaunch of the integration process and the ‘common market 1992’ initiative during the commission presidencies of Jacques Delors (1985-95)<sup>43</sup> contributed to a shift of emphasis in academic research as well. With the increasing density of regulations- and decision-making procedures that followed from the Single European Act in 1986, the sub-disciplines of comparative government, public policy and public administration gained influence in integration research.<sup>44</sup> This administrative turn led to a closer focus on ‘Europeanization’ understood as the capacity for institutional adaptation with European conditions of regulation within the various EU member states. In the beginning this research was primarily interested in identifying the conditions and the readiness of fit or misfit with European directives within the common market initiative.<sup>45</sup> Building on the growing volume and density of regulations of domestic politics through European policy initiatives questions of political participation, co-determination, transparency, and political organization gained importance in political science integration research.<sup>46</sup> Overall this phase of integration research demonstrates a significant change of focus from international relations theories towards comparative politics. However, it is important to note that this phase has not necessarily produced a convincing or generally accepted

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<sup>43</sup> W. Sandholtz/J. Zysman, Recasting the European Bargain, *World Politics* 42 (1989), 95 et seq.; G. Ross, *Jacques Delors and European Integration*, 1995.

<sup>44</sup> R. M. Czada/A. Windhoff-Heritier, Political choice : institutions, rules, and the limits of rationality, 1991; G. Majone, The Rise of the Regulatory State in Europe, *West European Politics* 17 (1994), 77 et seq.; F. W. Scharpf, The Joint-Decision Trap: Lessons from German Federalism and European Integration, *Public Administration* 66 (1988), 239 et seq.; H. Wallace/W. Wallace (eds.), *Policy-Making in the European Union*, 2000.

<sup>45</sup> Sandholtz/Zysman and Wallace/Wallace, see note 37; K. Armstrong/S. Bulmer, *The Governance of the Single European Market*, 1998; W. Wessels, *Die Öffnung des Staates : Modelle und Wirklichkeit grenzüberschreitender Verwaltungspraxis 1960-1995*, 2000; J. J. Richardson (ed.), *European Union. Power and Policymaking*, 1996.

<sup>46</sup> E. Grande, Demokratische Legitimation und europäische Integration, *Leviathan*, 3 (1996), 339-359; P. C. Schmitter, *How To Democratize the EU ... And Why Bother?* 2000; B. Kohler-Koch, Regieren in

systematization in theoretical approach. After all, different from the integration phase which was clearly structured by opposing theoretical positions of two camps and strongly influenced by the US-American sub-discipline of international relations, the second phase of integration is more clearly characterized by an absence of analytical clarity. Due to the enormous empirical breadth and diversity in research issues shared research programs are stand to be consolidated. In addition the frequently used term of ‘good governance’ and/or ‘multi-level governance’<sup>47</sup> is all too often applied as a catch-all expression that inevitably raises more questions than offering convincing theoretical answers. An important change in analytical perspective is the growing interest in the EU as a political system and not, as in the previous phase, as an international organization.

It was not until recently that this phase has generated more systematic approaches which offer a more succinct analytical focus on the question of Europeanization as a consequence of integration politics. Thus, it has been convincingly demonstrated that situations of institutional or structural ‘mis/fit’ caused institutional adaptation, hence justifying the term Europeanization understood as institutional adaptation due to pressure which has been generated by European rules and norms, *i.e.* directives and regulations of the expanding *acquis*.<sup>48</sup> Consequently, pressure for Europeanization is likely to be higher in those member states with policy sectors that entail institutions (norms, rules procedures) which are not readily compatible with European institutions. However, the Europeanization effect was found to differ in the area of identity politics. For example, research on variation in the impact of national identity options in the process of Europeanization demonstrated that the Europeanization of national “identity-options” was higher in member states with a higher (rather than a lower) compatibility of socio-cultural tradition with European integration. In the end, Europeanization research has produced a plethora of Europeanization approaches.<sup>49</sup>

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entgrenzten Räumen, *Politische Vierteljahresschrift*, 29 Sonderheft (1998).

<sup>47</sup> Kohler-Koch, see note 9; L. Hooghe and G. Marks, The Making of a Polity: The Struggle over European Integration, *European Integration Online Papers (EIoP)*, 1 (1997), No. 4, 10 April 1997, <<http://eiop.or.at/eiop/texte/1997-004a.htm>> (10 June 2003), respectively.

<sup>48</sup> T. Börzel, Non-compliance in the European Union: Pathology or Statistical Artifact? *Journal of European Public Policy* 8/5 (2001), 803 et seq.; Börzel/Risse, see note 19.

<sup>49</sup> See M. Marcussen, T. Risse, D. Engelmann-Martin, H.-J. Knopf and K. Roscher, Constructing Europe? The Evolution of French, British and German Nation-State Identities, *Journal of European Public Policy* 6, Special Issue (1999), 614 et seq. On a general assessment of research on Europeanization, see J. P. Olsen, The Many Faces of Europeanization, *ARENA Working Papers* WP

While each offers sufficiently systematic elaborations on the issue, the numerous and often descriptive and empirically rich policy studies in the 1980s and 1990s still remain considerably fragmented regarding a shared theoretical approach.

### **3. Late Politicization (since 1993)**

With the constitutional turn that had been triggered by the impending eastern enlargement process and was manifested by the Amsterdam Treaty, a new phase which I call late politicization has, if gradually, taken shape in the process of European integration.<sup>50</sup> Enhanced, if not triggered, by German Foreign Minister Joschka Fischer's Humboldt Speech in Berlin (2000), a pluralist debate about political finality and its constitutional frame has been brought to the fore of academic and public discourse. The Convention on the Future of Europe which meets in Brussels is one institutional expression of this process. Questions raised by the constitutional debate are above all directed to the forthcoming decision about either simplifying the treaties without changing their status, or revising them with the goal of creating a constitutional text. In general the constitutional debate is mostly interested in the judicial and political form and less in the substance, *i.e.* contents and meanings of the final text. As a member of the European Parliament notes, "despite being agreed as international treaties, the treaties are something akin to the constitution of the European Union. Therefore they accomplish the role of a constitution. For me the question is not, whether Europe has a constitution, but whether Europe has the constitution it needs. That is precisely the question. That's what this is all about. And [...] the answer is clear; the European Union does not have the constitution it needs."<sup>51</sup>

In light of the first and second phases which made little reference to political processes and the respective societal contexts in which they were generated,<sup>52</sup> the

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01/02, Oslo 2002.

<sup>50</sup> See for example the overview over legal, regulative and political thrust of these phases of integration offered by C. Joerges, *The Law in the Process of Constitutionalising Europe*, Arena Annual Conference, *ARENA*, Oslo, 5 March 2002, <<http://www.arena.uio.no/events/Conference2002/Papers.html>> (10 June 2003).

<sup>51</sup> Interview with a member of the European Parliament, Brussels, 29 August 2001. This and following interviews are cited anonymously; they are on file with the author.

<sup>52</sup> With the exception of neo-functionalists' interest in social interaction; yet this work received little attention during the 1970s and 1980s; see P.C. Schmitter, *Three neo-functional hypotheses about*



current constitutional debate enhanced by the added time pressure to produce a successful outcome within a relatively short period of time appears as a puzzle. The old and often repeated issues of the role of the public sphere and public opinion (*Oeffentlichkeit*), legitimacy and democracy as well as the appropriate means for establishing and safe-guarding these principles politically are reposed in a hurry. The answers, which were, for example offered by the European commission's White Paper on Governance<sup>53</sup> on the one hand and the number of proposals regarding the reorganization of European political organs, on the other, demonstrate the scarcity of conceptually convincing and politically feasible approaches to constitutional change. To lawyers particularly those projects which are aiming to achieve the 'constitutionalization of the treaties'<sup>54</sup> after years of integration through law and a prospering practice of law in Europe, come as a surprise, after all, constitutionalization has been an ongoing process for decades. The following elaborates on the theme of late politicization in relation with the current constitutional debate with reference to the role of hard and soft institutions pointed out in the previous section of this chapter.

After the shift in analytical perspective from politics of integration to policies of institutional adaptation, *i.e.* Europeanization, including constitutionally important changes brought about by the Maastricht and Amsterdam treaties and the pressure to enlarge the EU at the end of the cold war, students of European integration are now faced in addition with the third, polity dimension. Questions of identity, democracy and security among others have been brought to the fore with the introduction of Union citizenship and the communitarisation of the Schengen agreement to abolish internal border controls. Foreign policy changes such as the Kosovo crisis, the attack

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international integration, *International Organization* 23 (1969), 162 et seq.; L. Lindberg/S. Scheingold (eds.), *Europe's Would-Be Polity: Patterns of Change in the European Community*, 1970; E. B. Haas, Turbulent fields and the theory of regional integration, *International Organization* 30 (1976) 173 et seq.; Haas, see note 38.

<sup>53</sup> See COM(2001) 428 final, Commission of the European Communities, European Governance – A White Paper, 25 July 2001, <[http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001\\_0428en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf)>; for critical assessments see the contributions in C. Joerges/Y. Meny/J. H. H. Weiler (eds.), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*; in particular the contributions by F. W. Scharpf, European Governance: Common Concerns vs. The Challenge of Diversity and J. Shaw, European Union governance and the question of gender: a critical comment.

<sup>54</sup> See for example the report by the European Parliament's Committee of Institutional Affairs, 2000. Report on the Constitutionalisation of the Treaties, Final A5-0289/2000, PE 286.949. Brussels: European Parliament.

on the World Trade Centre and the political crisis in the middle-east have enhanced the challenge on the EU's role as a political actor on the world stage. In addition, the process of enlargement with new accession criteria settled in Copenhagen in 1993 has increased the pressure for institutional adaptation in the candidate countries, the European political organs and the member states as well. The current phase of late politicization therefore contributes to a more complex empirical context of institutional change which is characterized by multiple processes of institutional adaptation. After all, in addition to the familiar bottom-up and top-down perspectives on institutional change, now more fundamental issues of political responsibility and a revised constitutional framework have gained precedence over day-to-day policy issues.<sup>55</sup> As a consequence, the EU is now approached as a political system. "The whole is at stake", as Joschka Fischer had stipulated in his Humboldt speech, hence the pressure to face finality both in constitutional and political terms. The underlying security and financial interests that informed the choice and definition of the Copenhagen accession criteria (e.g. in the areas of minority policy, agricultural policy, visa policy, fundamental freedoms) raised questions about the political constitution, the leading principles and the value system within the EU as a polity. In this phase, legal work on European integration gains importance for political science approaches. The largely hidden link between 'integration through law'<sup>56</sup> as an approach that offered explanatory guidance for lawyers during the first phase of integration, on the one hand, and 'integration through policy' which had substantiated political science research during the second Europeanization phase, on the other,<sup>57</sup> stands to be investigated and scrutinized with a new focus on 'integration through politics' in academic research during the late politicization phase.

#### 4. Summary

At first sight, institution building in the integration process appears to rely most decisively on the founding treaties and their periodical revision at intergovernmental

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<sup>55</sup> See also J. Habermas, *Warum braucht Europa eine Verfassung?*, *DIE ZEIT*, 29 June 2001; later published in J. Habermas, *Zeit der Übergänge*, 2001, 104 et seq.

<sup>56</sup> M. Capelletti/M. Seccombe/J. H. H. Weiler (eds.), *Integration Through Law*, 1985.

<sup>57</sup> Wallace/Wallace, see note 43.

conferences. Yet, while the acts of treaty-making and revision are always exclusively submitted to final decisions within the institutional framework of the Council which grants voice and vote to the signatories of the treaties, the actual substance of treaty revisions is usually discussed, conceptualized and prepared by other European political organs. In particular, the Commission as the guardian of the treaties, the Committee of Permanent Representatives and increasingly the European Parliament as well as inter-institutional groups such as the Reflection Group and lobby groups had gained considerable influence on treaty revisions during the Maastricht Treaty negotiations. In addition to producing factual accounts of institutional change regarding the four central organs of the EU, *i.e.* the Council, the Commission, the Court of Justice and the Parliament, it is therefore interesting for political scientists to identify and explain which actors' interests were most decisive in the process, and what motivated the changes, to what end and with which consequences for power relations. That is, in addition to identifying and categorizing types of institutional change, it is deemed important to analyze the role of other actors, processes and organizational structures with a view to identifying interest aggregation, identity-formation and the transfer of action potential. Central research areas for political science are therefore democratic participation, types of governance, the identification of origin and type of state interest in institution building on the European level as well as its regulative and organizational advantages, in short, the factors which contribute to the efficiency-output of European integration. Stemming from different types of questions, regime analysis and institutional analysis in International Relations theory as well as comparative government, political economy, public policy research, democratization and social movement research all contributed to creating the current state of the art of political science approaches to European integration.<sup>58</sup>

### **III. INSTITUTIONS IN SELECTED POLICY AREAS: CITIZENSHIP AND THE CONSTITUTIONAL PROCESS**

Following the overview about central questions and research areas of European

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<sup>58</sup> For a systematic and comparative overview on European integration theories and their respective value-added in analyzing the past, present and future of the actual integration process, Wiener/Diez, see

integration raised by political science, this section turns more in detail to the process of institution-building in selected policy areas. In doing so, I draw on the distinction between the three different types of action discussed in *Section I*, *i.e.* the rational actor model, the structural approach and the intersubjective approach, respectively. In addition this section raises critical questions about the long-term political impact of institution-building as well as the chances for a successful outcome of the negotiations leading up to the 2004 intergovernmental conference. I argue for an opening of political science research towards more interdisciplinarity, in particular towards sociology and law. This argument recalls the principle of contestedness inherent in the two sets of practices that are constitutive for the *nomos*. Subsequently, I suggest conceptualizing the principle of contestedness as a fourth normative perspective on behavior in relation with – constitutionally defined – institutions. It is based on the assumption of the analytical and political impact generated by the “dual quality of norms” as both socially constructed through interaction as well as structuring actors’ behavior.<sup>59</sup> It proposes the extension of institutional analysis towards the assessment of the origin and transformation of soft institutions such as social norms, *i.e.* human rights, minority rights, labor and environmental standards, and their meanings. The model is based on the assumption that these norms are not sufficiently legitimized by exclusive reference to their facticity, *i.e.* the recognition of the powerful prescriptive rules they entail. In addition, successful norms entail socio-culturally generated validity.<sup>60</sup> Absent this validity, the likelihood of sustained norm resonance decreases. The principle of contestedness draws on theoretical arguments developed by deliberative approaches in political theory as well as in integration research.<sup>61</sup> It stresses the lack of a more pronounced and systematic empirical focus on the impact of socio-cultural trajectories on norms.<sup>62</sup> In addition, multiple path-dependencies of

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note 37.

<sup>59</sup> The approach draws on the concepts of ‘structuration’, A. Giddens, *Central Problems in Social Theory*, 1979; ‘constitutional recognition’ by James Tully, see Tully, note 2 and J. Tully, *The Unfreedom of the Moderns in Comparison to their Ideals of Constitutionalism and Democracy*, *MLR* 65 (2002), 204 et seq.; as well as the facticity-validity tension as a *Grundnorm* based on Jürgen Habermas’s work; J. Habermas *Zur Logik der Sozialwissenschaften*, 1985; and Habermas, see note 5. For an elaboration of the dual quality of norms and its implications for compliance research, norm generation, validation and implementation, see more in detail Wiener, note 35.

<sup>60</sup> J. Habermas 1992, note 5, 35

<sup>61</sup> J. Cohen, *Deliberation and Democratic Legitimacy*, in: J. Bohman/W. Rehg (eds.), *Deliberative Democracy. Essays on Reason and Politics*, 1997; S. Benhabib, *Democracy and Difference. Contesting the Boundaries of the Political*, 1996; C. Joerges/J. Neyer, see note 38.

<sup>62</sup> See for example Habermas, note 5, 629: “even if the wording of norms remains the same, their

soft institutions are considered as gaining in importance and impact on the meaning and role of norms. The following paragraphs introduce a more detailed application on the impact, possibilities and change of institution building based on two examples of evolving norms and their respective contested meanings in Europe. The first example refers to European citizenship, the second to the finality debate.

The current late politicization phase and its focus on the finality debate follows a long period of constitutional politics carried out without any particularly defined political goal. As one of the many unintended consequences of institution-building in the process of European constitutionalization, the finality debate facilitates the current speedy constitutional process which is, in turn, likely to generate even further unintended consequences. In the process, normative concerns against a European constitution that would lead beyond the simple re-organization of the treaties are raised.<sup>63</sup> In this context the understanding of institution building and its often path-dependent impact is crucial. In other words, the meaning of institutions and hence their constitutive and regulative influence on behavior changes once it is transferred across the socio-cultural boundaries which forge the meaning of core constitutional norms. That is, facticity and validity of norms produce conflicting interpretations across national boundaries within the territory to which a European constitution would apply. Historical institutional analyses have pointed out the significance of identifying institutional impact over long-time periods<sup>64</sup> with reference to changed resource constellations (*i.e.* power constellations, market resources, interests). This problem of so-called ‘snap-shot’ as opposed to ‘moving picture’ analyses extends towards the impact of socio-cultural resources which also produce unintended consequences under the conditions of time and contexts change. As I have argued elsewhere, “associative resources” (*i.e.* expectations, interpretations, meanings) are subject to change, misinterpretation and contestation as well.<sup>65</sup> The example of Union citizenship substantiates this particular effect.

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interpretations are fluid”; German original text: “auch wenn der Wortlaut der Normen unverändert bleibt, ihre Interpretationen sind im Fluss” [translation AW].

<sup>63</sup> See for example J. H. H. Weiler, *The Constitution of Europe. ‘Do the new clothes have an emperor?’ and other essays on European integration*, 1999.

<sup>64</sup> See on path-dependency in general North, note 14; and with particular reference to European integration Pierson, note 9; as well as A. Wiener, Zur Verfassungspolitik jenseits des Staates: Die Vermittlung von Bedeutung am Beispiel der Unionsbürgerschaft, *Zeitschrift für internationale Beziehungen* 8 (2001), 73 et seq.

The argument elaborates on the evolving meaning of soft institutions based on the discussion about norms in the theories of international relations as well as in the debate on European integration which offers new ways of assessing the establishment of democratic and legitimate process of governance beyond the state.<sup>66</sup> It begins from an institutionally established safe-guard mechanism for ongoing deliberation about the meaning of norms and rules. It hence establishes an institutional framework which allows for a flexible and equal assessment of the facticity-validity tension based on public participation, thus offering a constitutionally entrenched link between “[I]nstitutionalized deliberation and public debate” which “must, indeed, interact.”<sup>67</sup> It is here where the Europolity’s best and worst outcome may well be decided. Hence, the key problem of academic approaches to constitutional debate lies in the practice of analytically bracketing controversial associative connotations about the meaning of constitutional substance, *i.e.* in excluding the intangible factors that inform interpretation, and ultimately, resonance with contested socio-cultural norms from the analysis. For example, the debate focuses on the discussion of different constitutional models and their substantive aspects (vertical debate: Which model is considered legitimate?) Yet, shared constitutional norms inevitably acquire varying interpretations through associative connotations that are developed within different socio-cultural contexts (horizontal contestation: which meanings of a norm and which expectations?). It is ultimately the associative connotations within these contexts which are constitutive for unintended consequences of institution-building as the following will explicate further.

## 1. European Citizenship

The institutionalization of European citizenship with the Maastricht Treaty in 1991

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<sup>65</sup> Wiener, see note 59.

<sup>66</sup> H. Müller, *Internationale Beziehungen als kommunikatives Handeln. Zur Kritik der utilitaristischen Handlungstheorien*, *Zeitschrift für Internationale Beziehungen* 2 (1994), 371 et seq.; Risse, see note 10; Joerges/Neyer, see note 38; C. Joerges, ‘Deliberative Supranationalism’ – Two Defenses, *ELJ* 8/1 (2002), 133 et seq. But see also the more encompassing approach to “constitutional recognition” in multicultural contexts developed by Tully, note 2.

<sup>67</sup> Joerges, see note 61, 146.

presents a classic example of institution building with unintended consequences. This is due to the fact that Union citizenship entails all but a scarce amount of prescriptive force which would allow for the identification of guiding capabilities and a behavioral performance expected by the logic of appropriateness expected by constructivist compliance research.<sup>68</sup> Yet, what must appear puzzling to the latter is that Union citizenship has caused political reaction, all the same and despite the absence of standardized rule for behavior. Thus, political actors such as lobbying groups, associations and interest groups made explicit reference to Union citizenship following its stipulation with in the Maastricht Treaty, indeed, demanding its revision.<sup>69</sup> This case of mobilization in reaction to a newly established institution was less puzzling for work that analyzed European citizenship as a *practice*, *i.e.* the politics and policymaking which institutionalize the terms and forge the meanings of citizenship than work which analyzed Union citizenship as a new legal norm. The practice-oriented work was able to demonstrate that the institution of Union citizenship – as stipulated by the TEU - represents just *one* aspect of the multiple and fragmented meanings of European citizenship. The larger and more encompassing understanding of the meanings of citizenship have evolved in relation with European citizenship practice, involving socio-cultural spaces, *i.e.* transnational, national or international interactions, that remain theoretically (and therefore also empirically) hidden by structure-oriented behaviorist approaches. Thus, more than twenty-five years of European citizenship practice have had an impact on the transformation of national citizenship. While modern nationally defined citizenship stipulates identity and regulates rights and access based on membership within a centrally organized constitutional state<sup>70</sup> the European Union has forged a fragmented citizenship which is neither centrally defined nor centrally practiced. Indeed, Union citizenship is not thinkable without reference to national citizenship as the revision of the Amsterdam Treaty explicates.<sup>71</sup> This fragmentation of citizenship rights within and across national boundaries within the Europolity thus has created a new meaning of citizenship that

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<sup>68</sup> Checkel, see note 28, 200.

<sup>69</sup> See Article 8 a) - e) EC Treaty (Maastricht), now Articles 17-22 EC Treaty (Amsterdam).

<sup>70</sup> R. Grawert, *Staat und Staatsangehörigkeit*, 1973; R. Bendix, *Nation building and citizenship*, 1964; W. R. Brubaker, *Citizenship and Nationhood in France and Germany*, 1992; U. K. Preuss, Citizenship and identity: Aspects of a political theory of citizenship, in: R. Bellamy/V. Bufacchi/D. Castiglione (eds.), *Democracy and constitutional culture in the union of Europe*, 1995; B. Turner, Outline of a Theory of Citizenship, *Sociology* 24 (1990), 189 et seq.; R. Beiner (ed.), *Theorizing Citizenship*, 1995.

<sup>71</sup> Article 17(1) EC Treaty.

contests the modern concept. Based on the particular meaning that is specific to Union citizenship and has evolved through citizenship practice, it thus challenges modern conceptions of citizenship that are deduced from the universal norm of citizenship.<sup>72</sup> This transformation of meaning is however not readily visible as a prescriptive force which guides behavior based on an exclusive investigation of the citizenship articles (Art 17-22) in the EC Treaty. Instead, the meaning must be empirically explicated and *mediated* in order to facilitate understanding.<sup>73</sup> Absent a successful mediation of meaning and the understanding about where to locate them, the political reactions to Union citizenship must remain a puzzle for actor-oriented and structure-oriented approaches of institution-building. After all, in the absence of prescriptive force, behavioral change is not expected. (From the perspective of law the more controversial and hence interesting question is not about the ‘why’ of political reaction to Union citizenship but about the substance and possible reactions to institutionalization with a view to legal practice, on the one hand, and the consequences of institutionalization for the final political shape of the Union, on the other.<sup>74</sup>) Based on the premise of the dual quality of norms as structuring and constructed, it is however possible to shed light on the puzzle. Once the principle of contestedness is taken as the starting point, norm implementation is always interrelated with deliberation about the meaning of norms. It is this perspective which eventually allows for an analytical approach to the fragmented meaning of diverse norms of citizenship.

## 2. The Constitutional Debate

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<sup>72</sup> On the particularity of citizenship see in especially T.H. Marshall, who emphasizes the importance of the emergence of a citizenship ideal within particular societal contexts, T. H. Marshall, *Citizenship and Social Class*, 1950; on the EU see E. Meehan, *Citizenship and the European Community*, 1993; A. Wiener, Assessing the Constructive Potential of Union Citizenship - A Socio-Historical Perspective, European Integration online Papers (EIoP) 1 (1997), No. 17, 23 September 1997, <<http://eiop.or.at/eiop/texte/1997-017a.htm>> ; A. Wiener, ‘European’ Citizenship Practice - Building Institutions of a Non-State, 1998; A. Wiener, Citizenship, in: M. Cini (ed.), *European Union Politics*, 2003, et seq. On the crucial importance of the difference between universal and particular aspects of citizenship and its contextual application, see also M. Bös, Die Europäisierung nationaler Gesellschaften, *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, Special Issue 40 (2000), 429 et seq.

<sup>73</sup> Wiener, see note 59; on the mediation of meaning see more generally Kieser, note 20, Ch. 9.

<sup>74</sup> See *Kadelbach* in this volume.



The principle of contestedness in the process of norm origin, role and implementation has two implications for the current constitutional process. First, it can be noted that the two core processes in the run-up to the IGC, *i.e.* finality in the constitutional process and compliance in the enlargement process, follow two different action rationales. Thus, the finality debate provides a framework for open and constructive thought. For example, Joschka Fischer's Humboldt speech had put the finality issue on the agenda which then turned into a constitutional debate that was enhanced with the Nice IGC in 2000 and the Laeken Declaration in 2001. The debate is future oriented in style and dynamics, and it is evaluated according to democratic criteria with respect to procedure and substance alike. The yardstick for legitimacy is therefore the principle of equal access to participation in the debate for all those potentially influenced by the outcome of the process. Here the logics of arguing and the principle of contestedness are central for actors' behavior. In turn, the compliance rationale that guides the enlargement process entails the expectation of strict rule following and implementation of the compliance criteria. Accordingly the logics of action that influence behavior most decisively in the enlargement process are the logic of consequentialism and the logic of appropriateness. The behavior of the candidate countries is determined by the guiding impact of the accession criteria which had been identified in 1993 in Copenhagen. Their substance is not renegotiable. If the principle of legitimate governance is of concern, academic research on the constitutional debate needs to focus on both rationales finality and compliance, and critically assess their respective interrelation.<sup>75</sup> Due to the opposing action rationales, on the one hand, and the common goal as member states within one polity acting applying European law, on the other, the analytical separation of both processes is not particularly helpful. In turn, the analytical link between both processes offers an understanding of both processes not only as potentially conflictive but as producing additional hurdles towards the acceptance of a revised common constitution in an enlarged EU.

The democratic challenge thus entails the question of how to reasonably link the two

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<sup>75</sup> For a detailed argument on the two rationales, see A. Wiener, Finality vs. Enlargement, Constitutive Practices and Opposing Rationales in the Reconstruction of Europe, *Jean Monnet Working Paper* 08/02, 2002. For a focus on the logics of appropriateness and the logic of consequentialism in the enlargement process as separated from the process of EU polity formation and constitution making, see F. Schimmelfennig and U. Sedelmeier (eds.), European Union Enlargement – Theoretical and Comparative Approaches, *Journal of European Public Policy*, Special Issue 9 (2002); in particular the

processes of finality and enlargement, as well as how to establish a constitutionally entrenched institutional body that offers the possibility for ongoing transnational deliberation as a basis for democratic decision-making, recognition and constitutional revision on the long run.<sup>76</sup> While doubtful, it is worthwhile scrutinizing the constitutional role of the Convention on the Future of Europe which debates the constitutional changes in the run-up of 2004 regarding this dilemma between the two distinct and opposing rationales. Can the convention offer a way forward towards creating conditions for equal treatment between current and future member states? After all, the candidate countries are expected to act according to the compliance rationale and practice rule-following with a view to the policy of conditionality that governs enlargement; yet at the same time, they are called to constructively participate in the convention and in the wider public debate on the future of Europe.<sup>77</sup> The candidate countries are thus forced into a process of opposing identity formation which paves the way for a fragmentation among the future members of the constitutional community which raises four central questions; first, are restricted participation and opposing identity formation favorable factors for a successful outcome of the finality debate (*i.e.* agreement about the form and substance, and resonance of both within the respective member state); second, what is the contribution of the convention to solve the dilemma; third, how could the situation be improved; and fourth, what are the long-term consequences for establishment of democratic legitimation in the process of European integration?

With reference to the different logics of action presented earlier in this chapter, it is possible to conclude that, in principle, the following conditions are necessary for democratic governance. First, according to Habermas's ideal speech situation all participants of a debate must be able to debate under equal conditions, including information, voice and vote in order to be able to generate, identify and accept shared norms. That is, all participants must, in principle, be ready for persuasion by the better argument developed by the others, and to revise their previously held position

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contributions by Schimmelfennig and Sedelmeier.

<sup>76</sup> On the principle of constitutional recognition and the proposal to institutionalize access to ongoing deliberation about constitutional issues, see J. Tully's excellent work, see note 2, and note 59.

<sup>77</sup> Thus, for example, German Minister of Foreign Affairs Joschka Fischer "encouraged Poland and the other east and central European countries which apply for membership in the European Union, to participate in the debate over EU finality", *Frankfurter Allgemeine Zeitung*, 26 January 2002, 4

accordingly. The starting point of the finality/compliance situation in the EU differs from this basic scenario. For example, the criteria set up for accession in Copenhagen have been neither sufficiently defined by the EU so as to allow for uncontested implementation (e.g. in the area of administration) nor have the EU member states been subjected to scrutiny as to whether they have implemented the criteria themselves (e.g. in the area of minority rights). In addition, the so-called transition rules, for example, in the area of freedom of movement for workers, will create unequal conditions among the group of future Union citizens. While perfectly legitimate from political and legal positions, all these are examples of areas in which the public perception of equality may not agree with the agreements on the governmental level and may therefore cause political mobilization as an unintended consequence of institution building. Furthermore, the candidate countries work with a considerable information deficit in all areas of EU policy-making and politics, including the convention, in which they have the right to voice, but not to veto. They thus enter the union with a clear structural disadvantage. Possible initiatives for democratization would be to address the information deficit by offers to participate in day-to-day policy and politics in the EU for example based on inclusive practices such as the European Parliament's 'repossess enlargement' initiative which invites candidate country representatives to participate in meetings. In conclusion however, the establishment of spaces for transnational deliberation remains a core issue on the agenda for constitutional revision. Indeed, given past experience, with a view to constitutional change the main issue appears to be less one of agreeing on a new constitutional model than establishing transnational fora for deliberation in selected policy areas in which elected representatives from political levels of governance and public associations are entitled to participate in equal and ongoing debates as European citizens.<sup>78</sup>

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[emphasis added, AW].

<sup>78</sup> See proposals by Joerges and Neyer (supranational deliberation), see Joerges/Neyer note 30; U. Puetter, Informal Circles of Ministers – A Way Out of the EU's Institutional Dilemmas? *ELJ* 9 (2003), 109 et seq.; Abromeit (sectoral veto-points), H. Abromeit/T. Schmidt, Grenzprobleme der Demokratie: konzeptionelle Überlegungen, *Politische Vierteljahresschrift* 39 Sonderheft (1998), 293 et seq.; Maduro (pluralistic citizenship), M. P. Maduro, Where To Look For Legitimacy? *ARENA* Annual Conference 2002; and from a more theoretical perspective Tully, note 59. See e.g. recent proposals to include the Open Method of Coordination in the revised constitutional treaty by G. de Búrca and J. Zeitlin, Constitutionalising the Open Method of Coordination, *Paper* 6/2003, <[http://www.fd.unl.pt/je/edit\\_pap2003-06.htm](http://www.fd.unl.pt/je/edit_pap2003-06.htm)> (10 June 2003).

#### IV. CONCLUSION

The ongoing process of enlargement with the respective challenges towards institutional adaptation requires precise understanding of the institutional framework of the EU. The calculation of necessary and expected institutional changes creates an increasing challenge for both academia and politics. While in earlier enlargement rounds that basic information was relatively easy to convey, the current enlargement process evolves within a context of increasing density of governance processes beyond state boundaries, in general, such as the influence of supranational institutions on domestic political processes (regime building, norm diffusion). Moral and ethical questions matter in world politics in addition to arithmetic and geopolitics that suggest the prevalence of allocation and distribution of resources. In other words, it is not only the focus on hard institutions such as e.g. the political organs of the EU (Commission, Council, Parliament, Court of Justice) and the formal core of the *acquis communautaire*, but also the role of soft institutions such as values, social norms, routinized practices and ideas which factor into analyses of European integration and enlargement. While neo-institutionalists have been able to explain the social push by way of spill-overs among particular policy areas, negative integration, the democratic deficit debate and now the constitutional debate have demonstrated that processes of institutionalization have spread well beyond the market and its logic. In light of the dramatic increase in prescriptions for behavior lawyers have already suggested to clean up the *acquis*.<sup>79</sup> Furthermore Brussels officials have expressed the wish to “use a hatchet to change the *acquis*, to cut it down, to revise it towards its necessity today.”<sup>80</sup> The point of these observations is that the *acquis* has acquired an institutional breadth and density that creates all sorts of unintended consequences which are in turn hardly calculable.<sup>81</sup>

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<sup>79</sup> See more in detail A. von Bogdandy/J. Bast, The European Union’s Vertical Order of Competences: The Current Law and Proposals for its Reform, *CMLR* 39 (2002), 227 et seq.; as well as von Bogdandy who stresses the importance of consequently implementing majority decisions into secondary law. A. von Bogdandy, *Europäische Prinzipienlehre*, in: A. von Bogdandy (ed.) *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge*, 2003, 149 et seq.

<sup>80</sup> Interview with a member of the European Parliament, Brussels, 28 August 2001 [on file with author].

<sup>81</sup> Wiener, see note 59.

Academic studies on hard institutions have been the standard for a long time. Different from theoretical work in International Relations theories, assessing the impact of soft institutions still has some way to go towards systematic and generalisable approaches in European integration studies, and particularly, in European legal studies despite a number of more recent contributions to the field.<sup>82</sup> This chapter sought to highlight the different avenues of analytical access to an increasingly complex body of institutions from a political science perspective in order to offer guidelines for orientation on the success and risks of strategic institution building (hard institutions) in the process of integration based on the elaboration of a more distinct perspective on societally generated processes of institutionalization (soft institutions). The chapter suggests that the latter play an important role in particular for interdisciplinary perspectives that are increasingly attractive to legal studies of European integration and offer a perspective that avoids the analytical shortcomings in inspiration and flexibility presented by dogmatic approaches in European constitutional law, arguing that the latter is likely to overlook possibilities for theoretical innovation that are necessary to include a sharper analytical perspective on changing institutional contexts and their respective impact. Including different approaches in international relations and studies of European integration allows for a dual perspective, e.g. from the nation-state up towards the EU and from world politics down towards the EU. This combination of theoretical standpoints based on the respectively different strategic rationales could eventually contribute to avoid the trap of methodological nationalism.<sup>83</sup> Different from the considerably more narrowly conceptualized boundaries in law, for which a link or even overlap between international law and national law is almost unthinkable and which therefore raises the issue of creating a new discipline of European constitutional law, the interdisciplinary link between sub-disciplines in political science, law and sociology offers reasonable and so far little used possibilities – in particular from the perspective of German law – for a more comprehensive study the process of European integration,

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<sup>82</sup> See Olsen's critical perspective on the 'Europeanization' literature, Olsen, see note 49; but see recent work by Boerzel and Risse, see note 19; Caporaso et al., see note 28; the contributions in Christiansen et al., see note 37 as well e.g. H. Farrell and A. Héritier, Formal and Informal Institutions under Codecision: Continuous Constitution Building in Europe, *European Integration online Papers (EIoP)*, 6 (2002), No. 3, 12 March 2001, <<http://eiop.or.at/eiop/texte/2002-003.htm>> (10 June 2003).

<sup>83</sup> M. Zürn, Democratic Governance Beyond the Nation-State: The EU and Other International Institutions, *European Journal of International Relations* 6 (2000), 183 et seq.

and constitutionalism beyond the state at that.<sup>84</sup> This chapter is meant as a plea to move away from the conception of European integration research as a discipline that lacks in comparative perspective and interdisciplinarity and proceeds in isolation both with a view to disciplinary boundaries and subject matter.

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<sup>84</sup> Different from the British legal approaches to European integration such as e.g. “*New Legal Dynamics of Integration*” literature (Shaw, Moore, Armstrong, Scott, DeBurca, Benkowski, Chalmers, Walker, Eversen among others), aspect of interdisciplinarity stands to be explored further. However, see the work by *Joerges and Preuss*.