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The Influence of The Constitution of The United
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Doktorska disertacija

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ON EU CONSTITUTIONALISM

DOKTORSKA DISERTACIJA

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ABSTRACT

American constitutionalism has had both a direct and indirect influence on the constitution-making process of the European Union, particularly in terms of the vertical (EU vs. Member States) and horizontal separation of powers (legislative, executive and judiciary). The tendency of European constitutional framers to look abroad for guidance was particularly understandable in the light of the European predicament after two destructive wars. In fact had it not been for the help and encouragement of the U.S. through the Marshall Plan, the indigenous efforts at European unification might have rapidly stalled. European constitution-makers were significantly inspired by the 'universal' attributes of constitutionalism and by the U.S. Constitution itself. As the empirical research done on the European Convention shows, it was mainly the emulation of the U.S. Constitution which led the European constitution-makers to change the previous practice of a step-by-step process of integration "through concrete achievements" and take a big step forward by deciding to base the European Union on a document entitled "Constitution" with some statehood artefacts such as the flag, the anthem, the president, something which caused a political backlash in the given European circumstances, which meant that the Lisbon Treaty had to eventually be based on a different structure with different political characteristics.

The main constitutional turning point took place when the European Union reached the stage of Euro-sclerosis which could have led to a deadlock with regards to further enlargement. In addition, Europe's public opinion was in an unsettled mood and the lack of a genuine popular legitimacy for the European project created the need to legitimize the EU constitutional settlement mainly developed through the jurisprudence of the European Court of Justice. The Court had made constitutional choices, which should have been made democratically by a constitution-making body. The underlying reason for the turning point from economic and political integration towards constitution-making was therefore the need to codify the existing constitutional achievements, to fill the gaps in democratic legitimacy and to create a durable constitutional settlement, which would provide European governance and shape its response to globalisation. Some EU leaders eventually broke a political taboo by publicly speaking about a constitution for the European Union. The pressure for change reached its peak during the European Council in December 2001 at Laeken in Belgium, when the Heads of State or Government of the Member States called for a fundamental debate over reform of the EU and called for the

Convention on the future of Europe. During the 1990s, the process of treaty reform had become cumbersome and ineffective, whereby the EU leaders were impelled to find a more efficient and transparent way of revising the EU system of governance. Constitutional Convention as a more democratic method of treaty revision therefore provided an example worthy of emulation. The world renowned American experience of establishing a constitution was offered as a panacea for all the shortcomings of the previous treaty revisions by Intergovernmental Conferences. However, as the work of European Convention got underway, the historical analogy with the 1787 Philadelphia Convention became less obvious. It is mainly the different *ratio constitutionis* or *finalité ultime* that helps to explain why the constitution-making process resulted in two different systems on both sides of the Atlantic. Whereas the American framers hammered out a Constitution where none had previously existed for "one nation under God, indivisible…" (as it is stated in the Pledge of Allegiance of the United States), the pursuers of a European constitutional settlement were already sovereign and independent European states, hence the objective of European constitution-makers was not to form a nation-state, but rather a polity of states "united in diversity." The underlying reason for the transformed borrowing of U.S. Constitutional provisions therefore lies in the fact that the European Union was not aspiring to becoming a uniform nation-state, but it has developed into a polity of states (the political community with its institutions). Whilst on the one hand, the research shows that the European constitutional structure has been clearly inspired by the U.S. Constitution division of powers, on the other hand different *ratio constitutionis* led the European constitution-makers to transform some features of the U.S. Constitution in a way that creates a specific constitutional settlement for a European polity without creating a supra nation-state.

The vertical and horizontal division of powers offers an example of how borrowed provisions from U.S. Constitution were given a different form in the European context. The vertical division of powers in the U.S. and the EU are similar by virtue of the fact that the supranational level holds only enumerated (conferred) powers and leaves to the states a residuary and inviolable sovereignty over all other areas. Inspired by the U.S. Constitution, where the "supremacy clause" makes the Constitution the "supreme law of the land", the European Convention delegates for the first time enshrined the principle that the "Treaties have primacy over the law of Member States". Horizontal powers, however, are divided in a different way: European constitution-makers were careful not to create strong branches of government as is the case in the United States (Congress,

President, Supreme Court) but rather define *trias politica* by function (legislative, executive and judicial function) with different national and supranational institutions involved in each of the functions, thus reflecting that the Union is a polity of states and not a uniform nation-state. Consequently the legislative function is performed almost entirely by the Union organs themselves, and the executive and judicial functions are performed to a large extent by the Member States, acting on behalf of the Union's interest. The empirical research done on the European Convention shows that the EU constitution-makers sought parallels in the oldest operating written constitution in the world, i.e. the U.S. Constitution, particularly for those areas of the EU system that had provoked "negative feedback" and pressure for change. For example, the eagerness of the EU institutions to acquire more and more competences, often by stealth, increased demands for clearer delineation of powers between supranational and national level. Inspired by American constitutionalism, the European constitution-makers for the first time explicitly defined in the European Constitution (and retained in the Lisbon Treaty) that the limits of Union competences are governed by the "principle of conferral" and that the area of Union competence is governed by the principles of subsidiarity and proportionality. Demands to strengthen the protection of fundamental rights of the citizens vis-à-vis the Union, found its source of inspiration in the American Bill of Rights, and the need for European Citizenship irrespective of nationality followed the example of dual citizenship, which is also an innovation of American constitutional framers. The EU constitution-makers were even influenced by Kissinger's sardonic remark and international critics that the EU fails to speak with one voice and they thus responded by creating new positions of the full-time President of the European Council and the High Representative of Foreign Affairs and Security policy. However, the final compromise for the EU constitutional settlement (as it stands at present according to the Lisbon Treaty) was influenced by a variety of factors embracing both *endogenous constraints* (i.e. the Convention agenda setting with the predominant role of its Chairman, different delegates' preferences owing to their institutional background) and *exogenous constraints* imposed by various holders of power (i.e. the EU institutions pursuing an institutionalized perspective, member state leaders fighting for state sovereignty, and European citizens expressing their discontent through referenda). For the European constitution-makers, the main challenge was to work within the constraints of the existing political and cultural reality and not to trespass on the mandate which was to create a functional constitutional order for a Union of sovereign states and not for a unified nation-state. The constitutional

essentials of the European polity were therefore forged out of the tension between national and supranational forces. This brought into the forefront the distinctiveness of the European constitutional experiment, whose purpose has been to find the best arrangement for serving the common interest of the Member States, who are themselves deeply rooted nation-states and do not want to mutate into a European federal state. The nation-states that founded the Union want to remain the bearers of genuine statehood and retain the symbols of national identity.

Whilst the U.S. Constitution was established for the newly founded states who were enjoying a high degree of cultural and political homogeneity, European Union constitutionalism has developed out of more complex and long-established entities, each with its own distinctive history and tradition. This unique historical experience created a *sui generis* European constitutional settlement, autonomous from the legal order of its Member States on the one hand and from international law on the other.

The issue of finality (*ratio constitutionis*) is also a basis for hypothesis on prospects for future EU constitutionalization in the light of American constitutional development. The most recent constitutional conundrum suggests that further EU constitutional development is likely to continue incrementally, through treaty implementation, secondary legislation, and the ECJ's jurisprudence. Similar to the American constitutional development, with a long tradition of marginalized groups utilizing the courts to challenge existing governance structure, it is expected that EU supranational institutions and Member States' interest groups will utilize the ECJ strategically to expand the integration project. In particular, the legally binding EU Charter of Fundamental Rights will provide new opportunities to advance the protection of human rights and fundamental freedoms. Moreover, the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is likely to expand the meaning of EU law, by adapting rather abstract rights to concrete situations. Accession to the ECHR can be considered as the crowning achievements of European cooperation, which was evolving on two dimensions (through the Council of Europe, developing a "European Bill of Human Rights" on the one side, and through economic and political integration within the European Union on the other side). It is a historical moment as these two rather separate dimensions are coming into play in a way that brings the promise of developing the highest possible human and fundamental rights protection in the world.

POVZETEK

Ameriški ustavni sistem je imel posredni in neposredni vpliv na proces konstitucionalizacije pravnega reda Evropske unije, zlasti na določbe, ki opredeljujejo vertikalno (EU - države članice) in horizontalno delitev oblasti (zakonodajna, izvršna in sodna veja). Težnja sooblikovalcev konstitucionalnega sistema Evropske unije po prevzemanju t. i. primerov dobre prakse od drugod je bila zlasti razumljiva v luči težavnega položaja Evrope po dveh rušilnih vojnah. Prvi zametki evropske integracije bi verjetno kmalu zamrli, če ne bi bilo politične in celo finančne podpore Združenih držav Amerike v obliki Marshallovega načrta. Evropski ustavni sistem se je navdihoval tako po univerzalnih ustavnih atributih, kot po Ustavi Združenih držav Amerike. Kot kaže empirična raziskava Evropske konvencije, je zgledovanje po Ustavi Združenih držav Amerike v veliki meri vplivalo na odstop od pretekle prakse o postopni integraciji "s pomočjo konkretnih dosežkov", kar je Evropske voditelje vodilo k skokovitemu sprejetju formalnega ustavnega dokumenta, z atributi državnosti, kot so zastava, himna, predsednik, kar je v danih evropskih razmerah naletelo na tolikšen odpor, da je morala biti Lizbonska pogodba osnovala na bistveno drugačni strukturi in drugačnih političnih karakteristikah.

Evropska unija je doživela bistven ustavni preobrat v kritičnem obdobju t. i. evro-skleroze, ki bi s širitvijo Unije lahko vodila celo v zastoj. Zaradi demokratičnega deficita se je razširjal evro-skepticizem in potreba po legitimaciji evropske ustavne ureditve, ki se je razvijala zlasti preko sodne prakse Sodišča Evropske unije. Sodišče je tako sprejemalo ustavne odločitve, ki bi jih moral demokratično sprejeti ustavodajni organ. Osnovni razlog za zasuk od ekonomske in politične integracije h konstitutionalizaciji leži torej v potrebi po kodifikaciji doseženega ustavnega razvoja, zapolnitvi vrzeli v demokratični legitimnosti in oblikovanju trajnega ustavnega sistema, ki bi zagotovil Evropsko vodstvo in sooblikoval odziv na globalizacijo. Nekateri evropski voditelji so tako prelomili politični tabu z javno omembo »ustave« v povezavi z Evropsko unijo. Pritisk po spremembi je dosegel vrhunec na Evropskem Svetu v Laekenu (v Belgiji) decembra 2001, ko so voditelji držav ali vlad držav članic pozvali k temeljiti razpravi o reformi Evropske unije in sklicali Konvencijo o prihodnosti Evrope.

V devetdesetih letih je bila vsaka reforma temeljnih pogodb Evropske unije slabša od prejšnje, kar je evropske voditelje prisililo k iskanju bolj učinkovite in transparentne poti preoblikovanja evropskega sistema. Ustavodajna konvencija je bila zgled za bolj

demokratično metodo revizije pogodb. Svetovno znana ameriška izkušnja oblikovanja ustave se je torej ponudila kot »panaceja« za vse pomanjkljivosti preteklih revizij temeljnih pogodb v okviru Medvladnih konferenc. Vendar pa je zgodovinska analogija med filadelfijsko konvencijo, iz katere se je rodila Ustava ZDA leta 1787, in Evropsko konvencijo postajala vedno manj očitna s poglabljanjem razprave o Evropski uniji. Gre predvsem za različen *ratio constitutionis* oziroma končni cilj ustavne reforme, ki pojasni zakaj je konstitutionalizacija privedla do dveh različnih sistemov na obeh straneh Atlantika. Medtem ko so oblikovalci Ustave ZDA skovali ustavo, kjer pred tem nobena ni obstajala, za »en narod pod Bogom, nedeljiv« (kot pravi slovesna zaobljuba zvestobe Združenim državam), so evropski ustavodajalci oblikovali ustavni sistem v kontekstu že obstoječih ustavnih tradicij držav članic in temelje ustavne ureditve postavili na načelo »združeni v raznolikosti« in tako niso sledili cilju oblikovanja enotne nacije. Osnovni razlog za t. i. preoblikovano prevzemanje določb Ustave ZDA torej leži v dejstvu, da si Evropska unija ne prizadeva postati uniformna nacija, ampak se je razvila v obliko mednacionalnega vladanja (kot politična skupnost z nadnacionalnimi institucijami). Medtem ko po eni strani raziskava kaže na to, da se je ustavni sistem Evropske unija občutno navdihoval po ameriški ustavni ureditvi, je po drugi strani bistveno različen *ratio constitutionis* vodil člane Evropske konvencije in voditelje držav članic do preoblikovanja nekaterih ameriških ustavnih določb na način, ki je bolj ustrezal specifični evropski obliki vladanja, brez oblikovanja nad-nacionalne države.

Primer vertikalne in horizontalne delitve oblasti dobro kaže na to, kako so nekatere prevzete določbe ameriške ustave dobile različno obliko v evropskem kontekstu. Nedvoumna podobnost pri vertikalni delitvi oblasti v ZDA in EU je v tem, da nadnacionalna raven poseduje samo prenesene pristojnosti, medtem ko države članice ohranijo vse pristojnosti, ki niso s pogodbo dodeljene Uniji. Po zgledu Ustave ZDA, kjer »klavzula o vrhovnosti« daje ustavi status »vrhovnega prava«, so člani Evropske konvencije prvič vnesli načelo, da imajo »pogodbe prednost pred pravom držav članic«.

Horizontalna delitev oblasti pa je organizirana na različen način: oblikovalci evropske ustavne ureditve so pazili, da niso ustvarili močnih organov oblasti kot v primeru ZDA (Kongres, Predsednik, Vrhovno sodišče) in so raje definirali *trias politica* po funkciji izvajanja oblasti (zakonodajna, izvršna in sodna funkcija) in v izvajanje vsake od teh funkcij vpeli različne nacionalne in nadnacionalne institucije, kar ponovno kaže na to, da je Unija politična skupnost držav in ne uniformna nacija. Posledično, zakonodajno

funkcijo opravljajo skoraj v celoti organi Unije, medtem ko izvršno in sodno funkcijo v veliki meri izvajajo države članice, ki pri tem delujejo v interesu Unije.

Empirična raziskava Evropske konvencije kaže na to, da so ustavodajni delegati iskali vzporednice v najstarejši veljavni pisani ustavi na svetu, to je v Ustavi ZDA, zlasti za tista področja evropskega sistema, kjer se je izkazala potreba po spremembi zaradi »negativnega odziva«. Na primer, pretenzija institucij Unije po prevzemanju vedno več pristojnosti, pogosto na prikrit način, je izzvala zahteve po jasnejši razmejitvi oblasti med nadnacionalno in nacionalno ravnjo. Evropski ustavodajni delegati so se tako navdihovali po ameriški ustavni ureditvi, ko so prvič jasno vnesli »načelo prenosa pristojnosti« v Evropsko ustavo (in ohranili v Lizbonski pogodbi), ki omejuje pristojnosti Unije in nadalje določa, da za izvajanje pristojnosti Unije veljata načeli subsidiarnosti in sorazmernosti.

Zahteve po učinkovitejšem varstvu temeljnih pravic državljanov vis-a-vis Unije, so našle vir navdiha v Ameriški Listini Pravic (Bill of Rights), in potreba po državljanstvu Unije ne glede na nacionalnost je sledila zgledu dvojnega državljanstva, ki je prav tako inovacija ameriške ustavne konvencije. Na člane Evropske konvencije je vplivala celo Kissingerjeva opazka in mednarodne kritike, da Evropa ne govori z enotnim glasom, na kar so reagirali z ustanovitvijo novih pozicij Predsednika Evropskega sveta in visokega predstavnika Unije za zunanje zadeve in varnostno politiko.

Vendar je na končni kompromis evropske ustavne ureditve (kot trenutno obstaja v skladu z Lizbonsko pogodbo) vplivala vrsta dejavnikov, ki predstavljajo tako *endogene* omejitve (agenda, vsiljena s strani Konvencije in dominantna vloga njenega predsednika, različne institucionalne preference delegatov) kot *eksogene* omejitve vsiljene s strani nosilcev oblasti (EU institucije zasledujoč institucionalno perspektivo, voditelji držav članic zagovarjajoč suverenost držav in evropski državljani izražajoč nezadovoljstvo preko referenduma). Za oblikovalce ustavne ureditve je bil torej največji izziv delovati v okviru omejitev obstoječega političnega konteksta in tako ne preseči mandata, ki je obsegal oblikovanje delujoče ustavne ureditve za Unijo suverenih držav in ne za uniformno nacijo. Ustavni temelji evropske oblike vladanja so bili torej izklesani iz napetosti med nacionalnimi in nadnacionalnimi silami. Prav to poudarja posebnost evropskega ustavnega eksperimenta, katerega namen je najti najboljši dogovor za služenje skupnemu interesu držav članic, ki so globoko ukoreninjene nacije in ki ne želijo mutirati v evropsko federalno državo. Nacionalne države ustanoviteljice Evropske unije želijo ostati nosilke državnosti in simbolov nacionalne identitete.

Medtem kot je bila Ustava ZDA sprejeta za novoustanovljene države z veliko stopnjo kulturne in politične homogenosti, se je ustavna ureditev Evropske unije razvijala za bolj kompleksne in globoko ustaljene državne tvorbe, vsaka s svojo lastno značilno zgodovino in ustavno tradicijo. Tovrstna edinstvena zgodovinska izkušnja je izoblikovala evropsko ustavno ureditev *sui generis*, avtonomno tako od pravne ureditve držav članic, kakor tudi od mednarodnega prava.

Ratio constitutionis evropskega povezovanja je tudi temeljno izhodišče za napoved vplivov ameriške ustavnosti na razvoj konstitucionalizacije Evropske unije v prihodnje. Evropski pravni red se je razvil postopoma na priraščen način, zato lahko v luči ponesrečenega poskusa prehitre vzpostavitve evropske ustave pričakujemo, da se bo postopen razvoj nadaljeval tudi v prihodnje, in sicer v okviru *obstoječega* ustavnega okvira. Podobno Ameriškemu ustavnemu razvoju, z dolgo tradicijo gibanj, s katerimi so marginalne skupine koristno uporabljale sodišča za oporekanje obstoječi vladni strukturi, je na ravni EU pričakovati, da bodo nad-nacionalne elite EU in interesne skupine držav članic strateško uporabile sodišče zlasti za napredek v varstvu človekovih pravic in svoboščin. Prvič, veliko vprašanj se postavlja v zvezi z »vrednotami Unije«, ki so prvič izrecno navedene v Lizbonski pogodbi, kar pomeni, da državljani črpajo svoje pravice iz skupnega kataloga vrednot. Drugič, na področju pravno zavezujoče Listine EU o temeljnih pravicah lahko v prihodnje pričakujemo, da bo Sodišče EU s pogumno in razvojno razlago določb v korist razvoja človekovih pravic še okrepilo pozicijo branika človekovih pravic in temeljnih svoboščin. Tretjič, pristop Evropske unije k Evropski konvenciji o varstvu človekovih pravic in temeljnih svoboščin (EKČP) bo vnesel novo dimenzijo v pravno ureditev EU, kajti s formalno podreditvijo evropskega pravnega reda zunanjemu pravnemu nadzoru, ki ga izvaja Evropsko sodišče za človekove pravice v Strasbourgu, je upravičeno pričakovati razvoj v smeri prilagoditve navidezno abstraktnih pravic v konkretne odločitve. Pristop Evropske unije k EKČP lahko označimo za »krono« evropskega sodelovanja, ki se je po drugi svetovni vojni praktično razvijalo na dveh ravneh. Pravzaprav gre za zgodovinski dogodek, ko se ti dve navidez ločeni, pa vendarle zelo uspešni dimenziji evropskega sodelovanja (sodelovanje v Svetu Evrope in Evropski uniji), združujeta na način, ki prinaša obete o razvoju najvišje možne ravni varstva človekovih pravic in svoboščin na svetu. V očeh evropskih državljanov lahko tako Evropska unija pridobi na popularnosti zlasti z dodelitvijo več pravic posameznim državljanom. Evropski politični sistem lahko na ta način izboljša tudi politično legitimnost in razpoznavnost.

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ABBREVIATIONS

CAP   Common Agricultural Policy

CFSP   Common Foreign and Security Policy

CSDP   Common Security and Defence Policy

EEC   European Economic Community (EC after the 1992 Maastricht Treaty)

EC   European Community / Communities

ECJ   European Court of Justice

ECHR   European Convention for the Protection of Human Rights

ECSC   European Coal and Steel Community

EURATOM European Atomic Energy Community

EP   European Parliament

EU   European Union

GDP   Gross Domestic Product

IGC   Intergovernmental Conference

MEP   Member of the European Parliament

QMV   Qualified Majority Voting

US   United States of America

LISTS OF TABLES

1 INTRODUCTION

This dissertation deals with the influence of the Constitution of the United States of America (hereafter the U.S. Constitution) on the *constitutionalization* process of the European Union, which culminated in the Treaty establishing a Constitution for Europe (hereafter the European Constitution), and which was eventually revised by the Lisbon Treaty.[1] The analysis focuses in particular on a system of separation of powers, the way the power is divided vertically amongst national and supranational levels, and horizontally, between the legislative, executive and judicial branches.

The American Federal Constitution is the oldest and, by all accounts, most successful operating written constitution in the world. Framed in 1787 it was without precedent. The innovations brought by American constitutionalism justified the motto of the Great Seal of the United States: *Novus ordo seclorum:* "A New order of the Ages". No country had ever adopted a single document constitution based on consent freely and popularly given, that had the status of supreme law. The American constitutional development took two centuries to be implemented, provoked a terrible Civil War to settle the biggest unresolved questions, and underwent an imperialistic dilemma "does the Constitution follow the flag?"

Abroad, it ranks amongst the greatest and most influential constitutions in world history, for several reasons, as highlighted by the constitutional historian George Athan Billias:

> One is its longevity as the oldest national written constitution in the world. Another is its durability. It has survived all manner of tests, including the Civil War, and achieved its adaptability through judicial reinterpretations of its words and with a minimum of amendments. It is also remarkably brief… Finally and most importantly, the Constitution created a new concept of federal political power (Billias 2009, 32).

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[1] Throughout the dissertation references are made to the Treaties on which the European Union is founded, which means European law as it presently stands according to the Lisbon Treaty (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the EU, C83, 30 March 2010). When reference is made to the Treaty establishing a Constitution for Europe, it is accompanied by reference in the Lisbon Treaty (in case the provision was kept in the ratified Lisbon Treaty). According to the Lisbon Treaty (Article 1, third paragraph) the European Union replaced and succeeded the European Community. For convenience, the dissertation generally uses the term European Union.

Time and again constitutionalists considered the U.S. Constitution in their role as catalysts, examples or inspirational models. The French Alexis de Tocqueville called it "a veritable work of art" and "the best of all known federal constitutions", for the German political scientist Robert von Mohl the U.S. Constitution was the "miracle of our time", the French philosopher de Ségur considered it "one of history's most remarkable creations", and for the Swiss constitution-makers Zschokke and Troxler, the U.S. Constitution had universal significance "which from now on in the history of the world must be looked upon as the authoritative pattern of all federal republics" (quoted in Billias 2009).

American constitutionalism has had a powerful impact upon political systems abroad. As Warren E. Burger, Chairman of the Commission on the Bicentennial of the United States Constitution, put it: "Our Constitution has had as great an impact on humanity as the splitting of the atom" (Burger quoted in Bowen 1986, 10).

The United States, as a well-functioning political order, offers wide opportunities for providing an example worthy of emulation. American influence and borrowing of the features of American constitutionalism on EU constitutionalism has to be understood as a dynamic process during the whole EU integration.

The main incentive for the study about how the American constitutional tradition influenced the European integration and European *constitutionalization* was given when the idea of discussing the future of Europe in constitutional terms gained steady momentum and when the final task of giving formal expression to the constitutional nature of the European Union was handed to the Convention on the Future of Europe (hereafter the European Convention). The constitutional reform process of the European Union was formally launched in 2001 by the European Heads of State or Government at the European Council at Laeken, Belgium. The work of the European Convention was often compared to the drafting of the U.S. Constitution in Philadelphia in 1787 and therefore engendered discussion about the relationship between the constitution-making process in the United States and the EU. Moreover those who framed the European Constitution regularly made reference to the U.S. Constitution during their intensive deliberations between February 2002 and July 2003. The President of the European Convention Valéry Giscard d'Estaing particularly emphasized in his interview with the author (Giscard d'Estaing 2007) that he was casting about for some "good practices" in

the American constitutional experience and its political system. The position papers prepared by a think tank group of experts at the University of Florence for the Convention Vice-President Giuliano Amato often referred to the American practice. Some Convention delegates also took time to discuss this issue with the American lawyers and politicians during their special trip to the United States.[2]

Evidence for tracing influence may be found in a wide range of sources. Historically, the United States has played a considerable role in the process of European integration and the EU is still learning from America's long and multifaceted constitutional experience.

The *main hypothesis* of the dissertation is that American constitutionalism has had a direct and indirect impact on the constitution-making process of the European Union, particularly in terms of the separation of powers.

The *sub hypothesis* argues that the influence of American constitutionalism has been limited by the political and cultural circumstances in the European Union and by its interconnection with the Member States' constitutions. As a result constitutional borrowing was transformed to suit European tradition.

In terms of the *indirect* impact, American constitutionalism echoed through European nation-states, which consequently framed the European constitutional system.

The idea of a United States of Europe (which evokes the example of the United States of America) with continent-wide constitution was expressed at different times, most explicitly by Winston Churchill in 1946: "We must re-create the European Family in a regional structure called, it may be, the United States of Europe."[3] The origin of the idea

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[2] Chairman of the European Convention Valéry Giscard d'Estaing went to Washington in February 2003 and had talks with Colin Powell, State Secretary, Alan Greenspan, President of the Federal Reserve. Moreover, he held a public discussion about the European Convention at "The Henry Kissinger Lecture". Vice-Chairman Giuliano Amato went to New York in March 2002 and discussed "Europe's Constitutional Convention and the future of Europe" at the Council for Foreign Relations, The American-European Community Association and Jean Monnet Seminar on Europe NYU Law School. In addition, the European Parliament organized a visit (for the EP representatives in the European Convention) to the U.S. Congress in Washington D.C. in June 2003. Source: http://european-convention.eu.int/agenda.asp?lang=EN (Website accessed on 12/10/2010).
[3] Winston Churchill, speech delivered at the University of Zürich, September 19, 1946:
"I wish to speak to you today about the tragedy of Europe. (...) If Europe were once united in the sharing of its common inheritance, there would be no limit to the happiness, to the prosperity and the glory which its

of a United States of Europe can be traced even earlier, as presented by Victor Hugo at the International Peace Congress in Paris, 1849.[4]

As soon as the Philadelphia Convention signed the Constitution in September 1787, one of its notable delegates Benjamin Franklin sent it "to friends in Europe" and wrote: "I do not see why you might not in Europe carry the project of good Henry the Fourth into execution, by forming a Federal Union and one grand republic of all its different states and kingdoms; by means of a like Convention; for we had many interests to reconcile" (Franklin quoted in Bowen 1986, 281).
And there was much more than "the interests to reconcile."

The European Movement, established in 1948 for the cause of European integration, "benefited a large donation from the USA, namely from the CIA" (Dumoulin 2010, 5). Jean Monnet (acclaimed as one of the founding fathers of the European Union) had led the Europe-wide Action Committee for a United States of Europe from 1951 until 1975, whose purpose was to act as a pressure group for closer European integration, which would culminate in a federal Europe.

Concerning the *direct* influence of American constitutionalism on European integration, the research study has shed new light on some areas; listed below are the most important, which may still not represent an exhaustive account of all nuances of American impact:

1) The Marshall Plan and process of European integration

A considerable burst of influence occurred after the Second World War, with the American concept providing a measure of guidance for the makers of European

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three or four hundred million people would enjoy. (…) I must now sum up the propositions which are before you. Our constant aim must be to build and fortify the strength of the United Nations Organization. Under and within that world concept, we must re-create the European family in a regional structure called, it may be, the United States of Europe. And the first practical step would be to form a Council of Europe. If at first all the States of Europe are not willing or able to join the Union, we must nevertheless proceed to assemble and combine those who will and those who can. (…) In all this urgent work, France and Germany must take the lead together. Great Britain, the British Commonwealth of Nations, mighty America, and I trust Soviet Russia - for then indeed all would be well - must be the friends and sponsors of the new Europe and must champion its right to live and shine" (Churchill 1946).

[4] "There will come a day when all of you, France, Russia, Italy, Britain, Germany, all you nations of this continent, without losing your distinctive qualities or your glorious individuality, will merge closely into a higher unity and will form the fraternity of Europe. (…) Two huge groups will be seen, the United States of America and the United States of Europe holding out their hands to one another across the ocean" (quoted in Bainbridge and Teasdale 1996, 35).

integration. The United States was recognized as the prime mover behind European integration. The dissertation provides an insight into the American impact on European unification formally started with The Marshall Plan (1947). The American proposal to assist European economic reconstruction after two destructive wars involved "no less than the projection of American corporatism in Europe" (Miscamble 1992, 42). The historian Michael Hogan (1987) traced the roots of the Marshall Plan in the context of America's twentieth-century search for a new economic order at home and abroad.

By all accounts, the rules of competition at the EU level were adopted alongside the Marshall Plan in the late 1940s and early 1950s. American aid undoubtedly came with many conditions in terms of the formation of a single large market without restrictions on the movement of goods, services, labour, and capital throughout the Union. Both the American and European systems feature broad and flexible clauses, which authorize the federal legislature to regulate interstate commerce.[5]

As revealed in a historical account based on a collection of memories of the European officials working at the European Commission, American influence could be perceived in every important decision during the process of European integration, for example, the development of the European agricultural policy (Common Agriculture Policy) when "the American president Kennedy was lobbying in Germany for common prices for European agricultural produce" (Dumoulin 2007, 173), or during the establishment of a common European monetary policy cooperation.[6] When it came to the enlargement issues, for example, the American 'pressure' on EU leaders was reported in order to start negotiations for Turkey's accession to the European Union.[7]

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[5] U.S. Constitution: Art. 1, Section 8 (3) The interstate commerce clause. Lisbon Treaty, Art. 3 of the Treaty on European Union, whose objective is the establishment and functioning of the "internal market" (in the previous treaties referred to as "common market").

[6] The indirect American influence related to the European monetary policy cooperation was shown in the research of Schmitter (1996, 13), who draws attention to the fact that European monetary policy cooperation began to evolve after US president Nixon's decision to take the dollar off the gold standard in 1971. Schmitter (1996) argued that Member States have adopted the single currency as a matter of rational self-interest. These interests have included a desire to challenge US dollar hegemony and France's determination to anchor a unified Germany to the West and to wrest a degree of control over monetary policy from the Bundesbank.

[7] Turkey applied for membership of the European Union in 1987. Instead of "full membership" the EU leaders favoured "special enhanced relationship". This had been an idea advocated by Christian Democrats in Europe, and Valéry Giscard d'Estaing, President of the European Convention, who initiated a new provision on "special relationship with neighbouring countries" (new provision introduced by the European Constitution and kept in the Lisbon Treaty, Art. 8 of the Treaty on European Union). However, Turkish lobbying reached the peak at the European Council in December 2004 when the EU leaders eventually agreed to open accession negotiations, also due to American pressure, it was reported: "the United States intervened in all directions to secure the unimpeded beginning of accession negotiations between the European Union and Turkey. Despite repeated official statements by the Bush administration, that it is an

This dissertation does not however analyze in depth the impact of those 'interventions' which could be considered as a 'normal' action in international relations. The research study focused on a more 'system-related' impact that American constitutionalism exerted on the European system, in particular the separation of powers and fundamental rights protection.

2) Federalism[8]

Federalism, that form of government in which power is divided between a central authority and smaller or locally autonomous groups is not an American invention, as its history stretches back to ancient Greece, but those who framed the U.S. Constitution were the first nation builders to overcome the problems encountered in earlier attempts at federal unions (Billias 2009). The U.S. Constitution thus created a new concept of a federal political order.

Keeping a balance of power was also the main objective of the European constitutional framers. In fact, much of the debate over a suitable form of European Union has been in terms reminiscent of those over the American Confederation. For a decade or more after the Second World War, the main debate amongst those favouring the unification of Europe was over the issue of federalism versus confederalism. The founding fathers of the EU were practically 'federalists' in a way Monnet described it in his *Memoirs*:

> The pragmatic method we had adopted would … lead to a federation validated by the people's vote; but that federation would be the culmination of an existing economic and political reality, already put to the test … it was bringing together men and practical matters (Monnet 1976, 367).

The Unfinished Federal State a noteworthy book by Walter Hallstein (1969), the first president of the High Authority (renamed the European Commission by the Treaty of Rome, 1957), also showed the idea of a step-by-step process of integration with a clear final vision: a "United States of Europe" in the classical form of federal statehood. This vision was not without controversy. The European Economic Community was then born

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internal issue of the EU in which the U.S. is not involved because it is not an EU member, the U.S. Secretary of State Condoleezza Rice exercised her influence in telephone conversations with European counterparts of hers, as well as with the Turkish government" (Source: Athens News Agency, available on http://www.greekembassy.org/Embassy/content/en/Article.aspx?office=3&folder=361&article=15877 - Website accessed on 12/10/2010).

[8] Latin term *foedus* - from which the term federal derives – means covenant, compact, bargain, or contract.

out of the disappointment over the failure of the much more ambitious project of a European Defence Community, "a project which carried the mission of serving as a 'first pillar' of the aspired European federal state" (Oeter 2010, 57). The federal vision suffered setbacks, mainly with Charles de Gaulle's initiatives of a purely intergovernmental political union. Consequently the EU construction developed into a new form of supranational integration, or as the architect of the European Constitution Giscard d'Estaing put it: "Europe's answer to the question 'federation' or 'confederation' is the acknowledgement that the Union is a unique construct, which borrows from both models" (Giscard d'Estaing 2003a, 8). From the outset, the project of European integration demonstrated features of a federal construction. The current 'institutional settlement' of integration can be placed somewhere between the classic poles of 'federal statehood' and 'confederation' which is characterized by supranational and intergovernmental features.

It was particularly the development of the concept of primacy of EU law (by the case law of the European Court of Justice in 1964) that "transformed, federalized and constitutionalized the relationship between Union and Member States" (Von Bogdandy and Bast 2010, 32). Inspired by the "supremacy clause" of the U.S. Constitution (Article VI), the primacy of EU law was for the first time enshrined in the European Constitution (and retained in the Declaration concerning primacy in the Lisbon Treaty,).

3) Vertical division of powers

The U.S. Constitution is the leading example of a Constitution embodying the doctrine of the separation of powers. The EU incontestably resembles the U.S. system in possessing both a vertical (EU vs. member-state level) and a horizontal division of powers (the legislative, executive and judicial branches of the Union). Many features of the EU vertical division of power were derived from the American federal system, for example, the tenth amendment of the U.S. Constitution, clearly stating that the powers not delegated to the supranational level are reserved to the states.

4) Horizontal division of powers

Trias politica, the power balanced between the legislative, executive and judicial branches is one of the most influential characteristics of the U.S. system abroad. During the European constitutional development, the so called "Institutional triangle" has been developed as an incomplete picture of *trias politica.*

In terms of drawing lessons from the American experience, Jean Monnet was very much influenced by the Independent agencies of the United States government. "Monnet seemed to mirror the idea of free standing federal bodies, which were appointed by the politicians, but entrusted then with independent authority jurisdiction within the law. The establishment of the High Authority at the European level bore a striking resemblance to the Independent agencies in the U.S. government" (Teasdale Interview 2009).

During the European Convention, there were also some unsuccessful attempts at borrowing from the U.S. Constitution. Giscard d'Estaing tried to mirror the U.S. bicameral democratic system, when he proposed establishing a Congress of Peoples of Europe (like U.S. Congress). The proposal was rejected and the system of double majority voting adopted, establishing the dual sovereignty of people and the Member States, following the same idea of a composition of the House of Representatives and the Senate in the U.S. Constitution. When seeking to define the role of the European Parliament in the process of the nomination of the European Commission's President, Giscard d'Estaing found another inspiration in the U.S. Constitution, notably in the principle "advice and consent".[9] As Giscard d'Estaing explained, similarly as the U.S. founding fathers introduced the principle requiring the President to gain the advice and consent of the Senate to balance power in the federal government, he "followed this pattern to give the European Parliament the power to elect the Commission's President and when international agreements are concluded, the Parliament has to give its consent" (Giscard d'Estaing 2003, 54). The dissertation analyses in-depth the specific features of the horizontal division of powers inspired by the U.S. Constitution and developed in a specific form in the EU.

5) Constitutional Convention

According to Billias (2009) American constitutionalism brought some remarkable political inventions that became norms for worldwide practices. One of them is the principle that constitutions should be drawn up by constituent constitutional conventions. Similarly, the convention as a method of treaty revision was adopted by EU leaders in

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[9] The term "advice and consent" first appears in the U.S. Constitution in Article II, Section 2, Clause 2, referring to the Senate's role in the signing and ratification of treaties. This term is then used again, to describe the Senate's role in the appointment of public officials, immediately after describing the President's duty to nominate officials.

order to meet demands for more representative composition of constitution framers and therefore more legitimate outcome. Moreover, the idea and role of the European Convention were often compared to the Philadelphia Convention, in particular by its President Giscard d'Estaing, who often evoked some parallels with his role in Madison and Washington positions in the Convention. Eventually, the key role played by Giscard d'Estaing (mainly in terms of personality and agenda-setting strategy) could be compared to the role played by Madison (who was the primary strategist, known today as "father of the Constitution") and Washington (the personality of unity at the Philadelphia Convention).

6) Constitutionalization and judicial review

The judicial review to check the authority of the executive and the sovereignty of legislative branches is another American innovation, Billias argues (2009). U.S. Supreme Court decisions soon became an integral part of American constitutionalism (Ackerman 1998). Similarly to the U.S. constitutionalism, the most significant incremental approach of EU constitutionalization took place at the European Court of Justice (ECJ), through the landmark legal cases. The ECJ has power to control the conformity of the Member States' behaviour with European Law, and ensure legal protection against measures by the Union. In constitutional terms this doctrine of the judicial review is very similar to what the U.S. Constitution established in 1787.

An important common feature of the U.S. and the EU judicial system is the fact that both courts act as constitutional and supreme courts at the same time. In the same way as the U.S. Constitution established the U.S. Supreme Court, the first Treaty establishing the European Coal and Steel Community (ECSC), signed in Paris on 18 April 1951, established the Court for any conflict that might arise. "Most of the international treaties do not establish a court, while the ECSC Treaty did establish it from the outset," one judge of the ECJ observed (Ilešič Interview 2010). The European Union thus created a judicial organ analogous to the U.S. Supreme Court. Similar to the role of the U.S. Supreme Court (particularly under Chief Justice Marshall) in consolidating American constitutional law, the ECJ played the leading role in early constitutionalization.

The Treaties[10] upon which the European Union legal order is based was formally recognized as a "European constitutional settlement", according to the case-law of the European Court of Justice. The jurisprudence of the ECJ was developed on the premise that the EU Treaties constitute the "constitutional charter of a Community based on the rule of law".[11] Constitutionalization of the EU during the foundational period was judicially driven mainly through four landmark decisions of the European Court of Justice establishing the 'constitutionalizing' doctrines of direct effect, supremacy of Community law, implied powers and human rights. The constitutionalization narrative generally starts with those decisions aiming at a strengthening of the effectiveness of the law and of its autonomy.[12] This laid the foundation for a step-by-step development of the EU's constitutional system and provided a window of opportunity for the political project of basing the European Union on a fully-fledged EU Constitution. The project of basing the EU on a document entitled "Constitution" has failed. Nonetheless, no political actor can challenge the ECJ jurisprudence that was developed on the premise that the founding treaties are of constitutional character.

7) Bill of Rights

Further evidence of the American model can be found in the EU constitutional system, for example, the European constitutional framers introduced a large spectrum of fundamental rights in the form of the EU Charter of Fundamental Rights, following the U.S. constitutional process, which incorporated The Bill of Rights as the first ten amendments to the U.S. Constitution in 1791 and thus completed the balance of power between people and the state by redressing the claim of individual rights against control by federal government. The bill of rights tradition was established by American constitutionalism along with Britain, France and even Hungary (see 2.3.2. Comparative Constitutional Theory).

Similarly, the legally binding EU Charter of Fundamental Right as part of the treaty gives the European Court of Justice the competence to deal with all rights from the Charter. It

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[10] Treaty of Rome in 1958, Single European Act in 1987, Maastricht Treaty in 1993, Amsterdam Treaty in 1999, Treaty of Nice in 2003, Lisbon Treaty in 2009.

[11] ECJ, Case 294/83 Les Verts vs. European Parliament (1986) E.C.R. 1339. Para. 23; ECJ, Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* (1991) E.C.R. I-6079, Para. 2 ("the EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law").

[12] The autonomy of Community law was in particular defined by ECJ Case 6/64 *Costa v ENEL* [1964]

also means that Europe is united by law and values. The constitutional principles are now found in the Lisbon Treaty, recognising "the rights, freedom and principles set out in the Charter of Fundamental Rights of the European Union."[13] Moreover, the Charter has been given international implications as its rights and values have to be respected when the EU concludes the international agreements.

8) Dual citizenship

American constitutional framers were the first to create the concept of dual citizenship of the people. Under the U.S. Constitution, Americans were to be citizens of both the United States and the states in which they resided. "Under the old theory of sovereignty an *imerium in imperio* was held to be an impossibility: two governments could not exist within the same geographical boundaries at the same time. The notion of dual citizenship, however, opened the door to exactly that" (Billias 2009, 37).

The notion of European citizenship bears a striking resemblance to this idea. The Maastricht Treaty in 1993 provided that "every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."[14] In the same way as in the United States, the European citizenship aims to ensure equal rights between nationals and members of other Member States throughout the Union.

9) Presidentialism

Presidentialism was also an invention of the American constitutional framers, when they created an executive branch headed by an indirectly elected chief executive. Presidentialism offers another example of how the American model motivated changes suited to the EU's needs.

Similarly as all delegates of the Philadelphia Convention assumed that its President George Washington would be the first occupant of the new president's office, the

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[13] Lisbon Treaty, Article 6 of the Treaty on European Union.
[14] According to the Lisbon Treaty, Article 20 of the Treaty on the Functioning of the European Union, the citizenship of the Union consists of the rights and duties such as: a) the right to move and reside freely within the territory of the Member States; b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of the State; c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

European Convention's President Giscard d'Estaing did not hide his aspiration to become the first President of the European Council. Ironically, his fellow Frenchmen were the first to prevent his bid by rejecting the European Constitution and delaying the establishment of this position, and even more ironically, the post of the first President went to Belgium, who was the most eloquent opponent of this position during the European Convention.

However, the position of President of the European Council is not comparable to the U.S. President, as explained in detail later in this dissertation.

10) Global power

The idea of Europe as a power on a continental scale, like the United States, has been present from the founding fathers to the most recent European policymakers. As one scholar accurately described:

> Jean Monnet was deeply affected by the time he spent in the U.S. His experience from living in several American cities had convinced him that there would be no contradiction between Atlanticism and Europeanism and that the notion of Europe drawn from Anglo-Saxon culture would be stronger and more likely to succeed. French President Charles de Gaulle even referred to Monnet as a 'Great American rather than Frenchman'. But in fact they both shared a desire that Europe and America should develop as equals (Teasdale Interview 2009).

When President of the European Convention Giscard d'Estaing participated at "The Henry Kissinger Lecture" in Washington, he expressed a confidence that the European Convention's success would be in the interest of the United States, and of good transatlantic relationship. "America needs, and deserves, a strong ally and partner, capable of producing coherent views, and to back its words with deeds" (Giscard d'Estaing 2003a, 12).

This dissertation gives some concrete evidence of American influence on European constitutional development and also the reasons for borrowing foreign constitutional principles. Applying American constitutional features, however, proved to be complicated as transplantation through the process of syncretism always results in a different outcome.

Chapter Two explains the main theoretical concepts, methodology and the objective of the dissertation.

The first part deals with the definitions of the main concepts, such as European integration, constitution-building, constitutions and constitutionalization.

The second part defines the theoretical framework. This dissertation extensively draws on theories of European integration, comparative constitutional theory and theory of transnational constitutional borrowing. For the purpose of explaining the processes of European constitutionalization and the reasons why the European leaders decided to establish a European Convention, this dissertation also looks into a comparative constitutionalization perspective, which provides some insights into why constitutionalization of politics occurred and why democracies increasingly turned to constitutionalization and judicialization of politics in the post-World War II period.

The third part develops the methodology and research design. The dissertation is mainly based on primary sources, i.e. interviews and the testimony of Convention delegates, reflecting motives of different political and institutional forces in the European Convention. The conclusions are also backed by direct evidence of decision-making.

Finally, the last part derives hypotheses that permit us to define the objective of the research study, which looks into the direct and indirect contributions of the U.S. Constitution to the development of constitutionalism within the EU, particularly with regard to the separation of powers.

Chapter Three outlines the constitutional milestones in the history of the EU (which created a protean European constitutional order) and traces the direct and indirect influence of American constitutionalism. This chapter clearly shows the seminal 'constitutional turn' at the European level, by providing the reasons and motivations for the move from economic and political integration towards constitution-making.

Chapter Four, which forms the main body of this dissertation, consists of the empirical research of the European Convention deliberations, held in Brussels from February 2002 to July 2003. The empirical part provides an insight into the behind-the-scene manoeuvrings of Convention delegates and leading European statesmen.

Chapter Five then explains the difficult ratification process of the European Constitution and provides the final Constitutional settlement, upon which the European leaders eventually agreed in the Lisbon Treaty, which entered into force on 1 December 2009.

Chapter Six compares the U.S. Constitution and the European treaties in terms of basic constitutional characteristics. There is an inevitable overlap area of constitutional and international law approaches to European Law, so the dissertation analyses the characteristics of the international treaty and the constitutional characteristics within the Lisbon Treaty.

Chapter Seven enquires about what influence the U.S. constitutional system had on the European system of separation of powers, the way the power is divided vertically between national and supranational levels, and horizontally amongst the legislative, executive and judicial branches of power. The research shows, that the U.S. political system has had a multiphase influence on the development of a European system.

Chapter Eight summarizes the broad findings, the innovative aspects of the dissertation and attempts to develop a theoretical component to the dissertation in order to develop a greater understanding of the reasons why Europeans borrowed some features of American constitutionalism and shows the changes in search of adaptation on the European tradition and an appropriate constitutional model.

Chapter Nine (the concluding chapter) sums up the explanation of the EU constitution-making process, empirical evidence of direct and indirect borrowing from the U.S. Constitution and the dynamics in the context of constraints imposed to the EU constitution-makers, which led to transformed borrowing.

Chapter Ten forecasts some prospects for future EU constitutionalization in the light of American constitutional development.

This doctoral dissertation is innovative in at least three aspects. The first is the novel approach to analyse the move from economic and political integration towards constitution-making, by explaining the main constitutional turn, by providing empirical

analysis of the most recent constitutional reform during the European Convention and by analyzing the final European constitutional settlement compared to the U.S. Constitution.

The second novel aspect lies in the concrete examples of U.S. influence with the empirical explanation of reasons why the EU constitution-makers were looking for guidance in the U.S. model, and strategic context in which the process occurred. This dissertation has developed a new theory of transformed and contextualized borrowing which explains the process of incorporation, rejection or adaptation of particular U.S. constitutional features to the European context. In this context, the dissertation finds out the main reason for transformed borrowing, which lies in the fact that the European constitution-makers were not creating the constitutional settlement for a *nation-state*,[15] as it was the case in Philadelphia Convention, but rather for a European *polity* of states and citizens "united in diversity."

The third novel aspect of the present research is its contribution to the limited and fragmented studies of the European Convention. The empirical research is based on an unprecedented series of first-hand interviews with the President and both Vice-Presidents of the European Convention, as well as representatives of all the component groups, which methodologically means that this research could use each component group as a focus group.

The original contribution of this dissertation lies in suggesting that a complex and interdependent mixture of motivations was present in the decision-making process at the European Convention. The final compromises were influenced by a variety of factors embracing both *exogenous* and *endogenous constraints* imposed by various power holders.

In addition the dissertation provides the most recent account of the current European constitutional development and brings research up to the very latest events related to the EU constitutional law as it presently stands according to the Lisbon Treaty.

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[15] Oxford Dictionary of Politics defines nation-state as a sovereign entity dominated by a single nation. 'State' refers to the political organization that displays sovereignty both within geographic borders and in relation to other sovereign entities. 'Nation' refers to the population within, sharing a common culture, language, and ethnicity with a strong historical continuity. When the two concepts, 'nation' and 'state' are combined, this creates an enormously compelling mixture of legitimacy and efficiency for governing elites (Mc Lean and McMillan 2009, 306).

2 THEORY AND RESEARCH DESIGN

2.1 Definition of the main concepts

In order to meaningfully analyze European integration and European constitution-making, constitutionalism and constitutionalization these concepts need to be defined.

Integration is first and foremost a process. According to the American political scientist and one of the most influential neofunctional theorists of European integration Ernst B. Haas[16] integration is the process "whereby political actors in several, distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states" (Haas 1958, 16). A more narrow definition, coming from a different perspective of intergovernmentalists, focuses on the creation of political institutions to which Member States subscribe. Some lawyers (Burley and Mattli 1993) define legal integration in formal and informal terms. The *formal integration* they define as the expansion of supranational legal acts that take precedence over national law, as well as the range of cases in which individuals may invoke European law in national courts. The *informal integration* is defined as "the gradual [i.e., through incremental spill-over] penetration of EC law into the domestic law of its Member States; the independent variables are supranational and subnational actors pursuing their own self-interests within a politically insulated sphere" (Burley and Mattli 1993, 43).

The object of the theory is the triad of European polity, policy, and politics. 'Polity' refers to the political community and its institutions. Any discussion of polity is likely to involve constitutional frames in which policy-making takes place, or which restrict the content of policy, as well as the implication of constitutional arrangements for politics. 'Policy' includes the actual measures and instruments to tackle concrete problems. 'Politics' comprises the process of policy-making and the daily struggles and strategies of political actors dealing with each other (Wiener and Diez 2009).

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[16] Interestingly, most of the classic European integration theories have been developed in the United States, rather than within Europe. 'European' approaches have traditionally tended to be much more historically or normatively orientated (according to Wiener and Diez 2009).

While the definition of European integration as a process does not suggest any end result, the concept of *European constitution-making* can be described as a process clearly suggesting a *constitution* as an endpoint.

According to the classic study of constitutionalism (Wheare 1966) the term *constitution* is commonly used in at least two senses. First of all it is used to describe the whole system of the government of a country, the collection of rules which establish and regulate the government. Today, the notion 'constitution' generally refers to the fundamental system of rules for governing and limiting governmental power. Secondly, the term 'constitution' is also used to describe not the whole collection of rules, legal and non-legal, but rather a selection of them which has usually been embodied in one document.

Constitutionalism refers to "the sum total of legal and political restraints that … safeguard the exercise of power and protect certain fundamental rights" (Flanz 1963).

In this context the term *constitutionalization* is applied with reference to the growing body of legal rules and procedures included in constitutional documents (Craig 2001; Schepel 2000). In the study of the European Union, constitutionalization has traditionally been employed to capture the process of European legal integration. More recently constitutionalization is considered to refer to "process which … tend to confer a constitutional status on the basic legal framework of the European Union" (Snyder 2003, 62-63).

Kenneth C. Wheare further underlines that the origins and the process by which we arrive at a constitution usually teaches us a lot about the significance of the constitution.
Most modern constitutions originate as the result of a disruption to the legal order produced by some catastrophic event such as a revolution or defeat in war (Wheare 1966). Constitutions are thus created to legitimize a new set of legal institutions and political leaders. For example, the American, German, Japanese constitutions, as well as the new constitutions adopted in former East bloc countries all fall into this category. By contrast, other constitutions, of which the United Kingdom's[17] is perhaps the best example, emerge organically. There has been no sharp break in the legal and political

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[17] The British did not define a constitution as a formal written legal act, but as a compilation of the common law, customs and institutions, along with principles such as those embodied in the Magna Carta.

order but rather an evolutionary and gradual process of constitutionalization over many years or even centuries.

The progress of European constitutionalization generally has followed this latter process. Indeed, the question of whether the European Union should create a formal Constitution was not a major concern of European leaders until very recently. Throughout most of the history of European integration, the establishment of new legal and political institutions was a secondary interest pursued only when deepening economic integration required them. The process of European constitution-making is more a process of 'creeping' accumulation of important fundamental decisions.

The result of the attempt to classify the EU constitutional development is that the European constitutional order is written, that it is supreme and that it takes the form of a covenant, a treaty.

In comparison with the Constitution of the United States of America for which Wheare (1966, 31) concluded that it is "written, that it is rigid, that it is supreme, that it is federal, that it establishes a presidential or non-parliamentary executive, and that is republican."

2.2 Theories of European integration[18]

2.2.1 Introduction to the integration theory

European integration theory is a vibrant field and the multitude of approaches has been developed over the last fifty years. In this context, the term 'integration theory' means the field of theorizing the process and outcome of European integration and the term 'theoretical approach' means the individual ways of dealing with integration.

> European integration theory is thus the field of systematic reflection on the process of intensifying political cooperation in Europe and the development of common political institutions, as well as on its outcome. It also includes the theorization of changing

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[18] This sub-chapter heavily draws on the book *European Integration Theory* (Wiener and Diez 2009) which provides the most recent account of the main theoretical approaches to the European Union, with a contribution of eminent scholars who have contributed significantly to the development of their respective theoretical approach (Moravcsik, Peterson, Pollack, Bellamy, Burges, Cafruny, Diez, Locher, Niemann, Peters, Pierre, Prügl, Risse, Ryner, Schimmelfennig, Schmitter, Waever, Wiener, Attuci).

constructions of identities and interests of social actors in the context of this process (Wiener and Diez 2009, 4).

This dissertation draws upon all theories of European integration in order to explain the main subject of the research, i.e. European constitution-making, and its outcome, i.e. current EU constitutional set-up. The theories help to explain why or how an event has come about, they provide labels and classifications, and develop norms and principles for the future of integration and constitution-making.

The various theories of European integration have been developed alongside the European construction.

2.2.2 Federalism

Federalism (considered more as a political movement than integration theory) applied federal principles to the process of European integration. The federalist movement had its heyday in the early post-war years that were remembered chiefly for the Hague Congress of May 1948 in which the federalists were particularly active and influential. Known as the Congress of Europe, this was an assembly of representatives of political organizations, comprising around 800 delegates from 16 countries, committed to both European integration and cooperation. Under the charismatic presidency of Winston Churchill the delegates adopted several resolutions calling for a European Union of federation. This congress also gave birth to the European Movement, a broad-based national federation of groups dedicated to the cause of European integration. In response to the drive for European integration, three strands of federalism have been developed: Monnet's federalism by instalments, based upon the political strategy of small, economic steps which would culminate in a federal Europe, Spinelli's[19] democratic radicalism, built upon the idea that the political institutions and a popularly endorsed treaty would be quickly translated into the familiar statist language of a constitution, and the third strand

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[19] Altiero Spinelli (1907-1986) an Italian federalist is considered as one of the key figures in European integration due to his founding role in the European federalist movement, his strong influence on the first few decades of European integration and, later, his role in re-launching the integration process in the 1980s. He had been a Member of the European Commission for 6 years and a Member of the European Parliament for ten years right up until his death. The main building of the European Parliament in Brussels is named after him.

'integral', 'personalist' federalism, based upon the notion of a European society and the spread of federalist values across the established boundaries of European states (Burges 2009).

The willingness of member state governments to pool or delegate control is often explained on the basis of ideological beliefs, which divide federalist and national governments. "The actual machinery of the Community" Perry Anderson observes "is inexplicable without the federalist vision of Europe developed above all by Monnet and his circle" (Anderson 1996, 17).

2.2.3 Neo-functionalism

Neo-functionalism was formulated in the late 1950s and was at its prime until the mid 1960s, during which time the development of European integration seemed to vindicate the assumptions put forward by the work of Ernst Haas and Leon Lindberg (see Haas' seminal book, *The Uniting of Europe*, 1958). Neo-functionalists posited 'spill-over' as the primary engine of the integrative process. They developed a concept of *'functional spill-over'* (which was already recognized by Monnet). The main claim was that due to the functional interconnectedness of policy areas, the initial decision by the Member States to place a certain sector, such as coal and steel, under the authority of supranational institutions created pressures to extend the authority of the institutions into neighbouring policy areas, such as currency exchange rates, taxation and wages. Haas (1958) described an 'expansive logic of sector integration' whereby the integration of one sector leads to 'technical' pressures pushing states to integrate other sectors because some sectors are so interdependent. A good case illustrating strong functional pressure is the spill-over from the internal market to the area of justice and home affairs. If the internal market – including the free movement of persons – was to be completed, certain compensatory measures were considered necessary in areas such as visa, asylum, immigration, and police cooperation.

Lindberg, for his part, attributed greater importance to the role of government elites who exerted the integrative pressures. According to the *'political spill-over'* (so-termed by Stephen George 1991) both supranational actors and national (governmental and non-governmental) elites created additional pressures for further integration.

The European decision-making after the creation of European Coal and Steel Community (ECSC) in 1951 and European Economic Community (EEC) and European Atomic Energy Community (EURATOM) in 1958 had been characterized by the so-called Community method,[20] conceptualized by neo-functionalists, according to which the governments accept the High Authority as a bargaining partner, they deal with each other with a commitment to problem-solving and they are responsive to each other. Haas emphasized how the High Authority of ECSC facilitated agreement on integrative outcomes, and thus 'upgraded common interests'. Many scholars stressed the role of supranational political entrepreneurs, like Jean Monnet in the 1950s and Jacques Delors in the 1990s.

Lindberg also emphasized the Commission's cultivation of ties with national elites to help realize its European objectives. The integrative role attributed to the Commission (or supranational institutions generally) was later termed *'cultivated spill-over'* (Tranholm-Mikkelsen 1991, 6).

However, the 'procedural code' of the Community method had been violated through the so-called Empty Chair or *chaise vide*[21] crisis in 1965, when French President Charles de Gaulle effectively paralyzed the Community and he insisted on the importance of state sovereignty. The empty chair was (and remains) the most serious breakdown in the Community's operation, which also influenced the theories of European integration.

Consequently, the neofunctionalism was increasingly criticized (mainly due to its assertion that spill-over is inevitable, more or less automatic) and in the mid-1970s Haas declared the theory to be obsolete.

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[20] 'Community basis' is the supranational order of EU institutions – Commission, Council, Parliament and Court of Justice, who guarantee respect for the Treaties. The Community method was not only a legal set of policy-making institutions but also a 'procedural code' conditioning the expectations and the behaviour of the Commission and the member governments as participants in the process.

[21] The 'empty chair' crisis took place in the period July-December 1965, when French ministers, on the instructions of President Charles de Gaulle, refused to take part in meetings of the Council of Ministers and the French permanent representative was withdrawn from Brussels. The empty chair crisis was part of President de Gaulle's long dispute with the Community and its institutions (particularly the Commission under the presidency of Walter Hallstein), which resulted eventually in the Luxembourg Compromise of January 1966. Its effect was to create a national veto over all key decisions. France was opposed to the Commission's proposal for financing the Common Agricultural Policy, to the introduction of own resources, to the granting of more extensive budgetary powers to the European Parliament and, in particular, to the prospect of majority voting being introduced into the deliberations of the Council of the EU. In more general terms France was also opposed to what it saw as the supranational pretentions of the Community institutions (Bainbridge and Teasdale 1996).

These tendencies were reinforced by developments in the 1970s, when economic recession led to the rise of new non-tariff barriers to trade among EU Member States and when the intergovernmental aspects of the Community were strengthened by the creation of the European Council in 1974, a regular summit meeting of EU Heads of State or Government.

2.2.4 Intergovernmentalism

Reflecting on these developments, Intergovernmentalist theory (developed mainly by Stanley Hoffmann 1966), claimed that the nation-state appeared to have reasserted itself and that European Community decision-making would reflect the continuing primacy of the nation-state. Intergovernmentalists explained supranational institution-building as the result of bargains struck between nation-states with specific geopolitical interests that militated towards a 'pooling' of sovereignty in specific historical circumstances.

In this context, it is important to underline that intergovernmentalism is both a theory of integration and a term used to describe institutional arrangements and decision-making procedures that allow governments to cooperate in specific fields while retaining their sovereignty. "The intergovernmental approach to European integration involves keeping supranational institutions to a minimum and is, accordingly, the opposite of federalism" (Bainbridge and Teasdale 1996, 284). As the empirical research shows later, intergovernmentalism was attractive to defenders of national sovereignty during the European Convention.

2.2.5 Liberal Intergovernmentalism

With the re-launching of the integration process in the mid-1980s, Liberal Intergovernmentalism came late 1980s and eventually acquired the status of a 'baseline theory' in the study of regional integration "due to its theoretical soundness, empirical power, and utility as a foundation for synthesis with other explanations" (Moravcsik and Schimmeffennig, 2009). Liberal Intergovernmentalism continues to treat the state as a unitary actor and begins every analysis by explaining (1) *national preferences*, (2) *intergovernmental bargaining* and (3) *the choices of governments to pool and delegate*

sovereignty to EU institutions.[22] In the first stage, national chiefs of governments aggregate their interests and articulate their respective national preferences (a particular set of policy goals and national objectives) towards the EU. Concerning national preferences, Moravcsik's empirical analysis (1998) confirms that the preferences of national governments vis-à-vis European integration have mainly reflected concrete economic interests rather that other general concerns like security or European ideals. Governments have pursued integration as a means of securing commercial advantages for producer groups, subject to regulatory and budgetary constraints and the macro-economic preferences or ruling governmental coalitions. Of the 15 cases (five decisions across three countries) studied in *The Choice for Europe* (Moravcsik, 1998), forces of economic globalization played an important role in all, yet geopolitics and ideology made an important secondary impact on European integration.

The national preferences of different states rarely converge precisely, so Liberal Intergovernmentalists deployed an interstate bargaining theory of international cooperation. Therefore, in the second or intergovernmental stage, national governments bring their preferences to the bargaining table in Brussels and bargain with one another to reach substantive agreements. States must overcome collectively suboptimal outcomes and achieve cooperation for mutual benefit, yet at the same time they must decide how the mutual gains of cooperation are distributed amongst the states. In this context, bargaining theory argues that the outcome of international negotiations depends on the relative bargaining power of the actors. The historical data in *The Choice for Europe* portrays processes of hard bargaining, in which credible threats to veto proposals, to withhold financial side-payments, and to form alternative alliances excluding recalcitrant governments carried the day.

Finally, EU Member States choose particular EU institutions in order to increase the credibility of their mutual commitments and to secure the substantive agreement they made. "Choices to pool and delegate sovereignty to international institutions are best explained as efforts by governments to constrain and control one another" (Moravcsik

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[22] Sovereignty is *pooled* when governments agree to decide future matter by voting procedures other than unanimity (for example, qualified majority voting in the Council of the EU). Sovereignty is *delegated* when supranational actors are permitted to take certain autonomous decisions, without an intervening interstate vote or unilateral vote (for example, the Commission enjoys such autonomy in some matters of antitrust enforcement etc).

1998, 9). EU institutions help states reach a collectively superior outcome by reducing the transaction and monitoring costs of further international negotiations on specific issues and by providing the necessary information to reduce the states' uncertainty about each other's future preferences and behaviour. By delegating sovereignty to international institutions, governments effectively remove issues from the varying influence of domestic politics and decentralized intergovernmental control, which might build up pressure for non-compliance if costs for powerful domestic actors are high. In empirical terms, Moravcsik argues that the EU's historic intergovernmental agreements were not driven primarily by supranational entrepreneurs, but rather by a gradual process of preference converging among the most powerful member states (Moravcsik 1998, 73).

2.2.6 Historical, Rational and Sociological Institutionalism

For a new generation of integration theorists, however, institutions were not merely tools in the hands of their creators, but themselves made an important impact on both the integration process and the development of European governance. As New Institutionalism has demonstrated, institutions can cause unintended consequences (North 1990), making the process of institution-building less easily reversible than the intergovernmentalists would have liked (Pierson 1996). A particularly good example of unintended consequences was a largely underestimated push to further integration by the Single European Act in 1986 (Weiler 1999). Another institution which has been able to pursue the process of legal integration far beyond the collective preferences of the member governments is the European Court of Justice. During the 1960s and 1970s, the ECJ interpreted its competences in an integrationist manner unanticipated and initially undesired by governments. This process helped strengthen national courts, private litigants, and occasionally the Commission, thereby influencing the distribution of gains from market liberalization, and encouraging states to accept institutions and enforcement schemes that the ECJ helped design (Burley and Mattli 1993; Alter 1998).

New Institutionalism, rational choice and historical analysis has contributed significantly to EU studies, mainly by analyzing the effects of institutions over time and examining their importance in shaping the policy process, outcomes and long-term process of European integration. The formal definition of institutions in rational choice approaches follows the idea that legislators deliberately and systematically design political

institutions to minimize transaction costs associated with public policy. On the other hand sociological institutionalism and a constructivist approach in international relations defines institutions much more broadly to include informal norms and conventions as well as formal rules, and they argue that such institutions 'constitute' actors, shaping the way in which they view the world.

Historical Institutionalism has adopted a position in between the two camps, focusing on the effects of institutions over time (Thelen 1999, Pierson 1996, 2004). They argue that institutional choices taken in the past can persist, or become locked in, thereby shaping and constraining actors later in time. Institutions, it is argued, are 'sticky', or resistant to change, both because of the uncertainty associated with institutional design, and because national constitutions and international treaties can create significant transaction costs and set high institutional thresholds (such as unanimous agreement) to later reforms (Pollack 1996).

In a presentation of this strand of Historical-Institutionalist thinking, Paul Pierson (1996, 2004) has suggested that political institutions and public policies are frequently characterized by what he calls *positive feedback*, insofar as those institutions and policies generate incentives for actors to stick with and not abandon existing institutions but adapting them only incrementally to changing political environments. Insofar as political institutions and public policies are in fact characterized by positive feedbacks, Pierson argues, politics will be characterized by certain interrelated phenomena, including: inertia, or lock-ins, whereby existing institutions may remain in equilibrium for extended periods despite considerable political change; a critical role for timing and sequencing, in which relatively small and contingent events that occur at critical junctures early in a sequence shape events that occur later; and *path-dependence*, in which early decisions provide incentives for actors to perpetuate institutional and policy choices inherited from the past, even when the resulting outcomes are manifestly inefficient.

Pierson's (1996) study of path-dependence in the EU seeks to understand European integration as a process that unfolds over time, and the conditions under which path-dependence processes are most likely to occur. Pierson argues that, despite the initial primacy of member governments in the design of EU institutions and policies, 'gaps' may occur in the ability of member governments to control the subsequent institutions and

policies, for four reasons: Firstly, member governments in democratic societies may, because of electoral considerations, apply a high 'discount rate' to the future, agreeing to EU policies that lead to a long-term loss of national control in return for short-term electoral returns. Secondly, even when governments do not heavily apply a discount to the future, unintended consequences of institutional choices may create additional gaps, which member governments may or may not be able to close through subsequent action. Thirdly, the preferences of member governments may change over time, most obviously because of electoral turn-over, leaving new member governments with new preferences to inherit an *acquis communautaire* negotiated by, and in light of the preferences of a different government. Fourthly and finally, Pierson argues, EU institutions and policies may become locked-in not only as the result of change-resistant institutional rules from above, but also through the incremental growth in political support for existing, entrenched institutions from below, as societal actors adapt to and develop a vested interest in the continuation of specific EU policies.

In the area of social policy, for example, the European Court of Justice has developed a significant jurisprudence on gender equality that certainly exceeds the original expectations of the member governments. Rolling back these unexpected consequences, however, has proven difficult, both because of the need for a unanimous agreement to overturn an ECJ decision in this area, and because of the domestic constituencies with a vested interest in the maintenance of the *acquis.*

Another important claim, developed by a second-generation literature within Historical Institutionalism, is that existing institutions and policies may produce not only positive feedback that supports existing institutions and policies, but also *negative feedback* that creates pressure for institutional and policy change. A formal model of institutional change (provided by Avner Greif and David Laitin, 2004) claims that 'self-reinforcing institutions' change the political environment in a way that makes the institution more stable in the face of exogenous shocks and 'self-undermining institutions', by contrast, change the environment in a way that shows that a previously stable institutional equilibrium has become undermined, thus increasing pressure for change with passage of time.

2.2.7 Social Constructivism

Social Constructivism became a study of the European Union in the late 1990s. According to this theory, institutions are understood broadly and influence the behaviour and preferences of individuals and member governments in more profound ways. With a focus on the impact of Europeanization on the Member States, a constructivist perspective complements rather than substitutes the prevailing theories of European integration, i.e. Neofunctionalism, Liberal Intergovernmentalism or New Institutionalism. The constructivists emphasize that the interests of actors cannot be treated as exogenous, which means that political culture, discourse and the 'social construction' of interests and identities matter.

Thus, a constructivist history of the EU would insist that we cannot even start to explain the creation of the major constitutional treaties of the union without taking into account the feedback effects of previous institutional decisions on the identities and interests of the Member States' governments and societies.

2.2.8 Innovative contribution to the integration theory

As European integration itself has evolved over the years, European integration theory became far more complex than it was at the beginning. Recent constitutional development represents a core challenge for European integration theory. With the new attempts of EU integration and constitution-making, the EU theories need to be reassessed as well. The discussion of approaches demonstrates that until recently, core constitutional issues had been receiving relatively less analytical attention than approaches that seek to capture institutional and regulatory processes.

This dissertation attempts to be innovative in explaining the move from economic and political integration towards constitution-making, by clearly analyzing the constitutional turn and its outcome, as well as all the constitutional principles brought about by the European Constitution and retained in the Lisbon Treaty.

2.3 Constitutional theories

2.3.1 Introduction

A complete survey of constitutional theory literature would take us beyond the scope of this dissertation. For the purpose of this research, the development of EU constitutionalism in the light of some main strands of Comparative Constitutional Theory is examined.

Firstly, this dissertation provides a brief overview of historical constitutionalism, with all important constitutional achievements on 'European soil', which are often taken for granted or attributed to the 'oldest written constitution in the world'. Constitutional theory (the concepts and categories taken to be central to modern constitutional practice) have been clearly crystallized through the history of comparative constitutionalism. The purpose of this brief history of constitutionalism on the European continent is also to show that fundamental features of a constitutional order (such as separation of powers, bill of rights, constitutional assembly, constitutional courts etc) have their own history and deeply-rooted tradition in Europe. It is important to bear this in mind when analysing the 'real' influence of the U.S. Constitution on the European constitutionalism, and avoid overestimating U.S. influence. The empirical research will later show that what is deeply rooted in history and tradition may be as much a problem as a solution for constitution-makers.

Secondly, this dissertation draws on the growing importance of theories of *transnational constitutional borrowing*. Increasingly, public law scholars have focused greater attention towards explaining the phenomena of transnational borrowing of other constitutional practices, in particular in relation to foreign precedents. This theoretical part helps to explain why and to what extent Europeans borrowed some features of American constitutionalism.

2.3.2 Comparative Constitutional Theory

"Constitutionalism has not been a single country project." This is a common conclusion of comparative historical constitutional scholarship (van Caenegam 1995; Ackerman 1998; Gordon 1999; Epstein 1999; Scheppele 2003).

The historical constitutional scholars traced the story of constitutionalism to the ancient world. Gordon's book (1999) shows how much formal structure both Ancient Athens and the Roman Empire had, but his account also reveals how little of that structure was to be understood and maintained by law rather than through appeals to tradition or through literal force.

The ideas of the medieval period in Europe were much more consequential than the ancient ones among the political actors responsible for constitutionalism's later development and most modern ideas about constitutionalism can be traced to this period.

The formal written agreements that resulted from the 'negotiations' between the kings and increasingly uppity nobilities in the 13th century serve as one of the earliest models of a bill of rights – for example, the Magna Carta in England (1215) and the Golden Bull in Hungary (1222). Given that these documents gave the nobility the right to resist the king if the king failed to carry through on his promises, these provisions mark the beginning of accountable government.

The age of absolutism in the European monarchy (16th to 18th centuries) generally brought an abrogation of these earlier power-sharing agreements as monarchs regained their power. However, by the 17th century in England, the 18th century in Western Europe and the 19th century in Russia, powerful kings were again increasingly challenged by the upper classes who were seeking to share power through constitutional means. For example, following a bloody civil war in England during which the king was beheaded and a short-lived republic announced, the 1689 Bill of Rights emerged. In Prussia, the codification of law and the creation of an independent judiciary under Frederick II the Great (1740-1786) was established. Frederick's innovation moved significantly towards the modern German conception of the Reichsstaat (the constitutional state under the rule of law) as it developed in the 19th and 20th centuries.

In simple terms, early constitutions originated when powerful sectors of society used their power to limit the monarchy and clergy. The modern doctrines of separation of powers and of separation of church and state were born during actual political struggles, setting clear boundaries between different political groups contesting power.

Federalism grew out of the challenges to royal power made by previously autonomous political subdivisions that were swallowed up by expanding empires.

All major features of modern constitutions originated in hard-fought struggles to call political power to account and to spell out in clear agreements just how the power of the king (or the emperor) was to be constrained.

Compared to this constitutional development on the European continent, we can conclude that the American Constitution written in 1787 was the first written national constitution to deliberately create new government from scratch by formal agreement among relative equals. In Europe, monarchical absolutism had reached its peak, when the Philadelphia Convention brought elected representatives together to produce a compromise agreement to share power among different political interests, without king, nobles, or hereditary fiefs. After that, the model of the constitutional convention was widely emulated.

As Scheppele argues (2003) America was not the only country at the end of the 18th century that bet heavily on the view that a written constitution could minimize the destabilizing effects of a change in government form. Both the Polish Constitution of 1791 (the first written constitution in Europe) and the French Constitution of 1791 were very real attempts to provide a political transition without bringing the old government down completely to do it. In both cases, these liberal constitutional experiences failed. In the case of Poland, Prussia and Russia deleted Poland from the political map for more than a century. In the case of France, the king never really agreed to be bound by a constitution. But unlike the Polish Constitution, which lacked a bill of rights, the French Constituent Assembly, convened in 1789, began with the Declaration of the Rights of Man and the Citizens, which set the tone for the rest of their constitutional effort.

Throughout the 19th century, much constitutional change in Europe was motivated by the desire of the newly empowered classes – empowered either by Enlightenment ideas or by the money made from the profits of industrialization – to force kings to share power. In the first decades of the century, a few European countries formalized the constitutionalization of monarchies, requiring them to govern with increasingly powerful parliaments. For example, the Netherlands got its first written constitution establishing a unified constitutional monarchy in 1815; but the king was forced by the uprisings in 1848 to introduce parliamentary government and ministerial accountability. In Belgium, the combined protests of the bourgeoisie and the clergy against the king culminated in the constitution of 1831, which refused general popular sovereignty but substantially strengthened the narrowly representative parliament. Britain adopted further

constitutional changes in the Reform Act 1832, which substantially expanded the democratic base of British government.

But at this time too, there was a backlash against the various efforts at constitutional modernization. France brought back the monarchy in the 1814, though not in the pure absolutist form France had previously known. German-speaking Europe generally retained its king and refused constitutional limits on them until well into the 19th century.

In general, however, the demands on the part of the privileged classes throughout Europe to share power with the monarch collided with the increasing radicalization of ever-wider sectors of the population as the 19th century progressed. Industrial poverty coupled with socialism and nationalism overtook some parts of the continents. The result was the sweep of revolutions that took place across Europe in 1848. While each of these revolutions had distinctively local causes, there was also a common theme that political power had to be democratized and that previously disenfranchised groups had to be given the right of political self-determination. As accurately described by Namier (1992) the revolutions in the streets were accompanied by movements among intellectuals to write constitutions in order to mediate the conflict by consolidating new political forms.

In space of a year or two after the revolutions of 1848, nearly 60 new constitutions were written. Most were either stillborn or died in infancy when the monarchies fought back. But the boom in constitution-writing produced some lasting ideas that still have their effects in modern constitutionalism.

According to Scheppele (2003) the most intellectually important of the 1848 constitutions was the one produced by the Frankfurt Parliament. Dominated by academics, the Parliament strove mightily to create a constitution that would unite German-speaking Europe into a single political entity (Eyck 1968). Less liberal in 1848 were the constitutional efforts of the French. In any constitutional assembly popularly elected to draft a constitution, the conservatives surprisingly dominated (one of its representatives was Alexis de Tocqueville, a cranky monarchist). The French Assembly showed the continuing viability of the monarchical idea.

The 1848 violent uprisings within the Hapsburg Empire, extending over a large part of central and Eastern Europe, witnessed the rise of nationalism as a rallying point for new constitutional demands. From these efforts, only the Hungarian one eventually succeeded

in establishing a constitutional system of power sharing between Budapest and Vienna in 1867. But the idea that every "people" deserved a "nation" was not lost. Generally speaking, the revolutions of 1848 opened the Pandora's box containing both socialism and nationalism, which could not help but affect popular constitutionalism of that day and since.

By the end of the century, the intersection of international trends with distinctly national events produced a new wave of constitutions that bore striking similarities across very different constitutional regimes. German unification was accompanied by the Constitution of 1871, establishing Bismarck as emperor. The Constitution conceded universal equal (male) suffrage and featured a bicameral parliament.

The 19th century therefore brought a major legal transformation: while written constitutions were absolutely novel at the start of the century, political change was nearly always signalled by the adoption of a written constitution by the end of the century. Constitutionalism as a binding legal basis for political power was widely recognized, but had yet to establish itself in most of the world.

The 20th century embraced many constitutional experiments in a variety of extreme ideologies. The ultimate engines of constitutional change during the 20th century, Sheppele argues (2003), were wars, revolutions, whipped-up nationalism and grand hatred that rose to new levels of violence.

The First World War brought to an end the last of the European empires - the Ottoman and the Hapsburg empires - and it also forced Germany under the last Emperor (Kaiser Wilhelm II) to accept defeat. As a result, new republics were created in Austria, Turkey and Germany and new ethnically based states (for example, Hungary, Czechoslovakia, Bulgaria, Yugoslavia) were established. Many of these states were forbidden from recognizing indigenous monarchies by the terms of the peace treaties they signed.

All of these developments had important constitutional consequences. The Weimar Constitution, adopted in 1919 in Germany, featured some of the most enlightened constitutional thinking of its day. The Weimar Constitution borrowed its initial rights' provisions from the failed constitution of the Frankfurt Parliament and also attempted to create a far more effective parliamentary government than the German lands had ever seen. Unfortunately, Germany was badly divided politically in the inter-war period and

the constitutional provisions ensuring the representation of every individual interest ultimately split the political world. A liberal amendment provision that was designed to ensure that the constitution could retain its flexibility ultimately proved to be the constitution's downfall. Into the breach caused by a series of unstable governments came Nazism. As a result of its evident weaknesses in the face of assault, the Weimar constitution went from being the model for liberal constitutional government to being the leading negative example of how *not* to write a constitution (Kennedy 2004).

The Austrian Constitution, constructed between 1920 and 1930 is known primarily for having created the institutions of the constitutional court, the brainchild of legal philosopher Hans Kelsen. The constitutional court, unlike supreme courts, was to have specialised jurisdiction over constitutional questions and, as such, was to be primary arbiter of constitutionality in the new king-less states. The Austrian court provided an important model for a variety of constitutions written later in the century. In the inter-war period of the 20th century, major national constitutions were created.

The Second World War was followed by even more sweeping constitutionalist counter-reactions. In the aftermath of the horrors of World War II, "the establishment of the European Court of Human Rights was an act of regret and contrition on the one hand and an act of hope and attempted redemption on the other hand" (Zupančič 2008, 359).

Scheppele (2003) observed that constitutionalism started to pull modern constitutions towards variants on a single model characterized by 1) a half-century-long transformation of constitutions in a variety of places towards liberal democratic regimes based on separation of powers and judicial enforceability of rights claims; 2) the emergence of judicial control over the other branches of state through the increasing delegation of political questions for courts and 3) the increasing interdependence of national constitutional systems through the borrowing of basic principles of constitutional governance from one system to another across a wide array of different political contexts including, prominently, human rights.

The most substantial post-war changes in constitutionalism occurred in Germany, where a constitutional assembly under the watchful eye of the occupying powers in the West met in Bonn to draft a new constitution. The result was the present German Basic Law, "a constitution that attempted to fix in a new structure of government safeguards against Germany's regime of horror" (Scheppele 2003). The constitution visibly promoted rights,

which was an attempt to say "never again" to the horror perpetrated by Germany during the war. At the insistence of the occupying Allied Powers, the West German Basic Law also firmly entrenched federalism by making it a strong and un-amendable feature of the new government, dividing power across a set of institutions that would make it hard to reawaken Germany's previous imperial ambitions. And perhaps most importantly, the new constitution created a constitutional court on the Austrian model, but with broader jurisdiction. Scheppele (2003) argues that the jurisprudence of the Federal Constitutional Court of (Western) Germany became a crucial international model, at first rivalling and then surpassing the influence of the U.S. Supreme Court on the developing jurisprudence of new democratic governments.

The French Constitution written after the war quickly fell under the combined weight of political fragmentation. The charismatic war-time leader Charles de Gaulle was urged to take over the government, but he would only agree if a new constitution were written specifically for him. As a result, the French Constitution of 1958, still in effect, was written to entrench a president with few constraints on his power. After several decades, however, the edges of this strongly 'presidentialist' document have been softened, elections produced parliaments and presidents of different political parties. And the Constitutional Tribunal, itself created to keep the parliament from encroaching on the powers of the president, began to reconsider its role and radically increased its own powers to declare laws unconstitutional.

In Southern Europe, the fall of fascist governments and military dictatorships in Spain and Greece produced new constitutions, new constitutional courts and a strong commitment to liberal constitutionalism in 1970s.

In Eastern Europe, the collapse of the Soviet Empire created a large number of newly independent states in the 1990s and constitutions were produced nearly everywhere.

Although the progress of constitutionalism was by no mean uniform over most of European countries, the historical overview shows that constitutional aspirations have become similar. In *The Rise of World Constitutionalism* Ackerman (1997) noted that many constitutional regimes at present aspire to the key tenets of liberalism: separation of powers, separation of secular and religious authority, a separation of civilian and military authority, a powerful and independent constitutional judiciary, a broad commitment to

widespread popular democracy and a strong preference for regular, electoral, and peaceful political change. Most striking has been the extraordinary levels of commitment to judicially protected rights.

At this point, the research looks into the recently developed comparative constitutionalization perspective (Woods and Hilbink 2009; Hirschl 2009), which offers some explanatory account of why democracies increasingly turned to constitutionalization and judicialization of politics in the post-World War II period. Constitutionalization is universal and widespread, Hirschl argues. "Over 150 countries from Brazil to Russia to South Africa, as well as several supra-national entities (e.g. the European Union) covering approximately three quarters of the world's population have gone through a major constitutionalization process over the last few decades" (Hirschl 2009, 830).

Many constitutional revolutions occurred over the last few decades and according to Hirschl, some of them were initiated by powerful political elites. "Consider here the continuous attempt by 'Eurocentric' politicians, bureaucrats, and jurists to create an 'ever closer union' in Europe by the adoption of an EU constitution; which did not exactly reflect popular will at that time" (Hirschl 2009, 826).

This dissertation uses this comparative constitutionalization perspective to explain the motivational dynamics of the EU constitutional turn, and upgrades it with an assessment of the specific European constitution-building process: clearly explaining the expressed constitutional aspirations, the influence from the 'universal' constitutional features and the impact from the U.S. Constitution, for which some theoretical explanation could be found in the theory of transnational constitutional borrowing.

2.3.3 Theory of transnational constitutional borrowing

In his paper *Whose Constitution Is It, Anyway?* the American legal scholar Robert H. Bork (2003) highlights the fact how a new constitution might be designed bit by bit from American, European, Asian and African models. American constitutionalism can perform a great service by helping other countries to borrow constitutional practices.

Another constitutional theory analyst Garry J. Jacobsohn argues: "Including American Constitution, I know of no example of a country whose constitution-making avoided examining and often incorporating promising features from the governing experience of distant lands" (Jacobsohn 2004, 1766).

Also the U.S. legal scholar William P. Alford suggests that "comparativists (scholars and judges) must consider how the free flow of commerce in constitutional ideas could affect valued political and legal assets" (Alford 1986, 945).

Constitutional historian Billias (2009), who traced the spread of American constitutionalism around the globe, argued that the first echo (1776-1800) launched a round of American-influenced constitutions in Europe. He further found evidences that "fifteen constitutions were written or promulgated in Europe between 1787 and 1800. All of them reflected some evidence of American constitutionalism, directly or indirectly" (Billias 2009, 65).

The influence continued particularly in the run up to the European revolutions of 1848. For example, in the 1830s Germany created the Customs Union, or Zollverein, for which it is argued that "it highlighted the role of American constitutionalism by extending the concept of federalism beyond the political realm into the economic" (Billias 2009, 162). The German economist and reformer of that time George Friedrich List went even further and viewed the United States as a perfect model of a free-trade zone not only for Germany but for the entire world. List was well ahead of his time and thus "a predecessor of the European Union and other integrated economies of modern times that anticipated globalization" (Billias 2009, 163).

In the era after the First World War and an outbreak of Democracy in Europe, the reputation of American constitutionalism soared because it became identified more closely with democracy and America's democratic ideals.[23] However, the ethnic,

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[23] For example, when the provinces of the old Austrian-Hungarian Empire broke away, the Czechoslovakia's founding fathers went to USA, and they signed their declaration of independence in Independence Hall, Philadelphia, on 18 October 1918. The Czech Constitution of 1920 then reflected American influence in its preamble from both the U.S. Constitution and the Declaration (Billias 2009).

religious, and economic divisions in the multiple nation-states created after the breakup of old empires[24] prevented them from following America's example.

The bill of rights tradition, with which American constitutionalism was associated, made great strides, incorporated in the constitutions in Germany (Weimar Constitution of 1919), Austria (1920), Czechoslovakia (1920), Poland (1921), Greece (1927) and Lithuania (1928). However, Europe's new democracies in the post-World War I period were unprepared for the idea of limited government inherent in America's representative democracy. By the outbreak of the Second World War, nearly every country in central, eastern and southern Europe was under the control of a nondemocratic regime of either the Right of the Left; so the influence of American constitutionalism had diminished markedly.

After the Second World War, America came out a superpower and the three decades from 1945 to 1974 represent the highest peak of American constitutionalism abroad to that date. America emerged as the leader of Western constitutionalism, Billias (2009) argues. It was also the period when some countries felt compelled to choose between the competing constitutional ideologies. Many nations allied themselves with the United States and began emulating its model. Others sided with the Soviet Union. America's constitutional influence abroad expanded mostly into former Axis countries, especially with the democratization of Germany. America's direct influence focused mostly on federalism, for which Germany already had its own tradition. The other prominent feature attributed largely to American influence was the judicial review.

Some of the principles of American constitutionalism (popular sovereignty, rule of law, judicial review, limited government, and the protection of individual rights) became international norms and were "internationalized" in international treaties, covenants, and transnational agreements. For example, the Council of Europe in 1953 adopted the European Convention for the Protections of Human Rights and Fundamental Freedoms and the European Court of Human Rights was established with powers of judicial review.

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[24] Four successor states had been created from the Hapsburg Empire: Austria, Hungary, Czechoslovakia, and Yugoslavia; and five successor states from the Russian Empire: Poland, Finland, Estonia, Latvia, and Lithuania.

2.3.4 Innovative contribution to the constitutional theory

While EU constitutionalization is a well-evidenced fact, the key contribution of this dissertation is the identification and explanation of the main turning point, forces behind and in particular the confluence of contributing factors. This dissertation also examines strategic contexts in which "constitutional moments" occurred and brought important changes in the constitutional order. All constitutions establish rules, so this dissertation looks into the kind of polity EU constitutional order seeks to preserve and to develop. In this context it is important to underline the 'constitutionalizing' role of landmark cases of the European Court of Justice and analyse a mix of attributes reflecting what is distinctive in the EU constitutional experience as well as what are taken to be universal attributes of constitutionalism (the principle of separation of powers, judicial review, the supremacy of the constitution etc).

The analysis of the constitution-making process in the European Union offers some insights into constructing and 'upgrading' a theory of borrowing to a theory of *transformed and contextualized* borrowing, which means transplanting the foreign constitutional features in a reconfigured way in order to adapt them to the European tradition and establish an 'acceptable' constitutional model. The empirical research shows, that the framers of EU constitutional order were indeed inspired by the American constitutional experience but they had to adapt it to the given political and cultural *context* and interconnect it with the Member States' constitutions in a number of ways. Attention to the particular details of constitutional context should be an awareness of how the achievements of local constitutional aspirations can serve the ends of a transcendent ideal of constitutionalism. Just as in Aristotle's discussion of the best practicable constitution, "the law giver and statesman should be attentive to actual conditions" (Aristotle quoted in Barker 1962) so must European constitutional framers remain sensitive to the "facts on the ground". In constitution making context this means remaining open to the possibilities of illumination from abroad while maintaining a realistic sense of how that light needs to be filtered through the prism of local experience. In these circumstances EU constitutional settlement is driven to the narrowest jurisprudential articulation of political culture.

It is in this area that this dissertation seeks to make a contribution to the literature by examining and analyzing how the framers of EU constitutionalism have borrowed some features of American constitutional experience, with a careful contextualized consideration. The research focuses on the political and cultural context from which EU constitutionalism emerged. This dissertation therefore shows the elements of borrowing transcendent norms of constitutionalism and seeks to develop contextually informed accounts of the unique features of European constitutional order with all constraints (cultural and political) imposed on constitutional actors, who were required to direct the foreign experience through the filter of their own cultural condition. The research shows that the impact of the transatlantic model on Europe was often limited and transformed, as one of the European Convention delegates accurately expressed by quoting Goethe's celebrated exclamation "Amerika, du hast es besser"[25] to underline a feeling that America was too different to serve as a model. How to achieve a balance between these constraints and aspirations is one of the great challenges for constitutional theory.

The EU constitution-makers therefore had to accommodate constraints of socio-political and historical significance and aspirations. The use of foreign constitutional practices (mainly from the U.S. Constitution) was thus considerably transformed, as not every constitutional "good practice" can be successfully transplanted to European soil. The dissertation contends that the main reason for *transformed borrowing* was the fact that the European-constitution makers were not 'mandated' to create a constitution for a nation-state (as the U.S. constitution framers) but a kind of constitutional settlement for a polity of states.

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[25]Amerika, du hast es besser
als unser Kontinent, der alte,
hast keine verfallenen Schlösser
und keine Basalte.
Dich stört nicht im Innern
zu lebendiger Zeit
unnützes Erinnern
und vergeblicher Streit.

America, you've got it better
Than our old continent. Exult!
You have no decaying castles
And no basalt.
Your heart is not troubled,
In lively pursuits,
By useless old remembrance
And empty disputes.

Johann Wolfgang von Goethe

2.3   Methodology and research design

Given that the overreaching rationale for the European Convention was to constitutionalize the treaties, this dissertation examines the European Convention as a case study of the EU constitution-making process. However, the European Convention is not analysed as an isolated case study but it is put in the historical context of European integration. The research design of this dissertation is therefore based on the European Convention case selected primarily for subsequent historical importance as a turning point from economic and political integration to constitution-building process.

The first methodological principle is to test explicit hypotheses drawn from competing theories described in the previous sub-chapter. Rather than simply demonstrate that some supporting evidence exists for a particular theory, the empirical part and the conclusion show what theories best explain transnational constitutional borrowing and transformational borrowing in the US-EU case.

The second methodological principle is the use of reliable "hard" primary sources.[26] Drawing upon independent analysis of the main debates at the European Convention and on an unprecedented series of first-hand interviews with European Convention delegates, this dissertation heavily relies on an interpretive methodological approach (e.g. historical context and interviews with participants are used to explain the motivations and preferences of numerous actors involved in the European Convention).

The framers' motivations and intentions are an important source for understanding the meaning of a constitution. Nearly all approaches to study of constitutional construction require some knowledge of what the framers' intended. Constitutional theorists and jurists may disagree about how to interpret specific intentions or what weight should be given relative to other factors such as text, tradition, or prudential considerations, but nearly all agree that some attention to the framers' motivations and intentions is at least a necessary starting point for interpreting constitutions (Garvey, Aleinikoff and Farber 2004).

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[26] Hard primary sources include objective facts about the decision-making process, unbiased reports, records of deliberations among key decision-makers, speeches read in context, corroborates memoirs by participants and interviews. Soft primary sources are usually referred to as most contemporary newspapers and magazine reports, public statements by government spokesmen and national leaders justifying their actions, and *ex post* interpretation by commentators.

While most debates revolve around specific provisions or compromises, there have been important efforts to map out the broader motivational terrain of the Philadelphia Constitutional Convention. For example Charles Beard famously argued in *An Economic Interpretation of the Constitution of the United States* (1913), that the structure of the U.S. Constitution was motivated primarily by the conflicting mercantilist and landed economic interests of the Founding Fathers. In *We the People: The Economic Origins of the Constitution* (1958), Forrest McDonald disputed this analysis, pointing out that there were at least three dozen identifiable, material interests that forced delegates at the convention to bargain. By contrast in his famous 1961 essay "The Founding Fathers: A Reform Caucus in Action" John P. Roche argued that the framing of the Constitution was essentially a set of pragmatic compromises involving the reconciliation of a variety of state, political, and economic interests. More recently, Gordon S. Wood's prize-winning book, *The Creation of the American Republic, 1776-1787*, observed that the framers were motivated by an ideological progressivism and the transformative experiences, which followed the American Revolution.

The fundamental goal of this research is therefore not simply to provide narrative reconstruction of the European Convention and Intergovernmental Conferences, but also to identify the preferences of actors, their strategic calculation, the power of some actors over others, and to assess the importance of causal processes of integration and constitution-building.

The analysis of the process by which the constitutions are drafted tells us a lot about the motivational dynamics and the objectives of their framers. Therefore, this research mainly covers the documents produced by the European Convention: 197 delegates from 28 different countries had made 6474 contributions in 5436 minutes of speaking time, tabling 5995 amendments.

Given such a vast volume of Convention documents, this research uses several approaches of analysing the primary sources. First of all, the dissertation uses some findings of the research which measured the delegates' positions by computerized word-scoring methods analyzing the thousands of Convention texts, with the goal of estimating the political positions of national party representatives participating at the Convention. Driven by relative word frequencies, the word-scoring method breaks down each text into words, treating these words as data to be analyzed statistically. Researchers (Benoit *et al*.

2005) applied the word-scoring method to analyse the thousands of Convention texts, with the goal of estimating the political positions of national party representatives participating in the Convention. The word-scoring technique is a method for estimating the position of 'virgin' (unknown) texts on a priori policy dimensions. Essentially, it does this by statistically comparing the patterns of word frequencies in the virgin texts under investigation with the patterns of word frequencies in a set of 'reference' texts from well-known sources. The respective research selected a set of extreme pro-EU texts and a set of extreme anti-EU texts as the reference texts. National party positions on EU policy dimensions were obtained through an extensive expert survey undertaken in 27 countries. The results show strong evidence that the word-scoring method is broadly successful in reconstructing the map of national party preferences for and against a more centralised and a more powerful Europe as expressed through the Convention texts.

Official documents and questionnaires, however, do not always reveal the behind the scenes manoeuvrings. Particularly the minutes of the Praesidium of the European Convention[27] which always took place behind closed doors, were not particularly illuminating, something which was confirmed by their author personally: "Indeed, the minutes were deliberately very vague, they were not sent out to the Convention's members and they were only made public at the end of the Convention" (Milton Interview 2007).

In order to map the motivational dynamics and developments inside the Convention and in Europe more generally, the following analysis is therefore mainly based on a series of first-hand interviews with the President and both Vice-Presidents of the European Convention, with the representatives of all the component groups and also with officials who worked closely with the President in the Convention Secretariat. There were four component groups: a group of governmental representatives; a group of national parliamentarians; a group of European parliamentarians; two European Commissioners. Given that they represented all 'interested parties', this research uses each component

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[27] The Presidium of the European Convention was named after a Latin word "Praesidium" meaning guard, garrison or protection. The Praesidium consisted of the Convention Chairman and Vice-Chairmen and nine members drawn from the Convention: the representatives of all the governments holding the Presidency of the Union during the Convention (Spain, Denmark and Greece), two national parliament representatives, two European Parliament representatives and two Commission representatives.

group as a focus group, which is a very common data-collection method. This method provides a clear account of the influences of group composition characteristics and gives a representative sample of the evidence available for and against any proposition.

The research is designed in a way to examine in-depth the provisions of EU constitutional order that consumed most of the Convention's debate and 'experienced' much of the influence from the American constitutional system.

2.4   Objective of the research

The objective of the research is to analyze constitutional development of the European Union and to find out how the U.S. Constitution has influenced constitution-building within the EU. The main purpose is to test the *main hypothesis* (American constitutionalism has had a direct and indirect impact on the constitution-making process of the European Union, particularly with regard to the separation of powers) and the *sub hypothesis* (that the influence of American constitutionalism has been limited by the political and cultural circumstances in the European Union and by its interconnection with the Member States' constitutions).

The puzzles or questions that the dissertation seeks the answers to are: what explains the EU constitutionalization process; how much of the EU constitutional system could be attributed to American influence; what particular features were borrowed from the U.S., which of them were rejected or significantly adapted; what explains specific choices in borrowing; the degree to which EU constitution-makers were influenced by American experience; and the form to which the borrowed provisions were given in the European context.

This dissertation tests hypothesis and sub-hypothesis through empirical research. In order to validate the hypotheses in a more systematic way, the final chapter provides the Table 8.1 about EU process of (transformed) borrowing from the U.S. Constitution.

The objective of the research is also to answer to the question why the borrowed provisions were given a different form in the European Union. Table 8.2 explains the underlying reason for the transformed borrowing which lies in the fact that the European constitution-makers were pursuing a different objective (*ratio constitutionis*) than U.S. constitution framers.

3 THE EUROPEAN CONSTITUTIONAL DEVELOPMENT IN THE LIGHT OF AMERICAN CONSTITUTIONALISM

3.1 Constitutional milestones in the history of the European Union

After two destructive wars, the original driving force behind European integration was the desire to eliminate conflict and guarantee permanent peace. The fear of returning to the destructive warfare among European nations provided a deep foundation for the movement towards a more united Europe.

At that time, the main concern was the necessity of restoring a balance of power in Europe. American policymakers supported European integration as a way of restoring that balance of power: "Some form of political, military and economic union in Western Europe will be necessary if the free nations of Europe are to hold their own against the people of the east united under Moscow rule" (U.S. Foreign Policy 1948). Memorandum presented by George K. Kennan, whom Secretary of State George C. Marshall had chosen in 1947 to direct the Policy Planning Staff[28] clearly outlined a blueprint for European integration: "If there is to be a 'union', it must have some reality in economic and technical and administrative arrangements; and there must be some real federal authority" (Kennan 1948, 8).

The integration of Western Europe's coal and steel industries was a central proposal of U.S. Foreign Policy, first aired publicly by Marshall as part of his statement, made before the Council of Foreign Ministers in Moscow on 10 April 1947. Marshall's argument was that the concentration of industrial resources in the Ruhr raised two problems: how to share those resources equitably between Germany and its neighbours so that they would benefit all European countries and not just Germany; and how to prevent Germany from restricting the access of other countries to those resources. The first problem could be solved if there was agreement on the principle of "equitable distribution of essential

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[28] In January 1947, George Catlett Marshall, the organizer of victory as Army Chief of Staff during Second World War became Secretary of State in Harry S. Truman's cabinet. Marshall had the idea of forming a planning group in the State Department, called Policy Planning Staff, dealing with a range of foreign policy problems. One of his first initiatives was the European Recovery Program, latter known as the Marshall Plan, which has long held "an exalted place on the list of postwar American foreign policy achievements" (Miscamble 1992, 43).

commodities in short supply." The second problem could be solved if there was agreement on the principle of "access to essential commodities on a non-discriminatory basis." If there was "no discrimination either by Germany or against Germany in the use of basic resources of the Ruhr, then the Germans would not be able to dominate Western Europe but would equally not be tempted to go over to the Soviet side" (Marshall 1947).

According to the analyst of the American Foreign Policy, Miscamble, "Europe was to be strengthened economically and politically to counter the perceived Soviet threat. The strategy of European economic integration ironically had served effectively to further the strategy of political containment" (Miscamble 1992, 57).

Kennan emphasized two major sources of American interest in European recovery. The first related to the economic interest of the United States in Europe stemming from the latter's role as a market and supplier of products and services for the U.S. The second and more important related to America's security interest in preserving a continuation in Europe of a considerable number of free states subservient to no great power. This objective from the outset had provided the central motivation for American assistance to Europe" (Miscamble 1992, 60).

Some account of behind-the-scenes manoeuvring showed that initially Marshall suggested that the practical plan had to evolve in Europe, but "the Europeans preferred to draw up a 'shopping list', neglected to stress the element of self-help and mutual aid and refused to transcend national sovereignties" (Kennan quoted in Miscamble 1992, 62). The Americans therefore first persuaded the Europeans to lessen their aid requirements.[29] On the internal front, the plan had to secure the vote in the U.S. Congress. In late September 1947, Secretary Marshall and President Truman informed a conference of congressional leaders that "unless funds are made available by the first of the year, the governments of France and Italy will fall to the Communists and a long-term program of rehabilitation of Europe will be impossible of accomplishment" (Diary of Admiral William Leahy, quoted in Miscamble 1992, 71). On 19 December 1947 Truman submitted to Congress 'A Program for U.S. Aid to European Recovery', for the first fifteen months – from April

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[29] At the Paris conference, on 12 July 1947, the participants (Britain, France, Italy, Norway, and the Netherlands) came up with "the astronomical figure of $28.2 billion required from the United States" (Miscamble 1992, 63).

1948 to July 1949 – of $6.8 billion, together with a further $10.2 billion in three succeeding years. During congressional scrutiny the bill limited the initial appropriations to $5.3 billion over a twelve-month period. Spurred on by the Communist coup in Czechoslovakia in February 1948, both the House and Senate voted in favour of the amended measure, and the Marshall Plan became a reality. Truman's signature (on 3 April 1948) brought the Economic Cooperation Administration to Western Europe[30] to the great satisfaction of the European countries whose feelings were expressed by Churchill at the Hague conference on 7 May 1948: "The mighty republic of the United States has espoused the Marshall Plan. Sixteen European States are now associated for economic purposes; five have entered into close economic and military relationship" (Churchill 1948).

The policy behind was crucial for promoting the integration of the European economies and the adoption of American labour and management practices. The objective of the Marshall Plan was mainly to benefit the USA by restoring her major trading partner. And there was more to it than that.

American pressure played a powerful role in pushing the French Foreign Minister Robert Schuman to call for the creation of a European coal and steel pool on 9 May 1950. Jean Monnet's memorandum (a week before the Schuman Plan announcement) expressed the American influence:

> There was an option open to France: she must offer to put all Franco-German coal and steel production under a common High Authority in an organization open to all the other countries of Europe. An agreement of this kind could create the conditions for the common expansion of German, French, and European industry and put our national industry on the same starting basis as German industry. Simply put, heavy industry integration offered to establish a rough balance of power between France and Germany. It would eliminate the problem of German industrial domination (Monnet 1950, 8).

Given that Schuman's proposal and the American strategy of integration were identical, it was no surprise that Washington welcomed it with enthusiasm, after having been officially declared on 9 May 1950. The U.S. official statement, given by the then Foreign Affairs Spokesman Dulles, emphasized that "the European Coal and Steel Community

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[30] Economic Cooperation Administration was formed to administer the aid, headed by an officer appointed by the American president and subject to confirmation by the U.S. Senate.

was along the lines which Secretary Marshall had thought about in Moscow in 1947"
(Dulles 1950).

The main idea of the Schuman plan, delivered in a Declaration of 9 May 1950 (leading to
the Treaty establishing the European Coal and Steel Community in 1952) was that
national coal and steel resources should be pooled and placed under the control of a
supranational authority. The motivation behind this proposal was simple: the capacity to
fight wars ultimately depended on access to coal and steel; when this was removed from
national control the risk of further conflict significantly decreased. However, the
banishment of war from Europe was essentially merely a diplomatic expression for the
fundaments of European integration. The containment of a potentially dangerous
Germany was its central objective according to some historians. The goal was to "take
control of the Ruhr and other vital German resources out of purely German hands" (Judt
2007, 124).

Instead of the 'direct method' of European constitutionalization, Jean Monnet and Robert
Schuman devised an alternative strategy, known as the strategy of 'small steps' or
'indirect constitutionalization'.

> By pooling basic production and by instituting a new High Authority, whose decisions
> will bind France, Germany and other member countries, this proposal will lead to the
> realization of the first concrete foundation of a European federation indispensable to the
> preservation of peace (Schuman 1963, 147).

The failure of the subsequent initiative for a European Defence Community led to an
increasing emphasis on the economic aspects of European integration. Economic
integration became the rationale for a new form of association among sovereign states,
based upon law and strong common institutions. The more ambitious proposals of the
political union were objected to by opposition from 'sovereignists'.[31] As a result, a more
pragmatic approach was fashioned by founding fathers of the European Union (Jean
Monnet, Robert Schuman, Konrad Adenauer, and Alcide de Gasperi). The Union was not

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[31] French President Charles de Gaulle was the most prominent 'sovereignist' and defender of Europe of
nation-states (*Europe des patries)* which encapsulates a model of European integration in which the states
are the essential building blocks, and in which the decision-making procedures reflect the pre-eminence of
the states within the system.

enshrined in a constitution but in the 1958 Treaty of Rome broadening the mission to include the creation of a European Economic Community (EEC) and European Atomic Energy Community (EURATOM). Instead of a grand constitution, the objective was to increasingly link West Europeans through a sense of solidarity and common economic interests. However, the Schuman Plan became a successful launching pad for European integration. Unlike its predecessors, this plan adopted a functional approach. Economic means were being managed for political ends. The functionalist approach is recognizable in a famous message from the Schuman Declaration: "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity" (Schuman 1963, 146). The traditional diplomatic approach was therefore neatly sidestepped and an incremental approach adopted. The Treaty of Rome introduced the idea of an "ever closer union among the peoples of Europe."[32] This reality was to be a dynamic process, based upon the recognition that concrete results would be needed before further advances could occur. As European economic integration deepened, political integration followed.

A series of treaties eventually formed a protean European constitutional order. These include the Single European Act in 1987, the Maastricht Treaty in 1993, the Amsterdam Treaty in 1999, the Treaty of Nice in 2003 and Lisbon Treaty, which entered into force in December 2009. The treaties upon which the Community's legal order is based are considered to be a "European constitutional settlement" or a *de facto* constitution. The constitutional character of the European Union was formally recognized in judicial decisions of the European Court of Justice stating that "the EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law."[33]

However, there had always been a dichotomy between the constitutional jurisprudence defined by the European Court of Justice and the way in which this was perceived by the Member States. As the scholar Weiler (1999) stated, constitutionalization of the EU during the foundational period was judicially driven through four landmark cases of the ECJ establishing the 'constitutionalizing' doctrines of direct effect, supremacy of Community law, implied powers and human rights.

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[32] Lisbon Treaty, Article 1of the Treaty on European Union.
[33] ECJ, Case 294/83 Les Verts vs. European Parliament (1986).

Apart from this gradual process of European constitutionalization imposed upon European political leaders as a result of deepening economic ties, there have also been sporadic efforts to create a formal or a *de jure* constitution for Europe. Not surprisingly most of these efforts originated in the European Parliament, a body that held out the promise of a united political order in Europe but which, unlike national parliaments, had limited decision-making power. "The establishment of direct elections of the European Parliament in 1979 was an important element in constitutionalizing the European Union, because the concept of direct elections to the European Parliament importantly reinforced a supra-national level of the European Union and therefore reinforced this 'constitutionalization' aspect of the European Union" (Milton Interview 2007). Inspired by this new sense of democratic legitimacy the EP Committee on Institutional Affairs, under the chairmanship of Altieri Spinelli drafted the first formal proposal for a European constitution in 1984.[34] But this document was ignored by the Member States. Soon afterwards, in 1990, Parliament adopted a resolution proposing guidelines for a draft constitution for the European Union (European Parliament 1990) and then followed this with another proposal for drafting a constitution in its Second report on the Constitution of the European Union in 1994 (European Parliament 1994).

Political leaders in the EU Member States, however, remained sceptical about creating a formal constitution, which might give the impression that a European super-state was in the making. Indeed during most of the twentieth century the mention of 'constitution' in relation to the European Union had been considered a political taboo. Even as recently as 2000, British Prime Minister Tony Blair rejected the idea of a European constitution. Europe, he argued, should retain its unique intergovernmental and supranational structure but should not become a super-state. Rather than a constitution, Blair suggested that European leaders should adopt a charter of principles and competences which would be a political, not a legal document (Blair 2000).

The tide began to turn that same year. German Foreign Minister Joschka Fischer became the first major national politician to break the taboo. In a speech at Humboldt University in May 2000, he publicly discussed the idea of creating a European 'constitution' and argued that the time may have arrived for Europe to move from a confederation to a

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[34] The "Spinelli initiative" led to the adoption of a Draft Treaty on European Union by the European Parliament in 1984 (Official Journal of the EC, C77/33).

federal political structure (Fischer 2000). French President Jacques Chirac followed Fischer's lead. In an address to the Bundestag in Berlin later that year, Chirac proposed that a restructuring of the several treaties upon which the EU rested might pave the way for a fully-fledged constitution (Chirac 2000).

With the French and Germans now leading the way, a summit of European Heads of State or Government at Laeken, Belgium, on 14 and 15 December 2001, finally agreed on establishing a convention for the drafting of a "Constitution for European citizens."[35] The Laeken Declaration committed the EU to greater democracy, transparency and efficiency, and set out the process by which a constitution could be established. This was to be achieved by a convention, which was intended to comprise the main 'stakeholders', in order to examine questions about the future direction of the EU. The convention was to produce a "final document" which soon became the draft constitution, to be handed over to the Intergovernmental Conference scheduled for 2004, which would finalize a new treaty.

It is therefore important to consider why national political leaders in Europe who had for so long been suspicious of the idea of a European super-state and centralization of power, finally agreed to establish a constitutional settlement. The research also looks at some of the factors that led to this decision and tries to find out what Europe's leaders hoped to accomplish.

3.2 The European Convention as a constitutional moment

The most recent constitutional reform process of the EU was launched by the European Council held at Laeken in 2001. Four primary factors led to Laeken: 1) a sense that existing political institutions in Europe had become exhausted and could no longer deal with Europe's most pressing policy concerns; 2) the perceived need to democratize and legitimize European political institutions; 3) the collapse of the Eastern Bloc and the need to enlarge the EU to accommodate the newly established democracies of Eastern and

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[35] Laeken Declaration, the Chapter *Towards a Constitution for European citizens*: "(…) The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?" (European Council 2001).

Southern Europe; and 4) the inertia created by European integration, the growth of European institutions and the need to find a way forward for political integration. Understanding these factors is thus the first step in uncovering the motivation and intentions of participants at the convention.

3.2.1 Institutional Fatigue

According to the Convention's President, Valéry Giscard d'Estaing, the primary reason for convening the European Convention was the fact that the traditional mechanisms for revising the EU's treaties and accommodating institutional change had become exhausted (Giscard d'Estaing Interview 2007). European integration and institution building had traditionally taken place through diplomatic conferences between representatives of the governments of individual Member States, which were later legally formalized in the treaty as the Intergovernmental Conferences (IGC).[36] Numerous researchers analyzed whether the supranational actors (representatives of the EU institutions) had any significant power at IGCs. Some argued that supranational institutions were only able to reshape the preferences of other actors in terms of agenda setting (Falkner 2002, Hix 2002). This, however, is not the same as having the power at the bargaining table, where member state representatives negotiate treaties. So long as the focus of such meetings was limited to trade and economic concerns they did not require making fundamental choices about political integration. As soon as political integration was put on the EU agenda, the growing power of supranational actors was highlighted and the content of IGC was shifted to the increasingly difficult questions involving national sovereignty and the balance of power between the European Union's institutions and member-state governments.

This shift made IGCs increasingly contentious and ineffective mechanisms for resolving disagreements, as highlighted in the following account:

In December 1993, EU leaders set up the list of 'must do' institutional reforms before the Eastern enlargement took place: Council voting rules (vote allocation to the Member

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[36] According to Article 48 of the Treaty on European Union a conference of representatives of the governments of the Member States (IGC) shall be convened for the purpose of "determining by common accord the amendments to be made to the Treaties". The decision-making process of IGC involves Member State representatives – first diplomats, then ministers, followed by heads of government – who meet over several months in closed session to debate package deals between themselves.

States and areas subject to majority voting), and composition of the Commission (necessary changes which would enable the EU to operate with efficiency, coherence and legitimacy). These institutional issues failed to be resolved at the negotiations in Amsterdam (1997) and therefore became known as the 'Amsterdam leftovers'.[37] As a reaction to the Amsterdam Treaty failure, EU leaders committed themselves to a new Intergovernmental Conference in 2000.

The issue of reform of the EU decision-making rules was thus put on the agenda of the Nice European Council in December 2000. As for the agreement concerning the allocation of votes Germany, Italy, and the United Kingdom had up until then the largest and equal number of votes. However, after the fall of the Berlin wall (in November 1989) and the reunification of Germany (in October 1990), its larger population necessitated greater voting power. The French, incidentally holding the EU Presidency in the second part of 2000, were determined to retain parity with Germany and insisted that the founding bargaining of the European Union – rooted in the post war deal - was that France and Germany should always be equal.[38] The final compromise on voting weight[39] agreed at the Nice European Council therefore did not take into account the 20 million population difference between Germany on the one hand and France, the UK and Italy on the other. Moreover, French President Chirac created further inequalities when rearranging the allocation of Council votes. In order to secure the final compromise, he put forward a proposal under which Spain and by extension Poland, would get a disproportionate number of votes. They were each allocated only 2 votes less than Germany, even though they had less than half Germany's population. Some political analysts therefore argued that there was anecdotal evidence "that Spain was the swing voter in the negotiations at Nice and this may explain why Spain's power share rose so much" (Baldwin and Widgrén 2007b, 5). Consequently, Poland got the same number of votes as Spain since they had a similar population of people at that time. Overall, the Nice voting rules raised the power share of the five biggest nations and lowered the power

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[37] For a detailed analysis of the Amsterdam Intergovernmental Conference, see: Hug and König (2006).
[38] "That Germany and France should be equal powers in the European Community had been established by Monnet and Schuman in the 1950s, endorsed by Giscard and Schmidt in the 1970s. During the negotiations on the Maastricht Treaty in December 1991, François Mitterrand had conceded that Germany should have more MEPs than France. But that deal was part of the package which gained for France and German commitment to the single currency" (Duff 2005, 24).
[39] EU Council voting rules according to Nice agreement: Germany, France, the UK and Italy 29 votes; Spain and Poland 27 votes; Netherlands 13 votes; Greece, Portugal, Belgium, the Czech Republic and Hungary 12 votes; Sweden and Austria 10 votes; Denmark, Slovakia, Finland, Ireland and Lithuania 7 votes; Latvia, Slovenia, Estonia, Cyprus and Luxembourg 4 votes and Malta 3 votes.

share of the rest. Since the meeting had to reach political agreement as a pre-condition for EU enlargement, "in the end, the small nations sacrificed power to allow the enlargement to proceed" (Baldwin and Widgrén 2007a, 4).

Inevitably, this system of power-sharing was denounced by most of the delegates before the ink was dry. The distribution of votes under the Nice Treaty rules has on many occasions been criticized for favouring a number of medium and small members, whereas the largest members have been found to be under-represented. The larger states claimed that the future enlargement would reduce their relative power.

By all accounts the Nice European Council was a sobering experience for Europe's leaders. After the conference on 11 December 2001, British Prime Minister Tony Blair reflected the general perception when he said: "As far as Europe is concerned, we cannot do business like this in the future" (Blair quoted in Norman 2005, 16). That perception was shared by Belgium's Permanent Representative to the EU, who called the Treaty of Nice "arguably the worst treaty we have ever negotiated" (Van Daele 2007, 7). To make matters worse, less than a year later the Treaty of Nice was rejected by a referendum in Ireland, on 7 June 2001. It was eventually saved by a second Irish referendum on 19 October 2002, but only after the addition of a declaration requiring the consent of the Dáil (the lower house of the Parliament of Ireland) for "enhanced cooperation" under the treaty, and another preventing Ireland from joining any EU common defence policy.

The difficulty in negotiating fundamental questions of state sovereignty, especially in the context of EU expansion, and the complex problems involved with overhauling EU institutions to democratize them, increasingly made Intergovernmental Conferences obsolete and ineffective mechanisms for EU governance. Indeed, the European Council summit at Nice, which was the longest summit in the history of the EU (8-11 December 2000), indicated that the Union had reached the limits of its ability to make political decisions within existing institutional structures.

This sense of institutional failure and fatigue, led European leaders to call for more fundamental debate over institutional reform. In the Declaration on the future of the Union (Treaty of Nice 2001) they acknowledged that while the Nice Conference was supposed to resolve the issues left over from Amsterdam, it produced its own leftovers. The Declaration set out four specific issues needing immediate attention: the delimitation

of powers between the European Union and the Member States, the status of the Charter of Fundamental Rights, the simplification of the treaties and the clarification of the role of national parliaments in the European architecture.

The failure of the Amsterdam and Nice IGCs led members of the European Parliament and the European Commission in particular to push for the creation of a new, more representative and more transparent decision-making procedure. The IGC was denounced in the European Parliament "as being too secretive and elitist, keeping citizens out of the debate and not taking their needs and their wishes into account" (Piris 2006, 44). Thus the main proponents of convening a constitutional convention of some sort were members of the European Parliament and the European Commission, neither of which had been fully involved in the treaty revisions in the past. According to some political analysts, the influence of the European Commission and the European Parliament on previous treaty changes was nearly non-existent (Polack 1997). So they would obviously benefit from a process in which their representatives would become equal partners with representatives from member state governments. "The European Parliament was certainly the most enthusiastic about the idea of convening a Convention. Originally, a consultative assembly, it had managed to reinforce its role as a legislator and wanted to take part in the revision of the Treaties as well" (Dehaene Interview 2007).

In its resolution on the constitutional process, the European Parliament argued that the aim of the 2003 IGC must be to create a constitution for the EU and reiterated its commitment to participate in a new method of reforming existing treaties: "The European Parliament insists on the need to establish a Convention whose composition reflects European political pluralism and in which, consequently, the European and national parliaments would be well represented. The European Parliament considers that a Convention of this kind could represent an innovation indispensable for the success of the democratic reform of the EU" (European Parliament 2001).

Incidentally the European Convention on Human Rights was convened in 2000 in order to draft the EU's Charter of Fundamental Rights. This offered "an appealing alternative to the IGC method and a credible precedent for the Convention" (Magnette and Nicolaïdis 2004, 382). In the light of this, the European Parliament recommended "the establishment of a Convention (to start work at the beginning of 2002), with a similar remit and

configuration to the Convention which drew up the Charter of Fundamental Rights, comprising members of the national parliaments, the European Parliament, the Commission and the governments, the task of which would be to submit to the IGC a constitutional proposal based on the outcome of an extensive public debate and intended to serve as a basis for the IGC's work" (European Parliament 2001a).

The failure of the Nice ICG in December 2000, which one commentator described as "a gladiatorial cliff-hanger of unusual bitterness" (Norman 2005, 15) therefore served as a final push for the European leaders, who eventually opted for a more innovative approach to Treaty change and moved towards the creation of a formal constitutional structure for governing Europe. One year after the Nice conference, the Laeken Declaration in December 2001, set out the key issues to be discussed at the Convention: the division of competences between the Union and its Member States, the simplification of the Union's legislative instruments, the maintenance of inter-institutional balance and an improvement in the efficiency of the decision-making procedure, and the constitutionalization of the Treaties.

3.2.2 Democratic Legitimacy

According to the former President of the European Commission Jacques Delors[40] a second reason for convening a special convention body was to confront 'democratic deficit' in the EU. A constitutional convention made sense, Delors argued, because "the so-called democratic deficit was the basis of this disenchantment throughout the Member States. The European Union had intervened openly in citizens' lives, whereas the Europeans were not able to say who does what and who controls what in Europe" (Delors 2004, 13).

In fact, despite their growing importance and power, EU institutions remained strangely disconnected from the European public. Surveys consistently revealed that the public lacked knowledge about the EU and perceived 'Brussels' as a distant technocratic

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[40] Jacques Delors was the President of the European Commission from 1985 until 1995. In order to prepare the Declaration on the Future of Europe (adopted at Laeken European Council) Delors was asked to take part in a high profile committee of 'wise men' (other members: Giuliano Amato, the former Italian prime minister, Jean-Luc Dehaene, the former Belgian prime minister, Bronislav Geremek, the former Polish foreign minister, and David Milliband, the then British MP and confidant of Tony Blair).

structure out of touch with the common people. Over the years, turnout for European Parliament elections steadily declined, from 63% in 1979 to 45,3% in 2004.[41] The EU seemed to be crippled by a 'legitimacy crisis' and lack of a commonly shared public vision of its role. According to one commentator the Laeken Declaration had noted this sense of pessimism:

> The Union has fallen from grace. It has become contaminated by intergovernmentalism. It has departed from the Vision of the Founding Fathers. Its institutional structure is not only complex, but indefensible and unnatural. It is technocratic rather than democratic, remote from citizens rather than close to them (Ludlow 2002, 180).

A constitutional convention was thus a way to give the EU a new breath of democracy and openness, to make it seem less a "product of that ivory-tower Europe which seemed so distant from the citizenry" (Amato 2004, 9). "According to its proponents and supporters, the method of the convention would have the advantage of avoiding the usual horse-trading between diplomats arguing behind tightly closed doors. The idea was that it would allow public opinion in the Member States to have opportunity of the following and influencing the debates and the content of the future treaty in the direction the people would wish" (Piris 2010, 14). As one scholar observed "enthused by the prospect of a re-enactment of the Philadelphia Convention of 1787, millions of web-savvy Europeans were expected to mobilize, to follow the constitutional convention, and to deliberate the meaning of Europe" (Moravcsik 2006, 221).

The Convention was therefore meant to provide a forum for legitimization of the European politics and policy - in a way that the final decision would not be perceived as a product of secretive IGC but as a transparent process of debate between the institutions and the civil society representations. As the group of researchers put it: "Convention was supposed to provide new forms of ex-ante legitimacy for constitutional politics in the EU" (Castiglione *et al.* 2007, 20). In other words, the Convention was a means of getting the final decisions legitimized (authorized) by the public; not only the innovations but

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[41] The most recent European Parliament elections in 2009 had an even worse voter turnout: 44%. Available on http://www.europarl.europa.eu/parliament/archive/elections2009/en/index_en.html (Website accessed on 12/10/2010).

also *acquis communautaire*[42] – the whole range of laws, policies and obligations that had developed within the European Union.

3.2.3 Enlarging Europe

The need to democratize EU institutions coincided with the pressure produced by the largest enlargement in the history of the EU. Following the collapse of the former Soviet Union and the Eastern Bloc, scores of Eastern and Southern European nations were in the process of democratization and anxious to become members of the EU. This was a great challenge. On the one hand, European leaders pushed for "a long-overdue unification of the continent" (Milton and Keller-Noëllet 2005, 24) and on the other hand, the accession of twelve[43] new Member States was to require the revision of the basic institutional structure of the EU. Blair summed up the situation in a speech to a European Council Summit in Cardiff in 2002:

> Europe has changed. Fifty years from the start of the European project, the world has changed almost beyond recognition. Today, our preoccupation is not about preventing war in Europe or ensuring adequate food production. That fact itself says something about what the European project has achieved. But we face new threats and challenges: security, economic and environmental issues. And the European project itself faces problems: apathy, disconnection from its citizens, and a lack of understanding of how it works. Today's challenge for Europe goes to the heart of the very institutions, which make up the EU. (…) But these institutions were designed for a Community of six, dealing with a handful of common policies. (…) In their current form, they are not up to the job of serving tomorrow's Europe of 25 or more. Nor do they measure up to tomorrow's expanding tasks (Blair 2002).

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[42] The term *acquis communautaire* or *EU acquis*, is used in European Union law to refer to the total body of EU law accumulated thus far. It comprises the Treaties (primary legislation), the legislation adopted under the Treaties (secondary legislation), the case law of the Court of Justice, the declarations and resolutions adopted by the Union, measures relating to the common foreign and security policy, measures relating to justice and home affairs, international agreements concluded by the Union and those concluded by the Member States amongst themselves in connection with the Union's activities. Available on http://eur-lex.europa.eu/en/index.htm

[43] The so-called Eastward enlargement of the EU was to include Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia and later on also Romania and Bulgaria.

The tension between the desire of existing EU Member States to consolidate what they had and their treaty obligations to consider the application of any European state, forced them to consider fundamental reforms to EU institutional structures. There were fears that a dramatic expansion of Member States would paralyze the EU and bog down its decision-making mechanisms. The need to transform the pre-enlargement Union to a structure, which would establish a more democratic, a more transparent, and a more streamlined process for governance and decision-making became a priority, and a constitutional convention the best avenue for accomplishing that task.

3.2.4 Political Inertia, and the Challenge of Further Integration

The Laeken Declaration (European Council 2001) suggests another, less evident motive behind the creation of a European constitution. After half a century of successful economic cooperation many political elites in Europe, and especially those inhabiting the EU institutions in Brussels, had come to accept the idea that full political integration backed up by a formalized constitution was a desirable and natural objective of EU development. The movement to full political union, however, was stymied by a conflict between two competing visions of what that union should be. On the one side were those who wanted to 'reinvent' the EU and who advocated transformation into a federal state. On the other side were those who argued that the EU's existing hybrid system of supranationalism (a process in which the European institutions enjoy political autonomy and authority) and intergovernmentalism (a process in which traditional states predominate, which allow governments to cooperate in specific fields while retaining their sovereignty) was the only possible basis on which to build for the future. A constitutional convention would provide a forum for resolving this conflict.

In general, however, eurosceptic member state governments were less inclined to buy into the convention strategy. According to some researchers (Magnette and Nicolaïdis 2004) in the UK and Denmark, the experience of the convention to draft the EU's Charter of Fundamental Rights in 2000, had left a bitter taste. In June 1999, these two governments

had accepted the German proposal[44] to create this convention body, believing it would be under their control. But, the 'conventioneers' had adopted a fully-fledged Charter of Rights, which in large bypassed the *acquis communautaire.* With this recent reminder of the power of 'unintended consequences' the British and Danish governments were unwilling in December 2001 to accept a new convention with an even broader mandate.

Conversely, the convention method was strongly supported by some small Member States that wanted to go beyond the status quo and had good reason to think that such a process would strengthen their position (Benelux, Portugal, Greece and Finland). Apart from the small 'pro-federalist' countries, Germany was also an early supporter of the call for a convention. This was largely due to the Germans' pragmatic calculation that important concessions that German leaders had made in order to reach agreements in Amsterdam and Nice (i.e. a smaller European Commission; an elected president of the Commission; more proportionally weighted voting) could be won at a convention. The French President Jacques Chirac had felt it necessary to express his support for the 'constitutional prospect' one month after Fischer's speech in order to avoid being seen as the weak part of the Franco-German 'engine' behind EU cooperation. Most of the other governments were sceptical about the convention process. The Spanish government was reluctant because it was unwilling to renegotiate what it had won at the Nice Summit (i.e. the weighting of votes and distribution of seats in the European Parliament). The Italian government vacillated between the traditionally pro-European stance of Italian political elites, and its more temporary inclination to support the British line (its position which was down to the then Prime Minister Berlusconi). Other governments oscillated between opposition fed by domestic euroscepticism (Sweden, Austria) and apparent neutrality (Ireland).

In this context, several actors and events proved crucial in maintaining the momentum for a convention. For example, in late 2001, the Belgians, historically amongst the most committed to European integration, took over the EU Presidency and put the constitutional idea at the top of its agenda. Against the background of stalemates at Amsterdam and Nice, the Belgian government proposed a clever strategy of getting a

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[44] The German Government had strongly promoted the 'Charter convention' in light of the German Constitutional Court jurisprudence on the EU's fundamental rights deficit. The powerful German Constitutional Court in Karlsruhe warned against any further transfer of competence to the EU level without a concomitant strengthening of fundamental rights protection.

commitment for a wider debate on Europe's future written into the Treaty of Nice. As former Belgian Prime Minister Jean-Luc Dehaene explained:

> It was mainly the Belgian Prime Minister Guy Verhofstadt who first convinced his Benelux partners and three other 'founding members' to support the adoption of a Declaration on the Future of the Union as a last-minute footnote to the Treaty of Nice. On the basis of the commitment for a wider debate about the future of the European Union, the Belgian Presidency was thus well placed to push forward the historic idea, reflecting a constitutional ambition for Europe. Prime Minister Verhofstadt took on political responsibility and managed to convince the Heads of State or Government that the concept of the Constitution was formally written into the Laeken Declaration (Dehaene Interview 2007).

The Belgians however had to reassure reluctant partners, particularly the British, but also the French and Spanish. Thus, they suggested a series of safeguards to make sure that member state governments would retain ultimate control of any future development. The most important safeguard consisted of creating a 'firewall' between a would-be convention and the IGC to follow. In that spirit, the convention was given a limited time and mandate to identify 'options' to be settled by the IGC. Secondly, the composition of the convention, whereby national representatives would make up three-quarters of the delegates, was meant to reassure governmental leaders. The third category of safeguards was spelled out in the limited mandate of the convention. A fourth and final safeguard became the governments' ultimate trump-card when they insisted on nominating the Chair of the Convention instead of leaving this matter to the conventioneers. When Jacques Chirac, backed by Tony Blair and Gerhard Schröder, requested the nomination of the former French President Valéry Giscard d'Estaing, many of his counterparts from smaller countries (the Benelux countries, Portugal, Finland, and Greece) feared a large country bias. The Belgian Prime Minister Verhofstadt countered by suggesting that Giscard d'Estaing should be flanked by two Vice-Presidents, former Belgian Prime Minister Jean-Luc Dehaene (conservative) and former Italian Prime Minister Giuliano Amato (socialist). With all these concessions and safeguards, the convention method was accepted by the European Council at Laeken in December 2001 (Magnette and Nicolaïdis 2004).

"The adoption of a constitutional text of the Union" (European Council 2001) and therefore constitutionalization of the Treaties through the European Convention was for the first time a stated goal, agreed upon by the European leaders at Laeken, 2001. It is mainly the theory of Historical Institutionalism that helps to explain why the EU constitution-makers turned to the new way of treaty amendment (through European Convention) and formally started a constitution-building process. Firstly, it was mainly because of the negative feedback produced by the 'old practice' of revision through diplomatic negotiations at the conference of member state representatives (IGC). Moreover the European Commission and Parliament proved to gain the stage of, what path dependence theory (Pierson 2004) calls "self-reinforcing institutions" which typically generate powerful inducements that reinforce their own stability and further development. In case of the composition of the European Convention, these two "established institutions" not only reinforced their stability, but also insured their important position at the bargaining table for the revision of the treaties.

This was the first time that European governments would jointly share the task of reforming treaties with the delegates representing supranational actors (European Commissioners and Members of the European Parliament) and with the national parliamentarians.

4 EUROPEAN CONVENTION

Over the first fifty years of European integration a largely invisible period of constitution-building took place in the European Union. A clear constitutional turn occurred by calling a European Convention, which offers a fascinating opportunity to examine directly the motivations and interests of modern constitution-makers.

This chapter examines the motives and actions of delegates to the European Convention, established with 105 members and 102 alternates. Its members were drawn from the national parliaments of member states and candidate countries, the European Parliament, the European Commission, and representatives of Heads of State or Government. The Convention was thus composed of 15 representatives of national leaders (one per member state), 30 members of national parliaments (two per member state), 16 members of the European Parliament and two representatives of the European Commission. The 12 accession countries (Bulgaria, Estonia, The Czech Republic, Hungary, Latvia, Lithuania, Poland, Romania, Slovenia, Slovakia, Malta, Cyprus) and Turkey were fully involved in the Convention's proceedings and were represented, like the Member States, by one government representative and two national parliament members each. The only restriction was that the candidate countries were not allowed to prevent any consensus that might emerge among Member States. There were also 13 observers: six representing the regions (European Committee of the Regions), six representing the social partners (European Economic and Social Committee) and one observer representing the European Ombudsman.

The Convention had a Praesidium, chaired by former French President Valéry Giscard d'Estaing, including two vice-chairmen and nine members drawn from the Convention. The Praesidium (the 13-member body) was charged with pushing the Convention forward and acted as an important catalyst in trying to resolve all outstanding issues.

Never before had the EU member state governments gone so far in sharing power. In the context of the 'democratic deficit', government leaders had little choice but to broaden the debate on the future of Europe. The European Convention met in unprecedented open conditions. Its plenary sessions were held in public and broadcast on the EU's satellite

television channel. It met for the first time on 28 February 2002 and thereafter in plenary session once or twice per month. Unlike the Philadelphia Convention where the secrecy rule applied,[45] the European Convention deliberated in public in the European Parliament building in Brussels. The European Convention thus represents an important turning point in the history of European integration.

Given the complex set of motivations leading to the Convention and the lack of a galvanizing event requiring a sharp break from past legal and political institutions, it is hardly surprising that no singular or related set of motives prevailed among Convention delegates. The analysis demonstrates that an interdependent mixture of motivations were present in the decision-making process at the Convention. The debates and final compromises were influenced by a variety of variables that embraced both *endogenous* and *exogenous factors and constraints* imposed by various power holders.

4.1 Endogenous constraints

4.1.1 The role of the President of the European Convention

According to the Laeken Declaration, the Convention's role was both limited and preliminary in nature. Its mandate was to debate the future of Europe and then to prepare a report of various options to be considered by the Intergovernmental Conference, which would have the power to make final decisions (European Council 2001). Not unlike the Philadelphia Convention in 1787, who basically gathered "for the sole and express purpose of revising the Articles of Confederation" (Bowen 1986, 4), however, the European Convention quickly moved beyond its mandate and drafted a fully-blown constitutional document.

The driving force behind this development was the Convention President Valéry Giscard d'Estaing. As French President between 1974 and 1981, Giscard helped to sustain the European Communities and promote European economic integration through the difficult

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[45] Delegates of the Philadelphia Convention were supposed to abide the rule of secrecy (which followed the tradition of secret revolutionary colonial assemblies). However, there was criticism of the secrecy rule and some rumors published in the press, to which the delegates uniformly answered "we cannot affirmatively tell you what we are doing, we can, negatively, tell you what we are not doing" (Bowen 1986, 191).

years that followed the inflationary oil shock and recession of 1973. More importantly, Giscard was founder of the European Council[46] he had also promoted the first direct elections to the European Parliament in 1979 and was involved in the foundation of the European Monetary System in the late 1970s. Some observers argued that the fact that he had co-founded the European Council, this 'exclusive club' of the Heads of State or Government, was the most important factor that persuaded the EU leaders to nominate him to steer the discussion on reforming the Union. During the Convention discussions, Giscard made frequent reference to the Philadelphia Convention which hammered out the American Constitution. He admitted that he was looking back at historical precedents:

> I have studied the American constitutional experience a lot and the role of Washington, Hamilton, Madison in the Philadelphia Convention. In the European case, I was nominated by the Member States' governments not simply to chair the Convention but also to assure its leadership and define its working methods. First of all, I set up a core body, Praesidium, charged with pushing the Convention forward (Giscard d'Estaing Interview 2007).

By all accounts, he managed to transform the presidency into a powerful office and saw his leadership of the Convention as an opportunity to leave his mark in history.[47]

At its very first session on 28 February 2002, President Giscard convinced the delegates to commit themselves to a "broad consensus on a single proposal" and abandon the idea that its role would be limited to identifying options. "This was a major decision, because it determined the organization of the Convention's work" (Magnette 2003, 8).

Giscard then 'negotiated' the rules of procedure, which were adopted a month after the opening of the Convention, on 14 March 2002. The Convention accepted his demand that

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[46] The first European Councils were held in February and July 1961 (in Paris and Bonn respectively). They were informal summits of the EU leaders and were started due to then French President Charles de Gaulle's resentment at the domination of supranational institutions over the integration process. The first influential summit was held in 1969 after a series of irregular summits. The summits were only formalized in the period between 1974 and 1988. In 1987, European Council was included in the treaty for the first time (the Single European Act) and had a defined role for the first time in the Maastricht Treaty: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof."

[47] As one of the members of the Praesidium observed "Valéry Giscard d'Estaing himself wanted to secure his place in history, not a dishonorable or uncommon preoccupation among politicians, by giving Europe a written Constitution. On one notable occasion he told us in the Praesidium that 'this is what you have to do if you want the people to build statues of you on horseback back in villages you all come from'" (Giscard d'Estaing quoted in Stuart 2003, 57).

its decisions would be established by *consensus* and not by votes.[48] Consensus was a vague concept and therefore Giscard's secret weapon as he was the only person who would summarize the debates and determine the 'consensus' position of the delegates.

Due to its dominant role, the Praesidium was dubbed the "Politburo" by some of the delegates (Bonde Interview 2007). Lord Alexander Stockton, a British delegate, remarked: "As far as Giscard's manner in exercising the presidency is concerned, it is not only *l'État c'est moi* , it is *l'Europe c'est moi*[49]" (Stockton quoted in Duhamel 2003, 178).

In response, Giscard d'Estaing defended his role:

> Some challenged me on the fact that I exercised my presidency in a too managed way. In my opinion the voting would have brutally exposed the difference in size and legitimacy of different component groups. Due to the imbalance between different component groups, for example, the government representatives, being overall in a minority, could have been easily outvoted. Not only that the component groups were of very different orders of magnitude but did not either reflect European demography. Conversely, the approach based on seeking consensus tended to encourage the identification of common points. According to my perception the consensus was reached when more or less 80% of delegates agreed (Giscard d'Estaing Interview 2007).

However, a few months after the Convention began the delegates were dissatisfied with the strong role of Giscard and the Praesidium. In an effort to bolster their role they moved to create working groups[50] on the main issues before the Convention. These would give delegates greater specialization and the ability to become more proactive in establishing the Convention's agenda.

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[48] According to the adopted Rules of Procedure for the Convention (CONV 9/02), Art. 6(4): "The recommendations of the Convention shall be adopted by consensus, without the representatives of candidates' states being able to prevent it. When the deliberations of the Convention result in several different options, the support obtained by each option may be indicated" Available on http://european-convention.eu.int/ (Website accessed on 12/10/2010)

[49] "L'État, c'est moi" ("I am the state"!) The famous exclamation of the 17th century French monarch, Louis XIV (1638-1715), who saw himself as personifying the state, was paraphrased to "I am Europe".

[50] The tasks of eleven working groups, set up in July 2002, were following: Subsidiarity, EU's Charter of Fundamental Rights, EU's legal personality, the role of the national parliaments, Division of competences, Economic governance, External action, Defence, Simplification of legislative procedure, Freedom, security and justice, Social Europe.

The working groups were intended to provide a more in-depth discussion on specific issues and to come up with recommendations to the plenary. Members of the Convention were invited to nominate themselves for a maximum of two groups and to express a preference for one. The Secretariat and Praesidium could suggest changes to ensure some sense of balance within each group. Broadly speaking 'natural selection' seemed to achieve a balance without too much interference afterwards (Milton Interview 2007).

Some features of this process however favoured a deliberative approach. "Most conventioneers acknowledged that they had generally been able to organize their deliberation on their own, without being subject to pressures from the European Council" (Magnette 2007, 9).

However, the working groups were set up against Giscard's will as he openly stressed: "I was against the formation of pseudo-specialist groups because they became too pretentious and wanted to draw up the document" (Giscard d'Estaing Interview 2007).

Interestingly enough, no working group was established on institutional questions, "thus reflecting the will of the Praesidium or of its President to keep these delicate questions under their control" (Piris 2006, 47). Moreover, "each working group was chaired by one of the Praesidium members whose first initiative was to proclaim himself the chairman and the reporter" (Lamassoure 2004, 470). In response, Vice-President Dehaene argued that "the chairman of each working group had to be one of the Praesidium members so as not to give free rein to its debate" (Dehaene Interview 2007).

Last but not least, Giscard exercised extraordinary control over the drafting of the final document. Much like the Committee on Detail in Philadelphia,[51] the process of drafting was used to make decisions and compromises as much as to reflect those already made by

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[51] When Philadelphia Convention was more than half over, a small committee – the Committee of Detail – was appointed to set their resolves, suggestions, amendments and propositions into workable arrangement, or, as Washington phrase it in his diary, to "draw into method and form the several matters which had been agreed to by the Convention as a Constitution for the United States" (Washington quoted in Bowen 1986, 192). At the final stage, the Committee of Style undertook the work "to refine Constitution into literary shape" (Bowen 1986, 199).
Similarly, a Working Party of Legal Experts was set up in September 2003 "to review the legal drafting of the text of the Constitution as proposed by the European Convention. The text of Constitutional Treaty as drafted by the Convention was not well drafted from the legal point of view; it contained a number of inconsistent provision, serious lacunae, and incorrect legal drafting or ambiguities" later recalled Director-General of the Council Legal Service, Jean-Claude Piris, who chaired the Working Party of Legal Experts (Piris 2010, 18).

the broader Convention. However, the Praesidium members were flabbergasted by some of Giscard's proposals, which "often took place in Giscard's study in his house in Paris, well away from the Convention secretariat offices" (Norman 2005, 190). The Convention delegates constantly complained that "they had been cut out of the loop and presented with a *fait accompli*" (ibid).

The President did not deny that fact and admitted:

> The very first 'draft constitution' with 46 articles was written by me and John Kerr[52] who came to my place in Paris. Later, Vice-President Amato also wanted to discuss it in-depth. I drew him the 'skeleton' on a paper napkin in one of the Brussels restaurants. He proposed some changes and by the time the last client left the restaurant, we finished the first 'draft constitution'. On 22 October 2002, I presented the first-draft to the Convention. The delegates were surprised at first, but then accepted it, mainly because the 'architecture' was so innovative (Giscard d'Estaing 2003, 15).

The President's role in the Convention was therefore predominant and some scholars concluded that the president was the "agenda-setter" for the Convention and had significant influence over the final outcome (Tsebelis 2005).

Similarly, the famous Virginia Resolves, or Virginia Plan,[53] claimed to be drafted by Madison, formed "the basis of the Convention's procedure – and the basis of the United States Constitution" (Bowen 1986, 38).

According to the rational choice scholars "tremendous power rests with agenda setters" mainly because they govern decision-making procedure and "select the sequence through which alternative proposals are considered" (Pierson 2004, 60).

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[52] Sir John Kerr (former head of the UK diplomatic service) was the head of the Convention Secretariat, which provided basic secretarial support and drafted all the papers which constituted the basis for the Convention's discussions, as well as, in the later stages, the first drafts of the articles of the new Constitution.
[53] During one of the first days of the Philadelphia Convention (on 29 May, 1787) the Virginia's delegation presented the so-called Virginia Plan. In the form of fifteen Resolves the plan outlined "what amounted to an entirely new national government, with a national executive, a national judiciary, and a national legislature of two branches: the first branch (the representatives) to be elected by the people; the second branch (the senators) to be elected by the first branch" (Bowen 1986, 38).

The empirical evidence shows that President Giscard d'Estaing certainly managed to seize occasion to set the agenda of the European Convention debate. Eager to 'give' Europe a written Constitution (very much motivated by his personal ambition and concern about his legacy) he put forward the European Constitution proposal well ahead of other actors who could have influenced the debate (as described in 4.1.5 Constraints related to horizontal division of powers). However, he faced some powerful constraints as further development witnessed.

4.1.2 The role of the component groups of the European Convention

In order to meet the expectations and establish a Convention, the composition of which would reflect European political pluralism, four component groups were created right from the beginning: a Group of Representatives of the Heads of State or Government of the Member States (15 delegates); a Group of Representatives of the National Parliaments (30 delegates); a Group of Representatives of the European Parliament (16 delegates); a Group of Representatives of the European Commission (2 delegates).

President Giscard tried hard to encourage the 'Convention spirit' or the idea that delegates no longer represented their respective constituencies but the broader interest of Europe. During the introductory speech on 28 February 2002 he pointed out: "The members of the four components of our Convention mustn't consider themselves simply as spokespersons for those who appointed them. (…) If your contributions genuinely seek to reach a consensus, and if you take account of the proposals made by other delegates, then the final compromise can be worked out step by step here within the Convention". He added that "this is the crucial difference between the Convention and a traditional IGC" which he defined as "an arena for diplomatic negotiations between Member States in which each party legitimately sought to maximize its gains without regard for the overall picture" (Giscard d'Estaing 2002, 7).

Nevertheless, positions soon tended to crystallize along national, institutional or party lines. Similarly to Philadelphia Convention, where "delegates were divided by two plans,

the one was federal, the other national"[54] Brussels Convention was split between those favouring a federal system in Europe and those wanting to retain member state sovereignty. More than half of European Convention delegates were convinced of the importance of deepening European integration, particularly the Members of the European Parliament and the representatives of the European Commission.

Not surprisingly, the dominant position of 'integrationist' members worried delegates committed to protecting state sovereignty. There were at least a dozen 'sovereignist' representatives from national parliaments and national governments. Their position was expressed by Blair soon after the Convention began: "We fear that the driving ideology behind European integration is a move to a European federal super state, in which power is sucked into an unaccountable centre" (Blair 2002).

The presence of members of national parliaments and the European Parliament also raised the possibility that transnational political parties might come to play an important role at the Convention. Parliamentarians, who generally have stronger party commitments, made up fully three quarters of the delegates in the component groups. As one of the political analysts pointed out, "the fact that each 'component' was to form part of a final consensus, potentially gave them a collective veto. Yet, none of these factors played a significant role in the end" (Magnette 2004, 389). The research on delegates' positions using the computerized word-scoring method of analysing the Convention texts (Benoit *et al*. 2005) confirmed that the left-right divide was not particularly dominant, but also shows, that the division into party families had some impact on the process of coalition-building during the Convention. The chairman of the working group on Economic governance Klaus Hänsch explained that "it was mainly on socio-economic issues, that a quite clear left-right divide dominated the discussion" (Hänsch Interview 2006). Transnational parties pushed for ideological gain, which was rather symbolic (for example, the socialists wanted a reference to the 'social market economy'). "But the big parties only had a superficial unity and on most issues were unable to overcome their divisions and build a coalition to go beyond the status quo. For most representatives, political or component identity was not the primary determinant of their position in the Convention" (Magnette 2004, 390).

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[54] "On these words, federal… national… supreme, the Convention would stick for days to come" (Bowen 1986, 41).

However, the leading political force in Europe (since 1999) and the biggest political group in the European Parliament – European People's Party (Christian Democrats) expressed satisfaction with its influence on the Convention as "a mediator between 'communitarians' and 'intergovernmentalists', between 'small' and 'big Member States', between 'old members' and 'new members', between 'Catholics' and 'laics', etc on the most dividing issues" (Lamassoure quoted in Fontaine 2009, 409).

4.1.3 The influence of the EU Institutional Structure

The European Convention delegates were also challenged by the numerous constraints within the institutional contexts in which they acted. The Convention decisions were significantly constrained by the checks and balances among the institutions, given the fact that the EU is a system of separation of powers, with power divided *horizontally* amongst the Commission, Council, Parliament and Court, and *vertically* amongst local, national and supranational levels.

The analysis done on the Convention's deliberations revealed that the debates in the Convention and the parallel debates taking place at national levels were mainly dominated by two classic cleavages. First and foremost, the intrinsic 'federalist' vs. 'intergovernmentalist' division emerged as clearly in the Convention as it had in European politics up until then. The second one dominating the Convention was also familiar to European politics, namely the division between the larger and smaller countries, but only on the institutional issue. This second rift to some extent overlapped with the first one, since most of the smaller Member States tended to favour a more integrationist approach.

Due to the expansion of the EU, a new divide had sometimes emerged, namely that between the new and old Member States. The analysis further indicates that length of EU membership was also likely to structure preferences regarding a more integrationist approach.

At some points of more political discussion, there was also a taking up of positions along the lines of ideological preferences.

4.1.4 Constraints related to the vertical divisions of powers

4.1.4.a Subsidiarity[55]

On the issue concerning the separation of powers between the EU and the Member States, there was a clear rift between the integrationists and the more sovereign-minded delegates.

The first camp wanted a more federal Europe, whereas the second one wanted political control to remain primarily with individual Member States and saw the revision of the treaties as an opportunity to delineate the powers once and for all and put an end to the phenomenon known as "creeping competences".

There was also a third camp with an extremely nationalist vision of the Convention's objective. They sought to introduce a review mechanism to return powers from the Union to the Member States. The British representative in the Praesidium, Gisela Stuart, came up with the idea of a mechanism to return (repatriate) powers from the Union to the Member States:

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[55] Subsidiarity is the principle that decision should be taken at the lowest level consistent with effective action within a political system. In the context of European integration, subsidiarity was referred to for the first time in the Tindemans Report on European Union in June 1975, which stated: "No more than the existing Communities have done so, European Union is not to give birth to a centralizing superstate. Consequently, and in accordance with the *principe de subsidiarité,* the Union will be given responsibility only for those matters which the Member States are no longer capable of dealing with efficiently." Subsidiarity was then revived in February 1984 when the European Parliament adopted its highly integrationist Draft Treaty establishing the European Union. The Parliament sought to invoke subsidiarity as a means of forestalling concerns within national political circles that closer European integration must necessarily involve an open-ended transfer of powers to centralized bodies at European level. In the mid-1980s the principle of subsidiarity was invoked by national governments in order to keep the Commission in check. This was especially true for the British government, which in 1989 cited subsidiarity as one of the reasons for not signing the Social Charter. By the time the Maastricht Treaty was finally agreed in December 1991, subsidiarity had also become important to the German government, which was seeking to address the problems of German reunification while maintaining its strongly pro-integration stance in European affairs. Defeats in *Länder* elections had resulted in a loss of control of the Bundesrat (composed of representatives of the *Länder*) and the government turned to the subsidiarity principle as a means of affirming its attachment both to the right of the *Länder* and to strong European institutions. The wording of the subsidiarity clause was a compromise between the British and German positions. The Maastricht Treaty itself described the new European Union as one 'in which decisions are taken as closely as possible to the citizens'. The 'no' vote in the Danish referendum of June 1992 made it clear that the Maastricht Treaty wording on subsidiarity was inadequate. Accordingly, a fuller definition was drawn up at the Birmingham meeting of the European Council in October 1992: "Decision must be taken as closely as possible to the citizens. Greater unity can be achieved without excessive centralization. It is for each Member State to decide how its powers should be exercised domestically… Action at the Community level should happen only when proper and necessary" (quoted in Bainbridge and Teasdale 1996, 432).

I discussed such a clause with German Convention delegates, some of whom were supportive in principle. They even had a word for it, a *Rückverlagerungsklause*. But there was no sufficient political support for this and we could not agree on areas where such a clause may be applied. This is a serious omission and makes the Union's structure inflexible (Stuart 2003, 30).

Eventually, the provision allowing Member States to "reduce the competences conferred on the Union" did get political support a few years later during the European Council in June 2007 (see 5.1 European Council 2007).

Against this background, attempts to introduce the term "federal"[56] into the Treaties had constantly run into strong opposition. The Convention President Giscard d'Estaing put forward a text proposing that the Union would exercise its powers "on a federal basis"[57], but he faced strong opposition, he explained:

The notion of a 'federal' system was anathema, particularly to the British. I decided to drop the word 'federal' and referred instead to a Union exercising competences 'on a Community base'. A few days later, on 22 May 2003, I met British Prime Minister Tony Blair in Downing Street. The use of the word 'federal' turned out to be the most contentious issue at dinner. My visit coincided with the release of the revised text without term 'federal'. This was presented as a major success of the meeting in the press (Giscard d'Estaing 2003, 33).

The issue of the division of powers was politically important in the light of a widespread feeling that 'Brussels' was acquiring more and more power by stealth. For example, the EU leaders complained that the European Commission and Council had in practice acted like judge and jury on whether new legislative proposals passed the subsidiarity test.[58]

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[56] The debate confirmed that federalism is a word that can excite passionate political controversy in different context, as Burges (2009, 25) put it: "Federalism suggests disunity and fragmentation in India and in the United Kingdom while it implies the exact opposite in Germany and the United States of America."

[57] Article 1 of the first draft Constitution: "Reflecting the will of the people and the States of Europe to build a common future, this Constitution establishes a Union, within which the policies of the Member States shall be coordinated, and which shall administer certain common competences on a federal basis" (Giscard d'Estaing 2003, 9).

[58] The subsidiarity principle has been part of European law since 1993 (Maastricht Treaty): "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

Compared to the U.S. it is interesting that the Reserved Powers of the States, inserted as the 10th Amendment to the U.S. Constitution States[59] is also the most commonly quoted constitutional provision by those who hold states' rights above federal powers. The framers of the European Constitution were mostly aware of the American experience of subsequent judicial interpretation of the enumerated powers by the U.S. Supreme Court (throughout the 19th century), which led to "a drastic enhancement of the federal government's power with no apparent limitation on federal power" (Pech, 2008, 33).

The principle of subsidarity was clearly inspired by the American system. However, it proved to be a vague concept and rarely complied with. As Director General of the Council legal service pointed out "the subsidiarity was an essentially political and subjective principle of the European Union decision-making process" (Piris 2003, 26). The European Court of Justice, by its very nature, tended to enlarge European powers at the expense of individual states; it had never annulled any act on the grounds of infringement of subsidiarity. In this case, the European Convention delegates began to search for 'good practices' partly from the U.S. Constitution (Reserved Powers and Concurrent powers) but also from other constitutional traditions, for example, the German, Belgian and Swiss federal Constitution in order to define the issue of competences[60] (the famous question "who does what" in Europe). Influence from American constitutionalism was thus also indirect because both the German Constitution (German Basic Law adopted in 1949) and the Belgian Constitution of 1831 borrowed certain features regarding the distribution of powers from American constitutionalism.[61]

Afraid of delivering a 'blank cheque', some EU leaders asked to set down explicitly and with limitation the matters which they were handing over to the EU. The division of powers was put on the reform agenda largely at Germany's behest. The German regional

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[59] Amendment X of the Constitution of the United States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
[60] The term competence was denounced as "Euro-speak" by the Economist (8 May 2003) but we cannot avoid it as it is widely used in the context of division of power and the scope of Union's powers.
[61] That the U.S. Constitution was much on the minds of the framers of the 1931 Belgian Constitution was evident from the comments of one of its framers, Desiré Pierre Antoine de Haerne: "We found a great people worthy of entire imitation, and it is the institutions of that people we have chiefly inscribed upon our organic charter. We have followed their example in all that regards public liberty, the distribution of power, the election of representatives and decentralization of rule" (quoted in Billias 2009, 156). "Belgian constitution, in turn, became one of the most widely copied in nineteenth-century Europe" (Billias 2009, 12).

authorities, the Länder,[62] declared that the EU encroached unduly on national competences. Prior to the European Council summit at Nice (2000), "the German Länder had threatened to refuse to ratify the resulting treaty unless there was progress towards a definition of a catalogue of competences" (Norman 2005, 72). The German Chancellor Gerhard Schröder instigated that the conclusions of the European Council noted "how to establish and monitor a more precise delimitation of powers between the EU and the Member States, reflecting the principle of subsidiarity and how to allocate the responsibility between the European Union, national governments and sub-national authorities" (European Council 2000). At the following European Council summit, the call for a precise delineation between European and state competences resulted in the Länder-inspired title in the Laeken Declaration: "A better division and definition of competences in the European Union" (European Council 2001).

Early in the Convention debate, the representative of the German Länder Erwin Teufel floated the idea of two catalogues that would clearly define the respective roles of the Union and the Member States. One of the German delegates clarified that their "main idea was to create a 'negative catalogue' about the areas that are not within the EU ambit in order to stop the encroaching Brussels-based bureaucracy" (Hänsch Interview 2006). The proposal was initially rejected by several government representatives, particularly France and the UK, because of the inflexibility that the rigid body of rules would entail. British Prime Minister Tony Blair preferred "a statement of principles to determine what would best be done at the European and national levels" (Blair 2000). However, Teufel, the president of Baden-Württemberg Länder, kept repeating: "Wir brauchen einen Katalog, Wir brauchen einen Katalog."[63]

The reason why German representatives insisted on this issue soon became clearer to the chairman of the subsidiarity working group Inigo Mendez de Vigo:

> This was in keeping with the German federal structure, where original power belongs to the Länder. The Länders were looking for a way to become directly involved in EU law making. When I invited the representative of the German Länder Teufel to a face-to-face meeting, I told him that the catalogue of competences was not feasible. Instead I asked him to tell me sincerely what he would need in order to satisfy the German public. He

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[62] Germany is a Federal Republic composed of 16 federal states (Länder).
[63] Source: European convention debate verbatim. Available on:
 http://www.europarl.eu.int/Europe2004/index_en.htm (Website accessed on 12/10/2010).

replied: 'I need the way for the German Länder to be able to block certain issues we believe are under our competence (Mendez de Vigo Interview 2006).

Another intention was revealed during the meeting between Giscard d'Estaing and the representatives of Germany's biggest political party CDU.[64] Erwin Teufel argued: "My Länder is more populated than eight countries joining the European Union and we do not have the right to make a request to the European Court of Justice" (quoted in Lamassoure 2004, 374). The president of another Länder (Bavaria) Edmund Stoiber went further: "I have had a Bundesrat seat for twenty years now, and I can say that mistrust regarding the EU is growing, because of the vagueness of the division of powers. Our democracy is deeply-rooted at the local level and the European Constitution cannot ignore the German Länders" (quoted in Lamassoure 2004, 375).

These concerns were well founded in theory and practice. According to some analysts (Cassese 1980), the process of constitutionalization, hardening Community measures into supreme, often directly effective laws, meant that once these laws were enacted, national parliaments could not have second thoughts or control their content at the national, implementing level. There has been a widespread agreement on the fact that the Member States' governments successfully bypass the control of their national parliaments by shifting problems of decision-making to the European level (Ossenbühl 1993, Fastenrath 1994).

The European Convention was therefore asked to find different ways of delineating powers, including the control of any parliamentary chamber.

> What satisfied the German delegates was the so-called 'early warning system' spelled out in the new provisions about the 'yellow card'.[65] The procedure can be activated by both chambers, Bundestag and Bundesrat, where the German Länders are represented. This was acceptable for them, because they could say to the domestic public, we did not really get the catalogue of competences, but with the 'early warning system' the German Länder will have a direct say in EU law making (Mendez de Vigo Interview 2006).

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[64] The meeting took place in Paris on 30 April 2003, with the presence of the then leader of CDU Angela Merkel (Lamassoure 2004).
[65] The so-called early warning system gives national parliaments the right to express concerns on subsidiarity directly to the institution which initiated the proposed legislation. Within eight weeks from the date of transmission of a draft legislative act any parliament or chamber may submit "a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity".

However, the Constitution's early warning mechanism was insufficient according to the British representatives of the House of Commons Gisela Stuart and David Heathcoat-Amory, as well as Denis MacShane, the British Minister for Europe. As one delegate put it: "In their favourite parlance of football, they would exchange the 'yellow card' for the 'red card'" (Duff 2005, 111). "The real intention of the British was to introduce the so called 'red card' according to which the national parliaments would be able to block the Commission's legislative initiatives. Politically they would take complete power when forcing the Commission to withdraw the proposal. This was the real fight in the Convention because the UK wanted to undermine the Community method[66] of decision-making in the Union. Accepting this proposal would mean a transfer of the real power to this body being competent to say 'yes' or 'no' to every single EU proposal" (Mendez de Vigo Interview 2006). "The fact is, that to give national parliaments the right of veto over EU legislation would create de facto a third legislative chamber" (Duff 2005, 111).

The final compromise was therefore the so-called early warning system or 'yellow card' with which the national parliaments can act as 'watchdog' for the principle of subsidiarity. If one third of all national parliaments contest within eight weeks after the proposal of a draft legislative act, the legislative proposal must be reviewed. The yellow card covers proposals not just from the Commission, but also from other EU institutions with powers of initiative.[67]

The issue was reopened after the rejection of the European Constitution (see 5.1 European Council 2007), where the Dutch put forward yet another decision-making procedure, the so-called 'orange card', which stipulates that more than half of the national parliaments can challenge a legislative proposal, subject to ordinary legislative procedure. If the Commission chooses to maintain the proposal, it has to justify why it considers that the

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[66] 'Community method' in this context means the classical decision-making process whereby the European Commission proposes a draft law, which is then adopted by the legislator composed jointly by the Council, representing the states, and the Parliament, representing the people. Community basis is the supranational order of EU institutions – Commission, Council, Parliament and Court of Justice – whose job is to guarantee respect for the Treaties, to pursue their objectives and enjoy law-making powers that have primacy over the laws of individual Member States.

[67] Draft legislative acts which need to be sent to national parliaments mean not only proposals from the Commission, but also" initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank" (The Lisbon Treaty, Protocol (No 1) on the role of National Parliaments in the European Union).

proposal complies with the principle of subsidiarity. This reasoned opinion should be submitted to the Council and the European Parliament to take a final decision. Practically it means that a majority of 55% of the members of the Council or a simple majority in the European Parliament can 'kill' a legislative proposal of the Commission.

For the first time, the national parliaments were thus given a chance at prior scrutiny of all Commission proposals on the grounds of subsidiarity. The framers introduced a new protocol, which spelled out how the EU institutions would respect the twin principles of subsidiarity and proportionality in order to increase the Member States' political safeguards against any centralizing urges emanating from 'Brussels'. Constitutional lawyer, Armin Von Bogdandy argues that this shows the tendency to formulate the order of competences from the perspective of safeguarding the Member States' interests.

> In accordance with numerous national constitutions, the Lisbon Treaty refers to the competences as being 'conferred' by the Member States and stipulates the principle of conferral, subsidiarity and proportionality. The choice of the wording 'confer' marks a distinction from federal constitutions, since a federal state is usually considered to enjoy its own intrinsic constituent power (Von Bogdandy 2010, 36).

The principle of conferral was for the first time clearly defined in the European Constitution (retained in the Lisbon Treaty[68]). According to Koen Lenaerts, Judge of the European Court of Justice, the need to clearly spell out that principle was already suggested by the Laeken Declaration on the basis of the legal advice of comparative lawyers who were inspired by the U.S. Constitution's provision of the enumerated powers.

> The new provision brought about by the European Constitution is a direct echo to the 10th amendment of the U.S. Constitution. This provision better defines the Member States' status in the EU constitution order and shows that the Member States are the ordinary bearers of competence and sovereignty, while the Union can only act to the extent that the competences have been conferred to the Union, and when that is not the case the competences remain within the Member States (Lenaerts Interview 2010).

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[68] Lisbon Treaty, Article 5 of the Treaty on the European Union: 1.The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

Another idea put forward by the European Convention was to clearly introduce the principle of primacy of EU law, which was inspired by the Article VI of the U.S. Constitution, which stipulates that the "Constitution (...) shall be supreme law of the land." The Lisbon Treaty in its Declaration concerning primacy, stipulates that according to the "well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law."[69]

4.1.4.b Defining the European Union's competences

The question of 'division of powers' was inherently complex in a system of multi-level governance. With this in mind, the European Convention delegates considerably reduced the 'grey zone' of powers by specifying three categories of EU competences: "exclusive powers" of the EU, "shared powers", where both the EU and the Member States may legislate, and the last category labelled "complementary powers" for the areas where the EU is limited to co-ordinate or supplement actions of the Member States. This provision was directly modelled on the American Constitution with a clear distinction between Federal Powers and the Powers of the States, but also on the German Federal Constitution, which distinguished between "exclusive" and "concurrent powers", and allows the Länder to make laws about the latter to the extent to which the Federation does not use its legislative power.

The Member States wanted to control exactly how much power they would give to the EU and to its institutions in performing these competences. The drafting of these elaborate provisions was the result of long negotiations in the successive IGCs. This explains why the longest part of the Constitution was the chapter that describes, in detail, all the competences conferred to in the Union and the limits of these competences. The section on categories of competences of the Constitution was also preserved in the Lisbon Treaty.

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[69] Lisbon Treaty, Declaration (No 17) concerning primacy.

4.1.4.c Participatory democracy

The German delegate Jürgen Meyer, coming from the Bundestag, found another way to 'limit' power of the EU institutions. Meyer and Alain Lamassoure, a long standing French Member of the EP, were the first to promote a citizen's right of initiative. The idea was that an initiative signed by one million citizens from a "significant number of Member States" could induce the Commission to take a legislative act. Drawn from both the Swiss and American experience, the introduction of this form of direct democracy has much potential in engaging the citizens in law making. In a Union of 495 million people a petition of one million is far from being an unreasonable hurdle. Some delegates therefore warned that a legislative petition could serve as a special lobby mechanism; "not only the business, but also a resourceful Commission or Parliament or both possibly stymied by the Council, might well succeed in stimulating public interest in a favoured legislative proposal by themselves promoting a petition" (Duff 2005, 104). However, the majority of delegates did not want to be seen to say 'no' to stimulating public interest and participatory democracy. A new Citizens' Initiative was agreed during the very last Convention session.

4.1.4.d Conclusion

All the decisions relating to the vertical division of power revealed the intrinsic divide between those who favoured pooling sovereignty i.e. the Community method, and those who wanted to retain Member States' sovereignty and preferred cooperation through an intergovernmental process.

It is mainly Historical Institutionalism that helps to explain how the intervention of Community institutions in citizens' lives provoked negative feedback (critics of 'creeping competences', 'Brussels is acquiring more and more power by stealth') which led to a negative referendum (Denmark 1992) and increased demands for clearer delineation and limitation of powers.

The American settlement exerted influence in terms of distinction between Federal Powers and the Powers of the States, but this proved to be insufficient to limit the EU competences. Therefore, the division of vertical powers was considerably 'refined' with

the Länder- inspired new provision of an "early warning system" (giving national parliament a chance of prior scrutiny) and the Swiss-inspired provision of direct democracy, Citizens' Initiative (meaning that one million people can petition the European Commission to bring forward new policy proposals).

4.1.5. Constraints related to the horizontal division of powers

Another controversial issue surrounding the Convention was the balance of power between the EU institutions. The Convention President Giscard d'Estaing, who had co-founded the European Council decades ago, came up with the idea that the future European executive power would be the European Council. In that sense he proposed downsizing the European Commission and the European Parliament. He expressed his perception of the institutional settlement at that time:

> I was very much upset about the state of tension, rivalry and antagonism between the EU institutions, which deformed the famous institutional triangle, designed by the EU founding fathers. It was therefore crucially important to return to basics, by ensuring that all three parties in the Union's institutional triangle would be able to function effectively. The Council of the EU, which represents the contribution of Member States to the building of the Union, the European Parliament, where the whole population must be represented on an equal basis, and the European Commission, which expresses and proposes the common interests of the Union, all need to be improved to meet the future challenges. Institutional reform was therefore not a zero sum game. We were not talking about hierarchy, about subordination of one institution over another: we were talking about keeping a balance (Giscard d'Estaing 2003, 23).

The controversy again reflected the opposing models of an intergovernmental vs. supranational institutional order. This conflict roughly matched the divide between the large and small states (with some exceptions[70]), the latter supporting the Commission in order to avoid the domination of the larger states through the Council.

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[70] Denmark and Sweden expressed their opinion that the interests of small and medium sized Member States could be best observed in the negotiations between the governments, whereas Belgium, Luxembourg, Portugal and Finland supported the Community approach, as solution to the problem of inequality between the Member States.

From the outset, the Convention confronted the antagonistic institutional choice: the Convention was supposed to opt either for the Community or Intergovernmental method. In light of this 'contemporary Manichaeism' the Community method represented 'good' and the Intergovernmental method represented 'evil'. It took several plenary sessions in order to grasp the real purpose of the proposed changes. The generalization of the Community method would have transferred the majority of powers to the EU Institutions and weakened the Council's power at the same time. When the delegates became conscious of the real intention – this happened during the autumn of 2002, when the Commission's proposal, code-named Penelope,[71] pushed the 'doctrine' of weakening the role of the Council to the extremes – they started to side with my concept of institutional triangle. At the same time, this was the only solution compatible with the Union's dual nature as both a 'Union of citizens' and a 'Union of States' (Giscard d'Estaing 2003, 24).

The revision of the institutional settlement had been the most divisive issue since the early 1990s, when European leaders started debating enlargement-linked institutional reforms. It was also the thorniest issue of the Convention because of the impact it would have on 1) the role of the European Council with a full-time President; 2) the size and nomination of the European Commission; 3) the size and power of the European Parliament; 4) the power that each Member State would have in the Council of the European Union.

4.1.5.a The President and the Foreign Minister of the European Council

The proposal to create a new position, i.e. a President of the European Council, created tremendous controversy and divided the delegates mostly between 'small' and 'large' countries. Fears were immediately expressed that a fixed President would lead to the dominance of the large nations; or that the Commission would be downgraded. Moreover, this would mean that the existing system of rotating presidencies would no longer be viable. The Union's six-month rotation of the Presidency attracted many critics[72] because

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[71] The Commission in its document set out its case for a stronger 'Community method' of running the Union. It said the system used for the single market legislation (the Commission propose legislation, which is then amended by the Council of the EU and European Parliament using majority voting) should be greatly extended, with some modifications, to foreign and economic policy. The Commission also wanted the post of EU High Representative, created in 1999, brought into the Commission itself. Available on http://european-convention.eu.int/ (Website accessed on 12/10/2010).

[72] Tony Blair in his speech on the Future of Europe in Cardiff, 28 November 2002, expressed his criticism regarding the system of rotating presidencies, which "had reached its limits": "The old system creates for

of the difficulties in ensuring consistency and continuity in the work of the Council: changes in priorities of the EU's work every six months; lack of leadership; the shortness of the mandate and the resulting lack of experience in the performance of duties combined with loss of institutional memory and an almost irresistible temptation to overexploit the Presidency for purely national concerns and interests etc.

In this context, the literature of Rational Choice and Historical Institutionalism helps us to explain 'negative feedback' that some political institutions and policies can produce over time. The performance of the rotating Presidency clearly generated critics and increased pressure for change with the passage of time. This empirical example confirms that some institutions and policies may produce negative feedback and become self-undermining over time.

The long-term Presidency of the European Council was therefore presented as a panacea for the drawbacks of the rotating Presidency, in particular by President Giscard d'Estaing, a long-term supporter of the creation of this eminent post.

The Commission and a large majority of the Member States[73] that preferred the six-monthly rotating Presidency as being more 'egalitarian', were opposed to the idea of a full-time President. The Commission argued that this would undermine the position of the Commission's President and that it would promote 'intergovernmentalism' at the expense of the Community principle. At the beginning only France, the UK, Spain and Denmark supported the idea of a permanent President of the European Council.

The main obstacle in reaching the consensus was the fact that the so-called engine of the European Union - the Franco-German axis[74] - had not been of the same opinion regarding the permanent President and Foreign Minister. One of the major trade-offs of the European Convention thus took place during dinner with the French President Jacques

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Europe a weakness of continuity in leadership. What's worse, each President sees itself as setting its own distinctive agenda for Union." He expressed his support for "a more stable Presidency of the European Union" and "a fixed President of the European Council" (Blair 2002).

[73] The Convention document CONV 724/03. Available on http://european-convention.eu.int (Website accessed on 12/10/2010).

[74] The Franco-German partnership is always considered as a major factor in creating European integration. François Mitterrand was reported to say during the meeting with the French Minister for European Affairs, Alain Lamassoure in April 1993 in Paris: "In Europe, everything is happening through the Franco-German axis. In case of problems, seek the compromise with the Germans first. When Germany and France agree on a particular issue, this gives the green light for the beginning of the European negotiations" (Mitterrand quoted in Lamassoure 2004, 298).

Chirac and German Chancellor Gerhard Schröder, on 14 January 2003 in Paris. After the meeting, Chirac reported on the Franco-German 'deal':

> The French and German visions were not exactly the same. Germany wanted to reinforce the power of the European Commission and bring about the Commission's President elected by the European Parliament. France was rather reluctant to adopt this proposal and wanted to reinforce the European Council, and therefore establish a permanent President of the Council. If we - the Franco-German engine - really want to give an impetus to Europe, everyone has to make a concession. France has therefore accepted that the Commission's President would be elected by the Parliament, and Germany has accepted that the European Council would be presided by a full-time President, elected by the Council by quality majority voting.[75]

Gerhard Schröder completed his statement by saying:

> France and Germany have always played the role of a precursor regarding the elaboration of the European foreign policy. This policy will be led by the Union's foreign minister, who would cover this portfolio within the Council and the European Commission. This role has been described as a 'double-hatted' foreign minister.[76]

The day after, on 15 January 2003, France and Germany submitted a joint proposal[77] to the European Convention for a long-term President and a 'double-hatted' foreign minister of the Union. The joint Franco-German proposals on the institution were to prove a key turning point in the life of the Convention. The text set the tone of the institutional debate for the rest of the Convention.

The day after publishing the French-German proposal, the Belgian Prime Minister Guy Verhofstadt issued a press release:

> Belgium fears that the creation of a permanent President of the Council would substantially modify the equilibrium between the institutions and would bridle the Commission's motor role for the European construction.[78]

Benelux countries immediately mobilized their forces and gathered the so-called like-minded group or the friends of the Community method.[79]

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[75] Press conference Chirac - Schröder, Paris, 14 January, 2003 (Source: Agence Europe).
[76] Ibid.
[77] CONV 489/03, Available on http://european-convention.eu.int/ (Website accessed on 12/10/2010).
[78] Press conference of the Belgian Prime Minister, Brussels, 16 January 2003 (Source: Agence Europe).

Convention President Giscard d'Estaing in a later interview explained that he tried to influence the delegates' position by providing them with a practical reasoning in the context of the larger Convention's mission:

> In order to overcome this opposition, I used the negotiating tool of demonstrating the absurdity of the current system. I asked the Convention delegates: 'Would you accept that in the next ten years, while the U.S. and Russia will have two presidents, the EU would have more than twenty succeeding presidents, none of them from the same country? Particularly at international summits Europe can not be taken seriously if the European Presidency changes every six months' (Giscard d'Estaing Interview 2007).

During the last hours of the Praesidium's meeting in June 2003, many 'bilateral' meetings took place separately with different component groups and most importantly with the government representatives of 'like-minded groups'. Apart from the strong bargaining of President Giscard, the most efficient proved to be the 'lobbying' of the German Foreign Minister Joschka Fisher to shift a stubborn position preventing consensus.

The delegates eventually reached a compromise over the President of the European Council, to be elected for two and a half years and represent the Union externally. As a compromise, those in favour were obliged to give up the idea of entrusting the President with the chair of the General Affairs Council and other Council configurations. The delegates also agreed on the establishment of a new Union Minister for Foreign Affairs, who would conduct the Common Foreign and Security Policy and be responsible, at the same time, as Vice-President of the Commission, for handling external relations and co-coordinating other aspects of the Union's external action.

The final compromise was forged through classic forms of bargaining, but only after a long period of practical reasoning. It was built through classic exchanges of concessions, facilitated by promises and threats. "But one cannot exclude that the long practical debate that had preceded this late bargaining had in part paved the way for the agreement: many members publicly stated that they accepted the compromise because they had changed their minds after the discussion or because at least they understood the position of other members" (Magnette 2003, 14).

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[79] 16 government representatives sided Benelux countries in 'fight' against the Franco-German proposal in order to preserve 'Community method': Austria, Portugal, Ireland, Finland, Sweden and Denmark and ten accession and applicant states: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, Slovenia and Bulgaria.

In this empirical case, Liberal Intergovernmentalism provides a lot of explanatory tools to explain meaningfully the outcome of these negotiations. The case confirms the claim that international negotiations depends on 1) national preferences (national leaders first articulate theirs preferences); 2) intergovernmental bargaining (in which bargaining power of individual actors plays a crucial role); 3) institutional choice, when EU Member States adopt a particular EU Institution in order to increase credibility and reduce the 'transaction' costs of further negotiations. Indeed, by establishing the post of the European Council Presidency, the EU leaders reduced uncertainty about each other's future preferences, because this role mainly consists of coordination work in order to "ensure the preparation and continuity of the work of the European Council" and "to facilitate cohesion and consensus within the European Council" and "ensure the external representation of the Union" (Lisbon Treaty 2009).

4.1.5.b The size and nomination of the European Commission

Another institutional issue that divided particularly 'new' and 'old' Member States was a proposal to reduce the number of European Commissioners, meaning that there would be fewer commissioners than Member States. New countries saw this proposal as a weakening of their influence in the institution, which was believed "independent and supranational guardian of the common interest" (Magnette and Nicolaïdis 2004a, 7). Moreover, the new countries considered the Commission as their best ally.

Additionally, the issue created a rift between 'small' and 'large' Member States, when the Benelux countries managed to create a coalition of small to medium-sized countries, by convincing them that a slimmed-down Commission would weaken the Community method and reinforce an intergovernmental institution – such as the European Council – where the larger countries play a dominating role. The composition of the Commission is inextricably linked with the system of weighted votes in the Council and has a long history.[80] Since the new voting rules had diminished the direct power of the smaller

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[80] In the original Treaty of Rome, the relative weakness of the smaller Member States was regarded by them as compensated for by the direct and indirect powers which the Treaty gave to the Commission. This institution was established in order to act independently in the sole interest of the Community, regardless of the power or influence of particular Member States. Therefore it was considered as a reassuring and counter-balancing element for the smaller or less powerful Member States. The three 'counter-balancing'

Member States (see 4.1.5.d The reform of the Council voting system), they sought to regain influence through a stronger institutional structure. The smaller states were significantly encouraged by the then President of the European Commission Romano Prodi, who presented the Community method as the best way for the smaller states to 'indirectly' defend their interests. Only the supranational Community method, it was believed, could ensure that the European Union remains acceptable to all Member States.

Actually, the size of the College of Commissioners has been a hotly disputed issue since the mid-'90s. Together with the voting weights in the Council it was one of the central elements to be tackled in view of the EU's Eastern enlargement. The European Convention settled for a reduction of two-thirds of the number of Member States but this was only accepted as an integral part of the overall 'package deal' on institutional reform (see 4.1.5.f. Final bargaining over the overall 'institutional package').

When the European Convention delegates came to the issue of the nomination of the Commission's President, the balance of *trias politica* was again hotly discussed:

> Everybody in the Convention, the convention delegates, Praesidium and me personally were in favour of giving the power to the European Parliament to elect the Commission's President. Up until then, the Council nominated the President and the Parliament could only approve it. Similarly as the U.S. Founding Fathers introduced the principle requiring the President to gain the 'advice and consent' of the Senate to balance power in the federal government, I followed this pattern to give the European Parliament the power to elect the Commission's President (Giscard d'Estaing 2003, 54).

Moreover, the new provision formalized the link between the European elections outcome and the Commission's composition, by stating that the European elections should be taken into account for the choice of the proposed candidate by the members of the European Council.[81]

On the one hand, such politicization of the selection of the President of the Commission may create potential problems, in that it may cause mistrust amongst those on the other

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powers of the Commission were: first, its exclusive right of initiative, second, the requirement for unanimity within the Council to amend a Commission proposal against the latter's will and, third, the 'super qualified majority' required in the Council when it acted without a Commission proposal (Piris 2006, 97).

[81] Lisbon Treaty, Declaration (No 11) on Article 17(6) and (7) of the Treaty on European Union.

side of the political spectrum. On the other hand, this constraint may also be turned into a new source of political legitimacy. According to the three Brussels based think-tanks "politicization of the designation of the Commission President also increases democracy, transparency and accountability of the institutions, and it is therefore a welcome development" (CEPS, EGMONT, EPC 2007, 13).

Soon after the European elections in June 2009, the first concrete political consequences of linking the Commission to the political parties could be observed. The political affiliation of Commissioners was clearly 'disclosed' and the College of Commissioners presented as a "grant coalition" of the members coming from "different political families."[82] The fact that the Commissioners came to the European Parliament hearings with a clear 'party label' had a non-negligible political impact on the hearings' outcome. For example, when Bulgarian Commissioner-designate Jeleva (coming from the centre-right European People's Party) was likely to be rejected by the parliament's Socialist, Liberal and Greens groups due to her incompetence and her alleged financial improprieties, the EPP tried to take down a Socialist or Liberal nominee in return.

The tit-for-tat battles created a tense atmosphere in the EP, where each political group was trying to hang on to 'its' commissioner but had sabotaged what the Commission's President Barroso had hoped would be an eventful seven days of hearings. The political bargaining forced Jeleva's departure and considerably delayed the vote, which made the previous Commission the longest "caretaker" Commission.[83]

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[82] Grant coalition consisted of the members of the European People's Party (EPP), the Progressive Alliance of Socialists and Democrats (S & D), and the Alliance of Liberals and Democrats for Europe (ALDE) according to the press release of the Commission's President Barroso, available on http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1837&format=HTML&aged=0&language=EN&guiLanguage=en (Website accessed on 27/11/2009)

[83] The mandate of the Barroso I Commission came to an end in October 2009 and it was first prolonged as "affaires courantes" Commission until the entry into force of the Lisbon Treaty (1 December 2010). Due to the long hearing, the Barroso II Commission only took office after the vote in the EP, on 9 February 2010. Sources: http://www.theparliament.com; http://euobserver.com/9/29280/?rk=1; http://euobserver.com/9/29293/?rk=1; http://euobserver.com/9/29276/?rk=1 (Websites accessed on 20/01/2010)

4.1.5.c The power and the distribution of seats in the European Parliament

During the discussion about the number of parliamentary seats during the European Convention and even later during the IGC, a division between 'small' and 'large' Member States re-emerged. The minimum number of seats per member state was hotly debated at the Convention and also at the IGC that followed. "The more populated states wanted a minimum number of four, the less populated ones a minimum of six. The final result, which provides for a minimum of six seats, is favourable to the smaller Member States. It was part of a package which included the reduction of the number of Commissioners, which had been something that these states found difficult to accept" (Piris 2006, 91). The final compromise therefore proposed a maximum of 750 members, with no state having fewer than six. The number of parliamentary seats was based on regressive proportionality, hence guaranteeing an over-representation of small states in the European Parliament. This concession to the small Member States was reached after Germany agreed to give up three of its existing seats and a maximum of 96 seats per member state (a decision that could be of considerable importance if Turkey joins the Union).

The strengthening of the Parliament's power was also one of the major controversies surrounding the Convention. The European Parliament was seen as a direct link to citizens through the European elections. This fact was a very strong argument in the context of the Convention's objective that the decisions should be made as close as possible to the citizens. "Most of the Convention delegates were of the opinion that an important way to decrease the democratic deficit was to strengthen the Parliament's role in the decision-making" (Magnette and Nicolaïdis 2004a, 4).

Although, the majority of larger Member States were initially reluctant to extend the rights of the European Parliament, the final compromise increased its role as a co-legislator. The analysis of the Convention debates of 5 December 2002 and 4 April 2003 maps the motivational dynamics, which eventually led to the full budgetary control of the European Parliament. Initially, France and the UK made clear[84] that they would not accept any interference of the European Parliament on the compulsory expenditure. According to the budget procedure up until then, the European Parliament had had the

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[84] See the statement by French representative Villepin, and British representative Hain, delivered at the Convention, 5 December 2002. Available on http://www.europarl.eu.int/Europe2004/index_en.htm

final say on the non-compulsory expenditures and the Council on the compulsory expenditures. Since the budget power of the Parliament was dealt with in the working group on simplification, it was under "the label of simplification"[85] that the delegates proposed to abolish the distinction between compulsory and non-compulsory expenditures in the budget procedure. The Praesidium rejected this idea in its first draft[86] and the controversy over the Parliament's power in the budget procedure continued to dominate the Convention discussion on 4 April 2003. The government representatives kept insisting on limited influence from the European Parliament. Yet, the delegates agreed to abolish the distinction between compulsory and non-compulsory expenditures (which gave the power to the EP over the whole budget) in exchange for a limited influence by the EP on the multi-annual financial framework (the Parliament can only give consent on the financial perspective, which reduced its influence to negotiate the budget ceilings jointly with the Council).

Similar Convention dynamics took place on the issue of strengthening the Parliament's legislative role. "Most of the delegates from small and medium sized states (e.g. Austria, the Benelux countries, Denmark, Finland, Ireland, Portugal and Sweden) were of the opinion that the co-decision procedure should be extended in the legislative field" (Magnette and Nicolaïdis 2004a, 5). The final agreement therefore significantly increased the scope of the Parliament's power through an extension to the scope of the co-decision procedure. The co-decision procedure was to become the ordinary legislative procedure and its scope was to be extended to around forty new areas[87] which would represent additional policy areas, where the European Parliament would be given equal legislative power with the Council. One of the examples relates to the common commercial policy, defining the position of the EU vis-à-vis the World Trade Organization. Up until then, the Council had decided by a qualified majority and the Parliament had not even had the right to be consulted. Under the new treaty the ordinary legislative procedure applies, and

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[85] The notion of 'simplification' was a leitmotiv of the Convention debates. Since "citizens wanted greater simplicity", the majority of delegates argued that "simplicity means legitimacy" (Magnette 2003, 14).
[86] The Convention document CONV 602/03, Available on http://european-convention.eu.int (Website accessed on 12/10/2010).
[87] Thirty of the existing legal basis have been modified to submit their use to the co-decision procedure, and thirteen new legal basis have been introduced with the use of the co-decision procedure. This is particularly relevant in the area of Freedom, Security and Justice where the normal legislative procedure was extended to frontier controls, asylum, immigration, judicial cooperation in criminal matters, minimum rules for definition of and penalties in areas of serious crime, incentive measures for crime prevention, Eurojust, police cooperation, Europol and civil protection. Significant changes also applied to agricultural policy and external trade.

when international agreements are concluded, the Parliament has to give its consent. This is another example of mirroring the U.S. Constitution, where a two-thirds vote in the Senate is needed for the signing and ratification of treaties.

It is extremely challenging to analyse how the European Parliament saw its prerogatives enlarged in the legislative, budgetary and international areas. Moreover it reinforced its role to approve the designation of the President of the Commission. The European Parliament even gained the possibility of initiating amendments to the founding treaties. Path-dependence theory offers good explanatory means to show the sources of positive feedback in politics that European parliament 'collected' through direct elections, which gave the Members of the EP the title of 'solely *directly* elected representatives' and thus providing direct link to citizens. Just like "economists typically refer to self reinforcing processes as involving a process of increasing returns" (Pierson 2004), the development of the European Parliament as institution gained its power in terms of increased seats, budget, human resources, and consequently political power.

4.1.5.d The reform of the Council voting system

The reform of the voting system in the Council of the European Union was by far the most contentious issue which, according to the lawyers involved in the Convention, "threatened to destroy the whole Constitution for the simple reason that, more than any other provision, it touches directly on the balance of power between member states" (Milton and Keller-Noëllet 2007, 97). The issue created a division along small – large country lines and also along new – old member lines.

As a matter of fact, the conflict between small and large states was the most contentious issue in Philadelphia and nearly led to dissolution of the Convention. The main issue was representation of states in U.S. Congress by equal votes or a representation proportional to inhabitants or wealth of states. The basic issue of small states against large, ten against three,[88] had blocked Philadelphia Convention proceedings for months, up to the adoption of the Great Compromise, giving equal representation in the Senate – two votes to a state whether large or small – and in the House, proportional representation (Bowen 1986).

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[88] The large states – Massachusetts, Pennsylvania and Virginia would carry everything if the representations 'by ration' had applied, the small states feared. The most critical problem was how to apportion votes in Congress. The small states wished an equal vote; the large states, for obvious reasons, a proportional one.

The long history of wrangling about European Union voting reform in Amsterdam (1997) and Nice (2000), resurfaced at the European Convention and the enlarged EU was in danger of facing gridlock. The Nice agreement concerning the allocation of votes to the Member States (already explained in 3.2.1 Institutional Fatigue) proved to be the biggest stumbling block one year later when the President of the European Convention proposed a change to the complex weighted voting system and expressed his concerns that the Nice agreement failed to consider the political and institutional consequences that would follow from the changes to the size and composition of the Union: "The Union's most populated state would have more people than the most populous state in the U.S. while its least populated would have fewer inhabitants than the least populated state in America" (Giscard d'Estaing 2003a, 2).

In that sense Giscard often made reference to the Philadelphia Convention and the opposition between the small states that wanted absolute equality and the bigger states that wanted proportional representations in the federal institutions. His vision was as follows:

> Initially I wished to follow the bicameral democratic systems. I therefore proposed to create the second chamber, called the Congress of Peoples of Europe, bringing together members of the European Parliament and members of the national parliament. But my proposal was denounced as a ruse to weaken both the European Parliament and national parliaments. The British delegates were also strongly opposed, mostly because they were not convinced about the importance of the second chamber, given the limited role of the House of Lords. Instead, I proposed to introduce the system of double majority voting establishing the dual sovereignty; of people and the Member States, basically following the same idea of a composition of the House of Representatives and the Senate as in the U.S. Constitution (Giscard d'Estaing Interview 2007).

Giscard d'Estaing, first of all, sought to overturn the unwieldy system of weighted voting, which was subject to a bargaining process prior to every enlargement. Secondly, he sought a means of codifying the Union's dual identity as both a "Union of States" and a "Union of People".

Mindful of Member States' demography and Gross Domestic Product (GDP), Giscard d'Estaing constantly referred to the chart, which was "the basic part of the 'dossier' for the Convention discussion" (Giscard d'Estaing 2003, 20).

Table 4.1 Member States' population (in million) and GDP (in billion EUR)

	MEMBER STATE	POPULATION			GDP		
6 states > 40 million population	Germany	82.44	336.06	74%	1 545.93	20.93 %	77%
	France	59.34			1 157.89	15.67 %	
	United Kingdom	58.92			1 087.58	14.72 %	
	Italy	56.33			1 028.84	13.93 %	
	Spain	40.40			549.13	7.43 %	
	Poland	38.63			304.38	4.12 %	
8 states 8 – 16 million population	Netherlands	16.10	85.13	19%	295.48	4.00 %	17%
	Greece	10.98			117.48	1.59 %	
	Portugal	10.33			125.49	1.70 %	
	Belgium	10.31			209.15	2.83 %	
	Czech Republic	10.21			122.82	1.66 %	
	Hungary	10.17			101.46	1.37 %	
	Sweden	8.90			149.52	2.02 %	
	Austria	8.13			158.42	2.14 %	
11 states < 6 million population	Slovakia	5.37	30.49	7%	48.95	0.66 %	6%
	Denmark	5.36			108.58	1.47 %	
	Finland	5.19			103.24	1.40 %	
	Ireland	3.88			72.09	0.98 %	
	Latvia	3.47			22.25	0.30 %	
	Lithuania	2.34			13.35	0.18 %	
	Slovenia	1.99			27.95	0.37 %	
	Estonia	1.36			10.68	0.14 %	
	Cyprus	0.70			9.79	0.13 %	
	Luxembourg	0.44			12.46	0.17 %	
	Malta	0.39			5.34	0.07 %	
	TOTAL		451.58		7 387.89		

Source: Giscard d'Estaing 2003, 20

The enlargement was about to significantly increase the number of the smaller states and to widen the difference between the Member States' economic powers. This fact urged on change to the existing voting system on the basis of a new balance of demographic,

economic and political elements. In that sense, Giscard d'Estaing initially suggested that a passage of legislation should require a coalition of countries representing a majority of the Member States (50%) that represent at least 60% of the population (a double majority mechanism).

Spain and Poland, the prime beneficiaries of the Nice Agreement, expressed the strongest opposition to the introduction of a double majority system. The new rules would greatly reduce the voting power of Spain and Poland and increased the voting power of Germany.[89]

There was also the objection expressed by the small and medium sized countries that the large countries could gain too much power since only a few Member States would be enough to block every decision. They insisted on raising the double majority threshold. To deal with this objection the Convention President agreed that 'a blocking minority' would require at least four Member States.

The final deal (retained in the Lisbon Treaty) eventually established the qualified majority voting in which legislation would require the support of more than just half of the Member States (55%) representing at least 65% of the EU population in order to be enacted.[90] The first requirement is in favour of small Member States (as it gives every member state one 'vote' regardless its size) and the second condition is in favour of big countries (as it bases the voting power on population).

4.1.5.e Veto or Qualified Majority Voting in the Council

The issue of which policies should be subject to *unanimity* - giving each country a right to veto- or *qualified majority voting* (QMV) - allowing individual Member States to be overruled - set the pro-integrationists against the eurosceptics in the Convention debate.

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[89] A deeper analysis of the power implications of the various voting rules: "Winners and Losers under Various Dual Majority Rules for the EU Council of Ministers", Richard Baldwin and Mika Widgrén, CEPR DP 4450, 2003
[90] However, when the Council does not act on the basis of a Commission proposal, but on the basis of another act such as recommendation, the type of QMV to be used will be the one with the higher threshold (Lisbon Treaty, Art. 238 (3b) of the Treaty on the Functioning of the European Union) which provides in this case a threshold of at least 72% of the Member States, representing 65% the EU population. This requirement of a more 'difficult' QMV when the Council does not act on the basis of a Commission proposal has always existed in the treaties.

In an enlarged Union of 27 or more Member States with increased heterogeneity of interests, the unanimity voting system (veto) looked as if it would be in danger of creating deadlock. According to a Neo-functionalist theory (Niemann and Schmitter 2009) enlargement thus posed strong functional pressure (functional spill-over) for the successive extension of qualified majority voting (in particular in EU migration policy).

The Convention therefore had to find an agreement in order to reduce the policies where unanimity voting applies. The possible extension of the votes by qualified majority in place of unanimity became one of the main points of contention, because many Member States wanted to keep unanimity for their 'vital areas'. The decision to precommit through pooling and delegation means a political risk of being outvoted or overruled on any individual decision. "As compared to unanimity voting, which permits recalcitrant government to demand side-payments, thus encouraging log-rolling, lowest common denominator bargains, or outright obstruction, QMV and to an even greater extent delegation reduce the bargaining power of potential opponents, encouraging higher level of compromise" (Moravcsik 1998, 75).

Moreover, in thinking about how to increase the democratic legitimacy and transparency of the Union's institutions, the Laeken Declaration asked whether the EU should extend 'co-decision', the procedure, which gives the European Parliament equal powers in legislating with the Council of the European Union.

Some Member States clearly indicated where they wanted to maintain absolute sovereignty. Since the 'red lines' were different, the delegates were obliged to form coalitions exchanging their support in return for the support of others for some provisions. The British delegates wanted to retain their veto on taxation, foreign and defence policy and criminal and social law. The UK also opposed the Charter of Fundamental Rights as a legally enforceable document, fearing that the European Court of Justice could interfere in the UK's industrial and social legislation. As a matter of fact, many governments originally (at the Nice summit in 2000) opposed the idea of making the Charter of Fundamental Rights legally binding, however, "the Convention's dynamics were such that it became politically impossible for those governments to maintain their position, which indeed clashed with that of the vast majority of the members of the Convention" (Ziller 2004, 53).

The German delegates, driven by rising unemployment at home, wanted to retain their veto on access to its labour market. France, fearing an invasion of 'Anglo-Saxon' culture, insisted on retaining its veto on trade covering cultural and educational services (the so called 'cultural exception'). The Danish representative was concerned with transport. The Greek representative sought a national veto in the area of maritime transport.

When the French demand (the so-called 'cultural exception') was discussed at the Praesidium, the Chairman Giscard d'Estaing (as a Frenchman) wanted to accommodate his country by supporting a veto in this field. Vice-President Amato also supported a veto with the tactical aim of solving the issue before the IGC. Vice-President Deheane backed France too. Barnier (French commissioner) first advocated a veto (as was being lobbied for by France) but later was reigned in by the College of the Commissioners and was counted as favouring QMV. Commissioner Vitorino had the same position. Spanish representative Dastis did not back the French partly out of displeasure that the Praesidium was making such efforts to appease France and Germany, while it had done nothing previously to help Spain in its opposition to the double-majority system. Slovene Peterle (representative of the accession countries) was also opposed to France's position, reasoning that the existing provision in trade policy was well balanced and acceptable. Given Peterle's anti-French position, Giscard d'Estaing sought to have him removed by asking if he was entitled to be part of the consensus in the Praesidium (Laeken Declaration indeed stipulated that the accession countries could take part in the Convention without being able to prevent any consensus). The Danish representative Christophersen was ready to back the French position if the provision supported the national veto in the area of maritime transport as well. The UK representative Stuart said that she would be against any change away from QMV if that were the Commission's position. This made Giscard d'Estaing very upset and he countered by asking her whether she wanted the opinion of the Commission on tax matters and if she would accept it.

The 'cultural exception' had a too sentimental value to be left to the mercy of qualified majority voting. The free circulation of American movies was seen as a 'hidden precondition'[91] of the Marshall Plan, and the French even to this day have trouble accepting anything that they consider detrimental to their artistic endeavours.

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[91] One of the greatest film-directors Orson Welles told the French MEP Alain Lamassoure about his meeting with the American president Franklin D. Roosevelt in 1945. "When the war in Europe was finished, President Roosevelt invited the biggest film-directors to the White House and said: 'We will help

The European Convention eventually managed to extend the scope of qualified majority voting (QMV) to new policy areas. The Lisbon Treaty eventually increased the number of cases where the Council may decide by qualified majority. This was presented as a mean to ease the ability of the EU to pass legislation within those areas.[92] The decision-making system therefore moved further from the procedures of intergovernmental co-operation towards the federal system, where the veto power of any member is significantly less forceful, as the possibility of majority decision increases the readiness of potential veto candidates to make concessions and to reach a compromise.

4.1.5.f Final bargaining over the overall 'institutional package'

Institutional issues, such as the voting weights in the Council, the number of commissioners, and the distribution of seats in the European Parliament, created significant differences in delegates' position. A majority of delegates created a coalition against the changes to the existing institutional arrangements; for different reasons: The UK representative joined the coalition in exchange for the support of the Spanish representative in maintaining the national veto on tax and social security policies. The Polish and Spanish representatives were against the change in the voting system because the existing one placed them amongst the biggest countries and they wanted to maximize the power of their country. The Irish representative was primarily concerned about the proposals for a slimmed down Commission, which would reduce the power of the Community institutions and therefore be less integrationist. Smaller countries usually tend to favour more centralized solutions, since equal treatment would increase their influence. The coalition of small to medium-sized countries was against institutional changes because of a potential weakening of the Community institutions, which they feared would reduce their influence in EU decision-making.

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to reconstruct Europe. Europeans will soon be able to produce cars, planes etc. even better that we can do. Whereas, we, Americans will produce cinema'. Thus, the agreement Blum-Byrnes demanded free circulation of American movies in exchange for material aid" (Lamassoure 2004, 137).

[92] The Lisbon Treaty increased by 44 the number of cases of QMV. The most important sectors (where QMV and not unanimity applies) are the Freedom, Security and Justice area, the co-ordination of social security for migrant workers, the establishment of permanent structured co-operation in defence and the definition of the EU Defence Agency's statute and seat and its operational rules, culture, the diplomatic and consular protection of EU citizens abroad and establishment at the EU level of intellectual property rights and other centralised regimes. However, it should be stressed that measures in a number of important sectors (about eighty cases) continue to be adopted by unanimity or by common agreement. For the complete list of areas where QMV and unanimity or common accord apply see Piris (2010 383-397).

The accession countries did not want to renegotiate the Nice Agreement, which was part of the membership agreement that was being put to their electorates in referenda. There was no meeting of minds on the 'institutional package' until the very end of the Convention.

Convention President Giscard said, that when he took over the Chairmanship he thought that the most important issue would be the separation of powers between the Union and Member States. Instead, he was surprised to see that "the institutional settlement turned out to be the biggest issue preventing consensus. For the majority of delegates this was the biggest political debate because it was about power sharing" (Giscard d'Estaing 2003, 38).

Interestingly, a similar testimony was given by the Father of the American Constitution Madison. The threatened contest in the Federal Convention, he said, had not turned, as most men supposed, on the degree of power to be granted to the central government but rather on "the rule by which the states should be represented and vote in the government – a question the most threatening that was encountered in framing the Constitution" (Madison quoted in Bowen 1986, 187). The Philadelphia delegates avoided a dissolution of the Convention with the famous Great Compromise, by which every state was to have two members in the U.S. Senate. This would offset proportional representation in the House, where the large states had the advantage, with one representative to every forty thousand inhabitants.

So, how did Brussels Convention go about the most threatening issue and how did Giscard manage to overcome these obstacles? Agreement was finally reached only three days before the signing of the Constitution (which finally took place in Rome on 29 October 2004). The first negotiations tactics was to link all institutional issues. The linkage of issues or "package deals" is a constant theme in the history of EU negotiations. Indeed, many commentators view linkage as the core of the EU's success.

A compromise was found to allow the veto in the field of trade in cultural and audio-visual services thereby conceding the French demand.[93] The UK's red lines were also

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[93] Treaty establishing a Constitution for Europe, Article III-315, 4, retained in Lisbon Treaty, Article 207 (4) Treaty on Functioning of the European Union: "The Council shall also act unanimously for the negotiations and conclusions of agreement: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; (b) in the field of

observed in full and Germany secured national control over the access of immigrants to the labour market.

Then, Giscard used the negotiating tool of 'destroying' different coalitions. During one of the last Convention's meetings, throughout the night of 6 June 2003, he managed to separate the new Member States from other small Member States by promising them that until 2009, every member state would have 'their' Commissioner in line with the Treaty of Nice. Although he regarded the model of 'egalitarian rotation' of the Commissioners as unlikely, he accepted it and this in turn prompted the acceptance of the deal by the Benelux countries. Convinced by the Benelux countries - through the historical importance of those founding members - other countries (forming the so-called 'like-minded group') simply followed suit. Spain and Poland found themselves isolated.

Isolation is also a very common tactic in the EU negotiation process. It worked well also in this case after a certain period of time. Spain and Poland had kept blocking the adoption of the Constitution until December 2003. Somewhat coincidentally, a general election was taking place in Spain and the biggest opponent to the new institutional settlement, the Spanish Prime Minister Aznar, lost a general election.[94] A newly elected pro-European Prime Minister Zapatero, who had based his campaign in part on a slogan of 'Return to Europe', lost no time in aligning Spain's EU policy with those of France and Germany. Spain agreed on a compromise but requested a population threshold of two thirds. The change in Spain had an immediate impact on the Polish representatives. After the loss of its ally, the Polish government had little option but to modify its hard-line stance on the voting system. The Polish Prime Minister Miller reckoned he did not want his country to be isolated "because it would be very dangerous for a country" (Miller 2004) and he agreed to the final compromise presented under the Irish Presidency in June 2004. To help Poland give up its favourable position, the final compromise accepted grudgingly by EU leaders in June 2004 was to retain the Nice Treaty rules up to November 2009. The deal also suggested a special provision to accommodate situations where a group of Member States constituting somewhat less than a blocking minority was opposed to a particular measure.

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trade in social, education and health services, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them."

[94] The elections took place in the aftermath of the terrorist attacks, when Al-Qaeda terrorists attacked commuter trains in Madrid during the morning rush hours on 11 March 2004.

Interestingly enough, the thorny issue of the European voting system was reopened at the European Council in June 2007, mainly at Polish behest, and it was changed significantly (see Chapter 5 From the European Constitution to Lisbon Treaty).

The negotiation procedures of 'intergovernmental co-operation' proved to be dependent upon "boxing up national interests in package deals" (Oeter 2010, 76) which differs significantly from the classical federal systems and empirically confirms the explanatory power of Liberal Intergovernmentalism theory.

4.1.5.g Conclusion

The analysis of the European Convention dynamics demonstrated that delegates sometimes formed complex multinational tactical coalitions reflecting a series of strategic calculations. There was a mixture of national preferences, individual motivations and agendas at play. In some cases, classic bargaining emerged. Where some delegates believed that their vital interests were at stake, they often formed coalitions to impose their views. The most known case was a coalition of the so-called 'like-minded group' or the 'friends of the Community method'.

Very often reservations about joining a particular coalition had to be overcome, in order to be in a good position to win over reluctant delegates on other issues. Sometimes delegates changed positions as other delegates and institutions' representatives introduced new arguments. One of the most interesting empirical cases was a striking change of the position by the 'friends of the Community method' after a meeting with the German Foreign Minister Joschka Fischer. The research showed that a shift in position was either a strategic retreat or a principled change of heart, or an effort to avoid conflicts with great power holders.

The theories such as Intergovernmentalism and Social Constructivism offer the prospect of explaining this empirical case. While Intergovernmentalists would claim that the delegates forming the 'friends of the Community method' first acted purely on the basis of strategic calculations (they backed up the institutional set up in favour of the smaller countries), constructivists would argue that the participants in a discourse are open to be

persuaded by the better argument. As Robert Keohane put it "persuasion involves changing people's choices of alternatives independently of their calculations about the strategies of other players" (Keohane 2001, 10). Actors' interests, preferences, and the perceptions of the situation are no longer fixed, but subject to discursive challenges. Where argumentative rationality prevails, actors do not seek to maximize or to satisfy their given interests and preferences, but to challenge and to justify the validity claims inherent in them – and are prepared to change their interests in light of the better argument.

The delegates sometimes even engaged in tit-for-tat[95] behaviour, as was the case in the negotiations for 'cultural exception' when Spanish representative Dastis did not back the French because Spanish opposition to the double-majority system was not supported in the previous round.

National and European parliamentarians were influenced also by the stances of various political parties. It is very important to distinguish between two types of influence, as observed by some analysts:

> On the one hand, most members either had specific mandates from their capitals or strong ideological agendas. On the other hand, there were some members who appeared more open to learning through acrimonious debate, either because they came from new member countries with less entrenched ideas or because they cared most about one or two issues and did not have strong views on others (Magnette and Nicolaïdis 2004, 395).

The institutional context also influenced the delegates' preferences, goals, and calculations. For example, in the case of the Commissioners, any institutional action was supposed to be in the Commission's interest. The two representatives of the Commission therefore mostly played the role of Commission stalwarts. Social Constructivism with its focus on the impact of Europeanization on the actors, helps to explain, what they call, the *constitutive* effects of institutions. Actors are deeply embedded in and affected by the institutions in which they act. Rule-guided behaviour differs from strategic behaviour in that actors try to 'do the right things' rather than maximizing their given preferences.

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[95] According to the Oxford Dictionary of Politics, "tit-for-tat means 'I will cooperate in our first encounter; thereafter, whatever you do in each round, I shall do to you in the following round" (McLean and McMillan 2009, 434).

4.2 Exogenous constraints

4.2.1 The influence of the Member States' leaders

Since the deliberations of the European Convention took place against a backdrop of European leaders having the final say, the Convention President Giscard d'Estaing held numerous bilateral talks[96] particularly with the larger and more powerful Member States, so as to sound out their 'bottom line' and secure consistency between the outcome of the Convention and the expectations of the national governments.

The first draft of the European Constitution was written on the basis of Giscard's proposal after eight months of his bilateral contacts with Member States leaders and discussion of the Convention. This proposal was also carefully timed to be publicly presented before the draft proposal of the European Commission. Giscard d'Estaing pointed out, that "the Brussels' vision of the European Constitution consisted of a strong and omnipresent Commission, a weak Council and a Parliament in the form of a political talking shop. I refused that proposal because I knew that it would never be accepted by the Member States" (Giscard d'Estaing Interview 2007).

After half a year of burgeoning activity, the Member States realized that the Convention was turning into a serious business that no government could afford to ignore. This was followed by a change of appointment amongst higher ranking delegates to the Convention. In October 2002, German professor Peter Glotz was replaced by Foreign Minister Joschka Fischer, which prompted other countries, including France (Foreign Minister Dominique de Villepin), Greece (Foreign Minister Georges Papandreou) and Slovenia (Foreign Minister Dimitrij Rupel) to follow suit. "This change made clear that the Intergovernmental Conference had already begun during the Convention"

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[96] Giscard's bilateral contacts with Member States leaders started early in January 2002 when he met Spanish Prime Minister Aznar, the holder of the EU's rotating presidency. Before the Convention's opening ceremony, he visited Italian Prime Minister Berlusconi in Rome, German Chancellor Schröder and Foreign minister Fischer in Berlin, British Prime Minister Blair in London, Dutch Prime Minister Wim Kok in The Hague and Swedish Prime Minister Göran Persson in Stockholm. By the time of the June 2002 Seville summit, there had been follow-up visits to Blair, Schröder and Aznar, and two meetings with Romano Prodi, the Commission President. As one of the political journalists observed: "There was a general perception that Giscard preferred to deal with the big Member States. This was not strictly true. In the early months, he also conferred with Austrian Chancellor Schüssel and German regional leaders. While the proceedings of the Convention were open to all, Giscard's bilateral meetings were not transparent. There was no schedule of his forthcoming talks on the website and no comment after the meetings. However, it was clear that potential problem countries, such as the UK or Austria, were high on his list of priorities" (Norman 2005, 48).

(Lamassoure 2004, 238). "Although the composition of the European Convention was broader, its process more transparent and its rules more flexible than classic Intergovernmental Conferences, it took place under the shadow of the IGC and under a leadership especially sensitive to the positions of big Member States and it reproduced, by extension, the logic of intergovernmental bargains" (Magnette and Nicolaïdis 2004, 381). The Convention delegates were therefore significantly constrained by the EU Member States' leadership. As one delegate later recalled "the delegates quickly learned that there were political controversial areas (…). This is why the Convention made no important proposals for the strengthening of the economic governance of the Union" (Duff 2005, 23).

4.2.2 The influence of International circumstances in case of CFSP

The Common Foreign and Security Policy (CFSP) is an example of a classic form of diplomatic bargaining in line with the practice of an Intergovernmental Conference. The mandate of the European Convention was to find a way of strengthening the Union's weak international profile and to develop a more coherent foreign, security and defence policy. The gap between the Union's economic strength and its ability to project power outside its territory was cruelly exposed during the wars in the Balkans. Moreover, the terrorist attacks on New York and Washington on September 11, 2001, stepped up the challenges facing Europe in terms of common foreign and defence policy. Although the majority of Member States were of the opinion that purely national frameworks of their security and defence policy were no longer enough, this issue led to a clear division between those who favoured more cooperation and even an extension of the Community method into foreign policy, and those who insisted that foreign and security policy should be intergovernmental and therefore exclusively the job of the EU leaders gathering in the European Council. Defence policy particularly proved to belong to the most sensitive areas of sovereignty and be dependent upon essentially national considerations.

The timing of the discussion was unfortunate as well. The Iraqi crisis further exposed the weakness of common foreign and security policy. The Franco-German claim to represent 'European' opposition to the invasion provoked competing statements by other groups of governments. Masks fell completely off, when the military intervention in Iraq was put on

the agenda of the international community. In September 2002, the Danish Prime Minister Fogh Rasmussen, then holding the Presidency of the EU, took stage at the UN General Assembly. A few days earlier the EU Foreign Ministers adopted a common position stating that diplomatic resources still needed to be explored. To the astonishment of many of them, the Danish Prime Minister was in favour of military intervention when he spoke 'on behalf of the EU'. The EU leaders learnt their lesson: "As long as the Member States are not looking for the common position at the UN Security Council, common foreign policy will not mean common policy but convenient policy" (Lamassoure 2004, 270).

The Iraqi crisis clearly polarized opinion in the EU Member States. Eight states (the UK, Denmark, Spain, Hungary, Italy, Poland, Portugal, the Czech Republic) signed the letter on 27 January 2003, to support the U.S. position on Iraq. The operation of eight pro-Atlantic countries was not only perceived as a snub to France and Germany; it contravened the rules of the European Union. A few days later, other East European countries, among them five future Member States, joined the initiative to finalize the result: thirteen vs. four EU Member States. "Disintegration of a common European foreign policy over the invasion of Iraq, in the winter of 2002-3, revealed the wide gap between a 'common' policy, created out of political negotiations among heads of government and foreign ministers, and an 'ingle' policy built on integrated institutions and expenditure and on a Europe-wide public debate" (Giegerich and Wallace 2010).

These developments made the Convention President Giscard d'Estaing very pessimistic about the future of common foreign and security policy: "The current events divide Europe and impede the work of our Convention. Some Member States do not even respect the Maastricht Treaty regarding the mutual solidarity. They speak with Washington before they speak with Brussels" (Giscard d'Estaing quoted in Lamassoure 2004, 282). The Greek Prime Minister Costa Simitis, who was holding the EU Presidency for the first half of 2003, made a strong comment that such a policy did not contribute to the efforts of the EU to speak with one single and powerful voice on the world stage.

The military attack in Iraq started on 20 March 2003, and the EU Member States remained split.

Faced with the impossibility of merging the two different aspects of external action, the Convention began to look at possible ways of improving coordination between the two individuals personifying these two aspects: the High Representative for CFSP and the Commissioner responsible for external relations. At the same time, the Convention recognized that the lack of continuity could only be addressed by tackling the problem at its source: the rotating Presidency. After Giscard's meeting with Tony Blair in Downing Street on 22 May 2003, there was a strong tilt towards the UK position regarding the common foreign and defence proposals. Britain expressed clear fears of 'communitarisation' of this policy when the first European Convention draft proposed that qualified majority voting would apply for joint proposals from the EU foreign minister and the Commission. In its revised version, the article underlined that QMV in external affairs 'shall not apply to decisions having military or defence implications'. Reflecting joint agreement from Britain, France and Germany the revised text also banished the idea of a European army by underlining that the Union should use 'capabilities provided by the Member States.'

Also from the legal point of view, the European foreign, security and defence policy is conceived as "a governmental *arcanum,* without sufficient judicial and parliamentary control" (Von Bogdandy and Band 2010, 34). This means that the classical foreign policy will remain in the hands of the Member States, who remain members of the United Nations, sovereign in their own right. The European Union' part of the external action concerns mainly development aid, humanitarian action, the conclusions of international agreements, the representation of the Union.

However, the Constitution brought about an innovation called "structured cooperation"[97] (open to all but imposed on no-one) allowing a group of countries with enhanced military capabilities to cooperate amongst themselves with a view to the most demanding missions.

Another provision concerning institutional flexibility was "enhanced cooperation."[98] The motive behind enhanced cooperation was again linked to the enlargement of the Union. It

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[97] Lisbon Treaty, Article 42 and 46 of the Treaty on European Union and Protocol (No 10) on Permanent Structured Cooperation.

[98] The possibility for 'enhanced cooperation' was already created by the Amsterdam Treaty and it could be triggered in cases "when the Council has established that the objectives of such cooperation cannot be attained within a reasonable period by the union as a whole." A certain number of Member States can then

was conceived as a tool to manage the growing heterogeneity of Member States. The Franco-German axis, supported at times by the Benelux countries and the European Commission, played a major role in promoting the concept which was supposed to reconcile the deepening and the widening of the Union. The main argument was that enlargement would increase the pressure for differentiation amongst Member States, which could lead to the creation of sub-groups like the Eurozone and the Schengen area. According to some analysts "it was considered preferable that such sub-groups should develop within the institutional framework of the Union, rather than outside it. That argument was of course convincing for supranational institutions, because the community method and judicial control were preserved. But it also provided some safeguards for those Member States who are not taking part in enhanced cooperation" (CEPS, EGMONT, EPC 2007, 99).

One of the implementation safeguards is that enhanced cooperation can potentially be initiated only in the areas covered by the treaties. The new provision thus introduced the extension of the scope of enhanced cooperation to CFSP and defence policy, as formally part of CFSP.

The European Convention also attempted to enshrine the possible establishment of permanent structured cooperation in the field of *defence*, whose 'story' began early on in the 2004 IGC, when France, the UK and Germany tried to find a deal according to their interests. The UK's interest in structured cooperation was in getting others to spend more on defence. It could not demand this and not at the same time yield to French pressure for a more generalized mutual defence guarantee. After lengthy trilateral negotiations, the article on structured cooperation was amended and complemented by a draft protocol. At the same time, the mutual defence guarantee was extended to apply to all, although hedged with an indirect reference to the neutrals, and an acknowledgment of the importance of NATO, for those states belonging to it. An essential element in these negotiations was the proposal (pushed by the French) to establish an 'EU operations cell' within the military staff. This was a sensitive issue, since it had the potential to drive a

be authorized by the Council to move ahead, between themselves, whilst staying within the safe constitutional framework of the Union. The Lisbon Treaty clarified and simplified many aspects of the procedure (Article 20 of the Treaty on EU and Articles 236-334 of the Treaty on the Functioning of the EU). For the first time in the EU history, Member States used the enhanced procedure in March 2010, when 14 Member States decided to move forward with a Regulation related to divorce and legal separation of international couples (which previously had not received the support of all Member States and had been stuck in an 'institutional traffic jam' for half a decade).

wedge between the two agreed options of running EU operations either through NATO or a national Headquarters. The UK fought to limit the size and scope of such a 'cell'. The final decision to establish a 'cell' with a restricted remit, was the result of a trade-off between the French and the UK.

Nothing stirred up United States' interest in the Constitution more than defence. Concerned that its own influential role in European defence through NATO would be undermined, the US viewed the initial structured cooperation provisions with suspicion, considering that they ran the risk of creating 'caucuses' within NATO. At the same time the Americans had a strong interest in circumscribing the role of the 'operations cell'. The final package largely allayed their concerns (Milton and Keller-Noëllet 2005, 65-66).

4.2.3 The influence of Vatican and Catholic Church

In some instances, the decisions of the Convention can be understood in terms of the practice, whereby "the authors of a constitution agree to leave controversial issues out of their agreement, so as to avoid incompatibilities" (Holmes 1988, 23). The controversy on a reference to God was a good example of a disagreement, which was 'solved' by being left outside the compromise.

President Giscard d'Estaing, who experienced the lobbying from the highest levels of the Catholic Church[99] explained the final decision concerning this controversial issue:

> In fact, the religious authorities addressed three main demands: first, to respect the status of churches and religious association; second, to have open and regular dialogues with these churches and organizations; and third, to mention God or Christianity in the European Constitution. The European Convention responded favourably to the two first demands, which have been inserted in the new article of the Constitution. The third demand was rejected, mainly by France, Sweden and some others, which were satisfied with just a reference to the 'religious inheritance of Europe' written in the Preamble. (Giscard d'Estaing 2003, 29-30)

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[99] As reported by some observers "the lobbying went to the highest levels, as Giscard found when he met Pope John Paul II in Rome three days after the publication of the skeleton" (Norman 2005, 66). At the invitation of Italian Prime Minister Silvio Berlusconi, the Convention president Giscard d'Estaing had an audience with the Pope (30 October 2002) where they discussed the church's concerns about its status and the legal recognition of religious organisations in a future constitutional text.

Despite heavy lobbing, the European leaders at the Intergovernmental Conferences did not include any reference to God in the final text. The principle of 'separation and independence between church and state' was the predominant argument expressed by the most of the Member States. Particularly convincing was the Irish Prime Minister Bertie Ahern whose job was to negotiate the final compromise among the Member States, since Ireland held the EU Presidency in the final phase. He said that he too would like to see this in the text, but one Member State (by which he meant France) had had a revolution to remove God from its own Constitution and was not prepared to risk another.

Interestingly, in the case of hammering out the American Constitution in Philadelphia the advocates of a secular state had also won. The Constitution was bitterly attacked for its failure to mention God. God and Christianity are nowhere to be found in the American Constitution, despite the fact that the framers of the U.S. Constitution were deeply religious, God-fearing Christians who often integrated into their political prose pious phrases like "upon the altar of God I proclaim this or that…" (Kramnick and Moore, 2005). The American Constitution, Justice Walsh pointed out, is not "governed by the percept of Christianity" (idem).

The reference to God, however, did not allow much American influence. Instead, this case shows the constraints imposed on European constitution-makers by the practices of different EU Member States. While the Roman Catholic Church has a special position in the Irish constitution, the majority of EU Member States are secular and do not refer to their Christian heritage in their own constitutions.

This empirical example offers an interesting question what would have been the impact if Christianity had got a 'constitutional recognition' in the European Constitution. With reference to comparative constitutionalism, we might see some parallels with the tension between Christian and democratic commitment which remains a factor at the core of constitutional interpretation in Ireland. The European Court of Human Rights found the Irish legislation to be in violation of the European Convention for the Protection of Human Rights. In Norris v. Ireland case (1988) the European Court suggested that the Irish Supreme Court majority's explicit invocation of Christian theology to uphold the criminalization of homosexual conduct represented an inappropriate elevation of sectarian natural law within the scheme of constitutional enforcement.

This practical case illustrates that the reference to Christianity, which might have influenced the outcome of future European court rulings (such issues as euthanasia, abortion rights, and human cloning) on the one hand, might clash with the European Conventions of Human Rights on the other. Therefore, the EU constitution-makers would have created a very inconsistent situation while, on the one hand, referring to Christianity and, on the other, introducing a commitment to accede to the European Convention on Human Rights, which is the foundation of human rights protection in Europe.

4.2.4 Conclusion

Regarding those exogenous constraints, we can conclude that the Convention debate about the most contentious issues, which are at the heart of national sovereignty, demonstrates that the negotiations within and around the Convention did not fundamentally differ from the previous treaty reform. As some political analysts observed:

> In spite of the Convention's formal independence from the government that had given birth to it, the broader range of actors participating in the process, and the public character of their deliberations, there is little doubt that the work of the Convention took place above all 'in the shadow of the IGC' with the familiar patterns of interest and strategies. And yet, on the other hand, the final result of the Convention would not have been imaginable as emanating from the output of an IGC (Magnette and Nicolaïdis 2004, 382).

When taking the final decision about the substance of the European Constitution, the Convention President and delegates had to anticipate the reaction of the European leaders and craft their decisions in a way that they would not be overturned by the IGC, which was to follow in order to examine and eventually adopt the final document. The Convention delegates often publicly stated that "if they reached a very ambitious compromise, but did not take into account the government's positions, they would be disavowed by the IGC" (Magnette 2005, 11). On each and every subject, governments drew lines in the sand and this hindered their ambitiousness. The decision about the European Convention was an ambivalent agreement, one Belgian scholar and politician observed:

European Convention offered opportunities to those who thought that the IGC process had reached its limits, while giving guarantees to those who wanted to preserve the rights they have always had under an intergovernmental process. As a result, the rules of the Convention remained remote from the ideal-type of constitutional deliberation, but they did not prevent the conventioneers from arguing and building agreements on rational grounds (Magnette 2003, 21).

4.2.5 The role of the European citizens and domestic constraints

The Convention's earlier period involved its President and delegates trying to reach out to a broader public through hearings with civil society.[100] The public forums were supposed to serve as an input to the Convention debate. However, they were unable to live up to their expectations, the Convention President Giscard d'Estaing argued:

> The public did not provide any answer to my basic question: What's your vision of the future of Europe? Actually, the public forums were only aimed at venting their grievances. At the end of the day, there was no added value (Giscard d'Estaing Interview 2007).

Although the Convention succeeded as far as possible in bridging the gap, thanks both to the transparent and public nature of its proceedings involving many segments of 'civil society', not only many Europeans remained oblivious to the Convention, but those who had heard of it, knew little about the contents of the Constitution.

As the eminent scholar of European integration Moravcsik observed:

> Informed and intense deliberation did not take place. Worse, once the issue was forced into the agenda via referenda in France and the Netherlands, domestic debates were dominated by issues unrelated to ongoing EU policy. Referenda were opportunistically called, ineptly waged and, in two cases, decisively lost. (…) Forcing participation is likely to be counterproductive, because the popular response is condemned to be ignorant, irrelevant and ideological (Moravcsik 2006, 221).

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[100] The so-called 'listening period' lasted about six months and gathered in particular the social partners, the business world, NGOs, academia, Youth organizations etc.

Like most international treaty changes, EU treaty amendments require unanimous agreement and subsequent ratification by each member-state. Although, the calculation of political risk regarding the public opinion in Member States was often taken into account during the Convention debate, the European citizens by the way of referenda practically sunk the document.

When the *Pennsylvania Packet* on 19 September 1787 published the U.S. Constitution "the country was shocked, startled," Bowen later reported about the general perception. "This Constitution, this three-headed government, was no mere amendment of the Confederation! Its provisions were novel, unlooked-for. Why had the Federal Convention insisted upon secrecy – because they knew the people would not consent to such drastic changes" (Bowen 1986, 267).

And yet, in less than one year, the U.S. Constitution had been ratified by all states through their ratification conventions. During the "fight for ratification" the arguments were all done again and "the whole country had to know and read, scorn, reject or accept" (Bowen 1986, 268). For the Father of Constitution – Madison – it was reported that for the rest of his life he had been explaining and expounding the new Constitution – in the Congress, as President of the United States, and years later at Montpelier, answering letters from all over the country. "Never had so educational a debate been sustained in America, though the shafts on both sides were bitter and often far from just" (Bowen 1986, 276). The ratification debate, marked by the opposition of the Anti-federalists and counterarguments of the Constitutionalists, gave birth to one of America's founding documents: in October 1787 a series began in the New York newspapers, the *Federalist Papers,* written by Madison, Hamilton and John Jay. Ever since *The Federalist* has offered a commentary, rationale, and interpretation of the U.S. Constitution itself, and proved to serve as an aid to the courts, to Congress and the President. Moreover, during the ratification period the Bill of Rights was suggested by the states and passed as the ten amendments to the Constitution by the first Congress (1789) under the new government.

Conversely, the reasons for rejecting the European Constitution had little to do with the content of the Constitution itself. The reasons for negative popular vote in France and the Netherlands on 29 May and 1 June 2005 respectively were manifold and contradictory. According to the post-referendum survey (Eurobarometer 171) almost one third of French responders said that it would have a negative effect on the employment situation (they

particularly expressed the fear of the relocation of enterprises), 26% claimed that the economic situation in France was too bad and 19% feared that the project would even liberalize the economy more, 16% of responders also reproached the lack of social Europe another 6% clearly stated that they were against accession of Turkey to the EU, and others lacked information or were against European integration as such. The research for the Netherlands (Eurobarometer 172) showed that almost one third of responders lacked information, 19% feared loss of sovereignty, 14% opposed the national government and certain political parties, 13% claimed that Europe was too costly, 8% were against European construction, 7% feared that it would have negative effects on the employment situation because its liberal approach would lead to the relocation of Dutch businesses and loss of jobs, others found the Constitutional treaty too technocratic and too complex. Economically speaking, both French and Dutch voters found the Constitutional treaty too liberal and feared loss of jobs.

In explaining this public opinion perception, Social Constructivists shed some light by pointing to the emergence of an alternative vision of European identity – 'fortress Europe' (Checkel and Katzenstein 2008). This conceptualization of European identity emphasizes the 'counter-vision' of Europe as an exclusionary construct and it resonates with 'exclusive nationalist' attitudes identified in mass public opinion. The counter-vision of 'fortress Europe' has recently become salient in two transnational debates. First, there is a Europe-wide concern about immigration and the influx of extra-EU foreigners. Second, the debate on the potential Turkish EU membership is replete with reference towards competing visions of Europe.

A striking fact that the older generation – eye-witnesses to the disastrous destruction of the Second World War– primarily voted "for" a Constitution, and the younger generation mostly voted "against" (Eurobarometer 171 and 172), demonstrated that the originating sources of fear would no longer serve as a powerful engine propelling the European Union. Many people in France and the Netherlands see European integration as a problem rather than the solution it used to be.

The 'zeitgeist' in Europe has changed. The European integration project was built by a political class, while the population at large was hardly committed. The lack of some form of direct democratic legitimacy at EU level proved to be the intrinsic problem of the European constitutionalization process.

According to some scholars (Castiglione *et al.* 2007), the main problem the Convention had to face was not so much whether it would succeed in writing a constitution, but whether it *could* write a constitution at all:

> The original sin of European constitutionalism is that it tries to apply categories that have been developed for polities which have a fundamental element of political 'unity'. The European Union and its preceding institutional expressions started life, instead, as a form of international co-operation (Castiglione *et al.* 2007, 11).

The Union lacks such political unity of a nation; instead it builds on nationally organized peoples.

A clear rejection of the Constitution by two founding Member States left the European Union reeling over two years. At the regular meeting of the European Council only two weeks later, in June 2005, Europe's leaders were unable to do anything more than call for 'time out', which was officially called 'the period of reflection'.

Throughout the period of reflection the Constitution hung over the Union like a milestone. From 2005 until the beginning of 2007, much intellectual energy had been devoted to the potential solution, which was also the subject of the EP Report on the period of reflection (Duff and Voggenhuber 2005). The main objective of the period of reflection was to find the way out of the constitutional impasse resulting from the failure to ratify the Constitutional treaty.

"There was a sense that the Union could not progress without the Constitution. In the first half of 2007, the German Presidency was invited to find a way out of the constitutional impasse" (Milton Interview 2007).

Indeed, the long stalemate on treaty reform infected the political climate in the EU and started to erode the legitimacy of the European Union system.

5 FROM THE EUROPEAN CONSTITUTION TO THE LISBON TREATY

5.1 European Council 2007

The European Council summit, which took place in Brussels on 21 and 22 June 2007, had been referred to as a historic make-or-break moment for the future of the Constitution. European leaders had to decide how best to extricate themselves from the political crisis caused by the Franco-Dutch rejection of the EU Constitution.

In the run up to the summit in June 2007, the German Presidency had sent member state governments a questionnaire asking them to reassess the main suggestions that had emerged from the preliminary consultations, which took place between the Presidency and the leaders of the Member States. These questions[101] clearly outlined the direction in which the European leaders were meant to move in changing the Constitution. Most importantly, it was agreed to abandon the 'conventional method' and the 'constitutional concept' and to return to the classical method of treaty changing through an Intergovernmental Conference.

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[101] 1) How do you assess the proposal made by some Member States not to repeal the existing treaties, but to return to the classical method of treaty changes while preserving the single legal personality and overcoming the pillar structure of the EU? 2) How do you assess in that case the proposal made by some Member States that the consolidated approach of part I of the Constitutional Treaty is preserved, with the necessary presentational changes resulting from the return to the classical method of treaty changes? 3) How do you assess the proposal made by some Member States using a different terminology without changing the legal substance, for example with regard to the title of the treaty, the denomination of EU legal acts and the Union's Minister of Foreign Affairs? 4) How do you assess the proposal made by some Member States not to include an article relating to the symbols of the EU? 5) How do you assess the proposal made by some Member States not to include an article that explicitly restates the primacy of EU law? 6) How do you assess the proposal made by some Member States that Member States will replace the full text of the Charter of Fundamental Rights by a short cross reference having the same legal value? 7) Do you agree that the institutional provisions of the Constitutional Treaty form a balanced package that should not be reopened? 8) Are there other elements which in your view constitute indispensable parts of the overall compromise reached at the time? 9) How do you assess the proposal made by some Member States concerning possible improvements/clarifications on issues related to new challenges facing the EU, for instance in the fields of energy/climate change or illegal immigration? 10) How do you assess the proposal made by some Member States to highlight the Copenhagen criteria in the article on enlargement? 11) How do you assess the proposal made by some Member States to address the social dimension of the EU in some way or other? 12) How do you assess the proposal made by some Member States applying to opt-in/out of the provisions to some of the new policy provisions set out in the Constitutional Treaty? (Source: Agence Europe, 27 April 2007).

According to the Council's legal experts involved in the Convention and later the IGC, "the only way that the Constitution could be sold again was by bringing its form in line with the substance" (Keller-Noëllet and Milton 2007, 98). The starting point of the new proposal was therefore to return to the traditional terminology and remove terms such as Constitution, Union Minister for Foreign affairs[102] and EU symbols[103] which were fiercely contested as they are traditionally associated with statehood, and hence a fear of the European super-state in the making. Moreover, eurosceptics[104] argued that only states had constitutions and the making of a constitution is usually understood as an act of sovereign self-determination.

> The requirement for changing terminology and symbolism mainly came from two Member States, France and the Netherlands, who received "no" votes, backed by the UK, for whom it was extremely important that the outcome looked very different from how the Constitution looked like before. On the title, the European leaders were outdoing each other with different 'low profile' titles, of which a 'Reform Treaty' was finally accepted. They could hardly propose a more boring title (Milton Interview 2007).

To sum up, the common 'bottom line' was to adopt just an 'amending or reform treaty' which would not repeal and replace all the existing treaties and therefore would not require the approval of the electorate through a referendum. Constitution equates to referendum, but referendum equates to failure. Other requirements were "disappearance of the words 'constitution' and 'constitutional', … the deletions of the words 'minister', 'law', 'flag', 'anthem' and any other wording which would evoke the possible transformation of the EU into a state or which would be ambiguous on this point" (Piris 2010, 32).

Undeniably, the quarrel over semantics was fought, above all, for symbolic political purposes and according to Moravcsik "the central error of the European constitutional framers was one of style and symbolism rather than substance" (Moravcsik 2005, 22).

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[102] The change in the title of the 'Union Minister for foreign Affairs' was purely symbolic in order to dispel the fears that the term could trigger. "High Representative of the Union for Foreign Affairs and Security Policy" was considered as a more low profile title, and closer to the position, established in 1999, with the appointment of the High Representative for CNSP and Secretary-General of the Council, Javier Solana.
[103] The EU was to have its own flag, its own anthem, its motto 'United in diversity' according to the Article I-8 of the Treaty establishing a Constitution for Europe.
[104] For example, Michael Howard, former Leader of the UK Conservative Party

Another stumbling block was the Charter of Fundamental Rights incorporated into the Treaty, which raised several concerns about its legal impact. The Commission's legal expert recalled:

> There was a general misinterpretation that the Charter would be legally binding for the Member States, but in fact it means that when the EU proposes and implements laws it must respect the rights set down in the Charter and the Member States must do so when implementing EU legislation. However, the Member States' delegations wanted it totally removed from the treaty. As a solution, the legal experts of the three EU institutions published it in an Annex, but this was still too far reaching for some states. The suggestion was therefore to include only an article providing a simple cross-reference to the Charter (Tenreiro Interview 2009).

Other contentious issues were the retention of the institutional section (double majority, the extension of co-decision with the EP etc.), the inclusion in the Treaty of new 'challenges' (energy, climate change, illegal immigration, etc.), criteria for future enlargement and the strengthening of the social dimension of the EU.

Most importantly, the thorniest issue during the European Convention, i.e. the 'institutional settlement', was not to be re-negotiated.

However, Poland opened what was considered a Pandora's Box. It threatened to veto the treaty rejecting the new voting system. The motive behind this was twofold. Firstly, Poland again referred to the Nice Agreement, which gave it a better deal than the new treaty. Secondly, the Poles supported the agreement because this would reduce Germany's influence. They claimed to be "prepared to die for the square-root voting system"[105] which reduced the population advantage of the largest Member States, particularly Germany.[106] Although, the so-called 'containment of Germany' was fundamental to the creation of the European Union (Judt 2007), after more than fifty

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[105] In June 2004, a group of mathematicians argued that the clearest way of ensuring respect for the basic democratic principle would have been to give each Member State a voting weight equivalent to the square root of its population. Source: Scientists for a democratic Europe, retrievable from http://www.ruhr-uni-bochum.de/mathphys/politik/eu/open-letter.htm (Website accessed on 15/03/2005)

[106] Moving to a system where the backing of 65% of the population is needed for decisions, Germany, with 82 million citizens, would have a clear advantage in votes. According to the analysis (Felsethal and Machover 2007) the Lisbon Treaty rules brings more power to the four largest members (Germany, France, the UK, Italy) and the seven smallest members (Malta, Luxembourg, Cyprus, Estonia, Slovenia, Latvia, Lithuania), while the medium sized countries lose out (the most under-represented are Portugal, Greece, Belgium, the Czech Republic, Hungry, the Netherlands, Sweden, Austria, Bulgaria, Romania, Poland, Spain, Denmark, Slovakia, Finland, Ireland).

years of European integration, the Poles were alone in openly voicing fears about what an increase in German voting power would mean for the balance of power in Europe. The Polish Prime Minister Jaroslaw Kaczynski went further and stunned his EU counterparts by suggesting that Poland deserved more voting power because its population would have been much larger had it not been under Nazi German occupation during the Second World War. Polish rhetoric thus appalled the EU leaders and provoked a general astonishment.[107]

After marathon talks and a threat from German Chancellor Angela Merkel, who held the EU Presidency, to launch a treaty-drafting IGC without Poland's agreement, eventually at one o'clock in the morning of 22 June, the Poles agreed to a compromise, postponing the introduction of the new voting system until November 2014, and creating a three-year transitional period (2014-2017) during which any Member State would have the right to request the application of the previous Nice rules, if the proposal would be of particular political sensitivity to that Member State. The additional clause of having at least four countries in a blocking coalition[108] was inserted in the Lisbon Treaty. Another element for allaying Polish fears about German dominance was introduced by the so-called 'Ioannina compromise'[109] whereby countries that would oppose the decision, but without quite enough votes to form a blocking minority could request a deferral and re-examination of a decision in order to establish an agreement with broader support.

According to the Council's legal expert the Poles managed to secure an outcome, which produced a considerable degree of uncertainty about the decision-making procedure in the

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[107] "Those who rule Poland now have not accepted within themselves the reconciliation with Germany." Statement by Luxembourg Prime Minister Jean-Claude Juncker, Rheinischer Merkur, June 26, 2007, p. 3.
"Anybody who tries to bargain with the dead of World War II against votes in the EU Council has to be rejected out of hand (…) The EU is an idea aimed at eliminating the spectres of the past. We will not permit few to bring up those spectres." Statement by MEP Martin Schulz, Socialist group leader in the European Parliament, European Parliament plenary session, Strasbourg, 27 June, 2007, available on http://www.europarl.europa.eu (Website accessed on 12/10/2010)
[108] Since the biggest countries could easily form a blocking coalition (for example: Germany + France; the UK + Italy + Spain; the UK + Italy + Poland…), a clause excluding blocking majorities with less than four members was introduced.
[109] The co-called "Ioaninna compromise" was invented in 1994 prior to the enlargement of the EU to 15 Member States. The Constitution negotiated in 2004 had included a new form of the" Ioannina compromise" which was further revised in the Lisbon Treaty, according to which it is possible for Member States which represent 1) three quarters of the population share necessary to constitute a blocking minority, or 2) three quarters of the number of Member States necessary to constitute a blocking minority to request the Council to continue its work to find an agreement with broader support, if a minority is strongly opposed to a proposal. A second threshold applies for the period following 2017 with the requirement then being "at least 55% of the population or at least 55% of the Member States necessary to constitute a blocking minority" (Lisbon Treaty, Declaration No 7)

Union, mainly because they had postponed a double majority voting until 2014 and created a three-year transitional period when every member state could choose one system or another. "It was for the first time that a procedural mechanism was used in the substance of the negotiations themselves" (Milton Interview 2007).

Poland (fearing Russia might withhold vital gas supplies) also had an 'energy solidarity' clause inserted in the new treaty, enshrining the principle of mutual assistance, whereby a Member State would come to the aid of another state, suffering energy shortages.

Given the fact that the citizens of two founding Member States by way of referenda had rejected the document, and some others threatened the same, the EU leaders came to Brussels with strong national agendas and raised issues in order to appease the concerns of their respective citizens.

For example, British Prime Minister Tony Blair put forward four 'red lines'[110] of British defence as follows: (a) no changes to UK labour and social legislation; (b) no overruling of the common law system or police and judicial processes; and (c) no undermining of the UK's foreign and defence policy. The UK also secured an opt out policy from the EU's Charter of Fundamental Rights.

French President Nicolas Sarkozy, who knew only too well the meaning of rejection in a referendum, sought to allay the concerns of his fellow citizens that the EU was too 'Anglo-Saxon' and persuaded EU leaders to scrap their commitment to undistorted competition.[111] The move by Sarkozy satisfied French demands that the treaty be stripped of its 'neoliberal' language.

In a move designed to appease the concerns of Dutch citizens, the Dutch Prime Minister Balkenende managed to get the national parliaments included more in the decision making processes by creating the so-called orange card procedure, which states that just more than half of national parliaments can challenge a legislative proposal.

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[110] In the finest tradition of the British army, thin red lines do not break. In 1854, at the battle of Balaclava, two straggling lines of the 93rd Highland Regiment held the mighty Russian cavalry at bay. The image stuck after the Crimean war.

[111] The European Treaties already stipulated the concept of the free competition. The European Constitution brought about an innovation in the chapter of the Union's objectives: Art I-3: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, *and an internal market where competition is free and undistorted*" (the part in italics was dropped in the Lisbon Treaty following the French demand).

To allay the concerns of those worried by the prospective accession of Turkey, the EU leaders agreed to have the EU's criteria for the accession of new members included in the new treaty, and in so doing, made future applications more answerable to a stricter criteria of eligibility. The so-called Copenhagen criteria (demanding a fair legal system and a market economy) therefore became a legally binding condition for accession to the EU.

Further concerns about the EU encroaching on the national rights of individual states were laid to rest by the Czechs, who had a clause inserted to say that future treaty negotiations could be convened to take powers away from the EU. The so-called "review mechanism" to return powers from the Union to the Member States was first proposed by the most eurosceptic members of the European Convention and lacked support among other delegates. It was now the unanimous choice of national governments to include a Declaration in relation to the delimitation of competences and for the first time explicitly declare that competences might be transferred back to the Member States, if they had not been exercised or if deemed by the Council that they should no longer be exercised at Union level.[112]

In order to reassure those who feared that the EU could legislate in any area, a new Protocol on the exercise of shared competence was inserted in the Lisbon Treaty to clarify that when the EU has taken action in an area of shared competence, "the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area."[113] In addition, the Netherlands insisted inserting Protocol on services of general interest[114] which basically stipulates that the EU is to refrain from any action that would detract from a Member States' role in providing services of general interest such as health, social services, police and security forces, state schools. "All those Protocols were just a clarification of already existing provisions, but politically were important for some Member States" (Tenreiro Interview 2009).

Given that the Treaty text was 'reopened' other Member States took the opportunity to renegotiate issues of their concern. The June 2007 European Council decided to raise the number of MEPs for the next legislature, 2009-2014 from 736 to 750. However, Italy was not entirely happy with a calculation of the 'population' and claimed that when counting

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[112] Lisbon Treaty, Declaration (No 18) in relation to the delimitation of competences.
[113] Lisbon Treaty, Protocol (No 25) on the exercise of shared competences.
[114] Lisbon Treaty, Protocol (No 26) on services of general interest.

the numbers of 'residents' (not only 'citizens')[115] Italy has the same amount of population as the UK and therefore should be entitled to have the same number of MEPs. The October 2007 European Council then had to resolve this thorny issue of accommodating Italy, but not at the expense of other Member States. A compromise put forward was to give one more EP seat to Italy, while keeping 750 Euro-parliamentarians plus the EP President, who would not have the right to vote.

It should be noted, that the allocation of parliamentary seats has always been subject to "political horse-trading between Member States" as some MEPs put it in their report (Lamassoure and Severin 2007).

The architect of the rejected European Constitution, Valéry Giscard d'Estaing strongly criticized the outcome of the summit, which left him wondering:

> How come that the majority of the Member States (the 18 countries that ratified the Constitution and the four that would do so without trouble) had to make concessions in favour of the minority of the so-called minimalist countries (the French and the Dutch who rejected the Constitution and others who probably would have done had they been given the opportunity - the British, Czechs and Poles). I was very much disappointed with the way of conducting these negotiations. The Presidency should have first 'consolidated' the group of countries who agreed on the Constitution and then said to others: We all agree, what do you actually want? (Giscard d'Estaing Interview 2007).

This is the reasoning of the founder of the European Council and its unique negotiating tactics between European leaders. Why didn't that particular tactic work in this case?

According to the Council's legal expert, involved in the Convention and IGCs negotiations:

> There was a completely unbalanced negotiation, because domestic ratification constraints were used explicitly as a negotiating tool. The arguments of France, the Netherlands and

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[115] This row over who should be counted as 'population' ('residents' or 'citizens'), exposed an important deficiency of the current EU system, missing a common legal basis to ensure a harmonised and accountable reporting by the national governments to Eurostar. The US is but one example where such regulation is in place. With no legal framework at the EU level for how governments aggregate and report their population figures, there appears to be some differences between how the Member States report the numbers of 'residents' and 'citizens' and to which extent 'migrants' are uniformly counted and reported in the national figures. According to the three Brussels based think-tanks "a legally founded definition of the population threshold should therefore be considered in order to avoid suspicions of statistical inaccuracy or even political manipulation" (CEPS, EGMONT, EPC 2007, 64).

the UK were very straightforward: 'If you want us to get the text ratified, we have to make these changes. Either we have a watered-down text or you have no text'. Their argument was much more powerful than the demands from the majority of Member States, to keep the text as close to the Constitution as possible. The Belgians were particularly frustrated. Verhofstadt *[the then Belgian Prime Minister]* tried to get things changed on several occasions, but Merkel *[German Chancellor holding the EU Presidency]* got cross with him. Actually, he was creating problems because there was a deep sense of frustration among the Belgians. They were simply unable to defend their position of keeping as much of the Constitution's text as possible. So, Verhofstadt was fighting a rear guard action, but to no avail, due to a generally unbalanced negotiation (Milton Interview 2007).

This empirical example is in line with the theory that domestic ratification constraints are a source of power at the Intergovernmental Conferences. "The constrained negotiator can make both a proposal and a credible threat that if the proposal is not accepted, his or her ratification constraints will scuttle the entire treaty" (König and Slapin 2006, 424).

The outcome of the European Council summit therefore can be largely explained by the concept that international bargains can be conceived as two-level games, with negotiators bargaining at one level, while their ratification constraints constitute the second level. Intergovernmental Conference 2007 therefore empirically confirms the mechanism of classical intergovernmental negotiations, with an additional source of power drawn from domestic constraints.

5.2 Intergovernmental Conference 2007

On 23 July 2007 European leaders opened fast-track negotiations (Intergovernmental Conference) on a 'Reform Treaty' amending the existing Treaties, which concluded their work in October 2007. The Commission's legal expert involved in the negotiations argued that this IGC was different from the previous ones "because the political agreement, reached during bilateral negotiations and spelled out in a clear IGC mandate, was so explicit, that there was only the matter of translating a political agreement into a legal document. The IGC was therefore merely the meeting Ground of Legal Experts,

dealing with the technical work" (Tenreiro Interview 2009). However, there were some final political issues which were solved directly by the heads of state or governments.[116]

At this point it is interesting to compare the changing negotiating context from the European Convention, the 2004 IGC and finally the IGC 2007. While the European Convention delegates either had specific mandates from their capitals or strong ideological agendas, the 2004 IGC was then very much dictated to by what had happened in the Convention as the Member States' representatives entered into a political process, which had its own constraints, namely a sense of having to stick as close as possible to the Convention's text. Conversely, the 2007 IGC was constantly challenged by the sceptical ratification constraints, which gave a huge bargaining power to some Member States. Some EU leaders had a strong national agenda aimed at appeasing citizens' concerns and operating a classical 'face saving exercise'. Whereas some analysts argued that potential ratification hurdles had only a small effect on the Convention's deliberations (König and Slapin 2006), the conclusions of the European Council and IGC 2007 suggest the opposite. The IGC's mandate[117] mainly reflected domestic ratification constraints.

5.3 Signature and the Ratification process of the Lisbon Treaty

In October 2007, the Intergovernmental Conference agreed on a Reform Treaty, which was solemnly signed on 13 December 2007 in Lisbon and therefore renamed the Lisbon Treaty. In less than a year and a half, the Lisbon Treaty obtained parliamentary approval in 26 out of 27 Member States and it was put to a public vote in only one member state, Ireland.

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[116] The composition of the EP, giving one additional MEP to Italy (Declaration No. 4 and 5); QMV in the Council (Declaration No. 7and Protocol No.9); the possibility to reduce the competences conferred on the Union (Declaration No. 18); the Court of Justice (Declaration No. 38) and the appointment of the High Representative (Declaration No. 12).
[117] Detailed Mandate for the 2007 Intergovernmental Conference (22 June 2007) is available on http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/94932.pdf (Website accessed on 12/10/2010).

5.4 Irish referendum 2008

The ratification process again exposed the Lisbon Treaty to the approval of the electorate through a referendum in Ireland. The government had considered ratification without referendum, but feared a constitutional challenge later on under the Crotty Case.[118] This judgment of the Irish Supreme court held that if the treaty amendments "alter the essential scope or objectives of the Communities" the decision had to rest with the people.

A nationwide referendum on the Lisbon Treaty was held on 12 June 2008. The referendum was defeated by a margin of 53.4% to 46.6%. Turnout for the Lisbon Treaty referendum was 53%, well in excess of the 35 % recorded for the rejection of the Nice Treaty in 2001.

According to the Eurobarometer survey[119] for 'yes' voters, the main motivation was the feeling that it was in Ireland's best interest (32%) and that Ireland benefits from the EU (19%), helping the economy (9%) and keeping Ireland engaged in Europe (9%) were other reasons.

The 'no' voters gave a much wider range of reasons to explain their preference. A lack of knowledge of the Treaty (22%) was the main one[120] while others included the protection of Irish identity (12%), safeguarding neutrality, lack of trust in politicians, losing the right to a permanent Commissioner and protecting the tax system (all 6%).

Over half of the people who did not vote in the referendum said this was due to a lack of understanding of the issues. A more in-depth qualitative research[121] also showed many emotional responses. Frustration was the most common one, as many Irish felt 'bullied' when asked to vote for the entire Europe, while they cited 'lack of knowledge,

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[118] Crotty v. Taoiseach, Judgment of 9 April 1987 – this case concerned the ratification of the Single European Act, following the claim of Mr Crotty that any amendment to the Treaties made after Ireland joined the EU in 1973 would require a further amendment to the Irish Constitution.
[119] A survey was conducted by Gallup immediately after the referendum, from 13 to 15 June. Altogether, a randomly selected 2000 respondents, aged 18 and older, were interviewed by telephone. A nationwide referendum on the Lisbon Treaty was held in Ireland on 12 June 2008 (Eurobarometer 245, 2008).
[120] NO voters are far less likely to express an understanding of the Treaty (47% versus 70%). The almost complete detachment from the Treaty of abstainers stands out: 80% vaguely/do not know issues involved.
[121] Post Lisbon Treaty Referendum Research Findings, carried out by Millward Brown IMS on behalf of the Irish Department of Foreign Affairs, consisted of a national opinion poll of 2,101 adults aged 18+. The poll was conducted between 24 July and 31 July 2008. Twelve focus groups were also conducted with a cross section of voter types and demographic groupings, between 28 July and 6 August 2008 (Millward Brown IMS 2008).

information, understanding' as the main reason for voting 'no'. Advocating EU institutional reform to voters who have a rather sketchy knowledge of how the EU operates, proved to be a very difficult task.

According to the same research, many people had made efforts to understand the implications of ratification but could not find the answers they were looking for; it was too complex and confusing: "I said I'd have a go at it (The Referendum Commission Booklet) to get more knowledge but being honest, I said oh my God, that's too complicated" (Hard Yes - Voter, Female).

Against this backdrop, the no campaign's camp attracted a lot of people by its main slogan, "If you don't know, vote NO!"

Lack of knowledge was expressed by both, 'yes' and 'no voters': "Why would I vote about something I don't understand" (Non-Voter, Male); "I think they just launch something that nobody understands… you had to go with your gut I think" (Hard Yes - Voter, Female); "I didn't know a hell of a lot about the Lisbon Treaty which is a pity because there was an awful lot of scaremongering… you had so many red herrings." (Hard Yes - Voter, Male); "I just didn't have a clue and I was saying to my parents what way I was supposed to vote, and they said we are voting Yes… so I just took it and said if my parents are voting Yes so am I" (Soft Yes - Voter, Female).

Confusion was also a prevailing theme. Many people were repeatedly swayed in different directions due to what they described as conflicting evidence. "It's an awful thing to say but I was completely confused between the two. I felt listening to one politician one day expounding about all the benefits of voting Yes, you kind of say, yeah, I can see that, and then you listen to someone else talking about the No campaign" (Hard No - Voter, Female).

Concerns over specific aspects of the Treaty loom large, particularly perception of an erosion of neutrality, the Commissioner issue, corporate tax and to a lesser degree abortion. According to a constitutional lawyer "this religious presence in Ireland, mainstream Catholic theology, was difficult to reconcile with a whole host of right-related concerns – abortion, birth control, and homosexuality, amongst others – that, particularly in the context of increasing integration into the larger European community, presented a substantial judicial dilemma" (Jacobsohn 2004, 1800).

"I wouldn't know very much about the ins and outs and the inner working of the EU, I wouldn't be extremely well versed on the inner workings of the Irish Government as well, I wouldn't go out of my way to learn a lot more about how the Irish government or the EU works, just leave that to the politicians and watch the football" (Hard No - Voter, Male). (All quotes from Millward Brown IMS 2008)

A lot has been said about the reasons and consequences of yet another negative referendum on the European Treaty. In the European Union it has become a habit that the political elites say YES and people respond NO. Why is that?

This can partly be explained by using a simple example of the 'normal' representative democracy, where people are represented by elected government, whose decisions are constantly called into question. The public deliberate over the government decisions which, Habermas (1964) argues, creates the so-called Public Sphere, a place to legitimize the politics, which also represents the very basis of the political community.

At the European Union level the European founding fathers seemed content to build European integration on the support of agreeable politicians and a conveniently indifferent electorate.

The Schuman Declaration of 9 May 1950, the Treaty of Paris and the Treaty of Rome plus the Single European Act which established the single market, occurred without a profound debate within the European polity. There was no deep-rooted debate about such revolutionary projects.

As Weiler (1999) observed, the new European construct simply offered a vision of peace and prosperity after two destructive wars. It was a spirit "Let's do and talk later" by a generation and its leadership whose personal experiences had instructed them that the alternative to the European dream was the recent European nightmare. A veritable political earthquake occurred when the political elites submitted the Maastricht Treaty (1993) to a referendum in Danmark. According to Weiler (1999), Maastricht was a shock at public level, given the fact that public opinion was more shocked to discover what was already in place, than by what was being proposed.

The same thing occurred when the French voted against the European Constitution. For example, when they got their own copy of the Constitution by post, they discovered

amongst other things four freedoms, i.e. free movement of capital, labour, goods and services, which was immediately denounced as a neo-liberal constitution. But those provisions had been in force since the establishment of the Single European Market in 1992.

Another example showed that not only ordinary people were oblivious to the existing European system. During the European Convention, when the supremacy of Community law was discussed, a British delegate stood up and argued that the UK would never accept that Community law would prevail over national law. The Convention President Giscard d'Estaing countered: "May I just instruct you that the supremacy clause, according to which the EU law is the highest law of the land, has been in force since 1964 and the UK had no objection when it signed the Accession Treaty in 1973" (Giscard d'Estaing quoted in Lamassoure 2004, 57).

It proved to be difficult to advocate a referendum, based on the premise of institutional reform, in the contexts of a general lack of EU knowledge, and a very weak affinity with a European identity.[122] European integration does not seem to be based on the European Public Sphere and a common political identity has not been established.

The Maastricht Treaty, the European Constitution, the Lisbon Treaty and subsequent debates therefore were the beginning of a truly Europe-wide public deliberation. Public opinion is, however, no longer willing to accept the orthodoxies of European integration. There is a general tendency to reject the political elites; to say NO. The British MP Katy Clark argued that "people felt they had to vote against the Treaty because it was the only way they could bear influence on events, or to actually have a say over European policy" (House of Commons Report 2008, 109).

The New Institutionalism theory had shed some light on the reason for the Union's constitutional crisis and the long decline in public support for further integration: The

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[122] Around three percent of citizens generally view themselves as 'Europeans' pure and simple, with barely seven percent saying a European identity is more important than their national one. By contrast, approximately 40 percent describe themselves as national only and 47 percent place nationality first and Europeans second. Indeed, though 89 percent of these citizens usually declare themselves attached to their country and 87 percent to their locality, only 58 percent feel attached to the EU. (Eurobarometer 60, published in February 2004, Eurobarometer 62, published in December 2004, Eurobarometer 63, published in September 2005, available on http://ec.europa.eu/public_opinion, website accessed on 12/10/2010).

notion that EU institutions and policies might have a negative and self-undermining feedback effect should be a focus of greater attention in future development of institutions and their role.

5.5 European Council 2008

Following the 'no' vote in Ireland, the European leaders at the European Council meeting on 18 and 19 June 2008 insisted that the ratification process would continue in the other Member States. The European leaders felt that more time was needed to analyze the situation and agreed to return to the subject in October. At its meeting of 15 and 16 October, the European Council took note of the post-referendum analysis presented by the Irish Taoiseach, Brian Cowen. The Irish government committed itself to continuing with the consultation process with a view to finding a way to resolve the situation.

The discussions continued at the European Council on 11 and 12 December 2008, where an approach was established to enable the Treaty of Lisbon to come into force before the end of 2009. Provided that Ireland undertook to seek ratification of the Treaty by the end of the term of the then European Commission (October 2008), the European Council agreed that legal guarantees would be given on three points of Irish concern: taxation policy, Ireland's traditional policy of military neutrality, and the provisions of the Irish Constitution in relation to the right to life, education and the family. Similarly, the European Council agreed that a decision would be adopted to enable the Commission to continue to include one national of each member state, which was another Irish demand.

In the meantime, the Irish Government undertook a clever strategy of presenting a better deal to the domestic public for the second referendum. The only problem was that the European Council Declaration was not a legally binding document, which would change the Treaty. But the European leaders did not want to change the Treaty, which would be subject to the ratification. So, how did the Irish go about this?

The Irish were very much inspired by the Danish opt-out strategy.[123] The Prime

Minister's delegation went to Denmark for 'instructions' and actually undertook the same

strategy as the Danish in 1993, when they got the first opt-outs in the form of

Declarations, which then became legally binding Protocols, on the occasion of the next

ratification of the Amsterdam Treaty 1999. So, the Irish mirrored this approach and

insisted that these legal guarantees become the formal Protocols in the Treaty of Lisbon,

on the first occasion of its new ratification, probably when the Member States ratify the

Accession Treaty of Croatia (Tenreiro Interview 2009).

In addition, European negotiations were very much marked by a global economic and
financial crisis, which hit Europe at the end of 2007, and beginning 2008. On the one
hand, a single currency euro gave the impression of an area of monetary stability, but on
the other the Member States governments tend to become inward-looking and favouring
more protectionist policy in times of crisis.[124]

5.6 European Council 2009

The European Council on 18 and 19 June 2009 finally responded to concerns raised by
the Irish people, by adopting legal guarantees that the Lisbon Treaty would not affect the
provisions of the Irish Constitution in the areas of defence, tax, education, family policy
and the right to life. The section on the Right to Life, Family and Education reiterates that
nothing in the Lisbon Treaty, relating to the Charter of Fundamental Rights, affects the
provisions of the Irish Constitution in relation to these issues.

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[123] In general, the law of the European Union is binding in all of the EU Member States. However,
occasionally Member States negotiate certain *opt-outs* from legislation or treaties of the European Union,
meaning that they do not participate in the common structure of these fields. Currently, four states have opt-
outs from parts of the European Union: Denmark (four opt-outs), Ireland (one opt-out plus one more under
the Treaty of Lisbon), Sweden (one opt-out, but only *de facto*) and the United Kingdom (two opt-outs plus
two more under the Treaty of Lisbon). Poland and the Czech Republic gained the first opt-out under the
Treaty of Lisbon.
[124] According to some analysts "European monetary union rests on fragile foundations" (Bearce 2009). In
particular because it is based on a single currency of sovereign states, who keep their power in the
budgetary and fiscal fields, albeit accepting a convergence of their economic policies. In addition, the Greek
crisis in 2010 showed the vulnerability of a monetary union (without an economic union), and pushed the
EU leaders and finance ministers to agree upon a €750 billion eurozone rescue mechanism in May 2010 in
order to relieve pressure on euro.

Regarding taxation, the decision stipulates that the Lisbon Treaty does not affect the extent or operation of the EU's competences in relation to this. The section on Security and Defence reiterates that the Union's common security and defence policy does not prejudice the specific character of that of Ireland's. Also, the Treaty does not provide for the creation of a European army or for conscription to any military formation.

Another contentious issue was the composition of the Commission, because Ireland wanted to keep a commissioner. The proposed Lisbon Treaty stipulated that "the Commission shall consist of a number of members corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number." This second part or condition therefore gave the window of opportunity to change the composition by European Council decision without formal ratification. Despite some formal objections from the Council legal service, the European leaders politically forced the interpretation in a way that they could change the composition simply by European Council decision. This decision was very much politically driven and got enough support, because many European leaders never accepted the concept of less Commissioners than Member States and the system of rotation seemed extremely unlikely, nobody really imagined the Commission one day without a German or French Commissioner, for example.

> Given all those reservations, the negative Irish referendum came as a practical excuse to change this bad deal. The legal guarantees have been a direct response to their concerns. The Irish formally insisted on getting those legal guarantees, which in the mind of people would be seen as a kind of re-negotiation and a better deal. In reality, there is no change to the Treaty of Lisbon. The decision of the European Council just stated that the Treaty did not affect provisions of major concerns. But for political reasons, the declaration was not enough for the Irish, so these decisions still need be integrated as a Protocol in the Lisbon Treaty, at the first occasion of its new ratification (Tenreiro Interview 2009).

Finally, the Commission will continue to consist of one Commissioner from every member state. The European Council decisions have therefore responded to the concerns of the Irish people and thus paved the way for another referendum.

5.7 Irish referendum 2009

According to some opinion polls, the legal guarantees appeased the public in such a way that the Treaty would encounter a second Irish vote. In addition there were some other exogenous factors that influenced public opinion. Soon after the financial crisis hit the global economy in 2008, Irish public opinion surveys showed that a majority of voters were mindful of how EU and eurozone membership had protected Ireland from economic disaster. European elections, which took place in June 2009, were another factor in influencing the mindset of the Irish electorate. The leader of the Libertas party Declan Ganley, who was almost single-handedly responsible for mobilizing opposition to the Lisbon Treaty in the first Irish referendum, was not elected to the European Parliament and decided to take no further part in Irish politics.

The second Lisbon referendum therefore took place in a much different context than the first one. On 2 October 2009 the second referendum was carried by 67.1% in favour and 32.9% against (Turnout: 58%). The swing to the Yes from the previous referendum in 2008 was 20.5 percentage points. At least 250,000 voters changed their vote from No to Yes.

General reactions were marked by a mixture of elation and relief in the Yes camp. On the other side, begrudging acceptance, mixed with accusations of the use of the fear factor with "the threat of further isolation from the union that would plunge the country into a deeper economic crisis" (Lodge Interview 2009) was the stark response from the No side.

According to some analysts, the reasons for success was the increased level of engagement by the electorate, 'entente cordial' by all political parties (party politics put aside in the interests of getting the referendum passed), a visible and active campaign by civic society and early agreement by Farming associations, Trade Unions and Business and Employers Associations. Last but not least, there was also a larger amount of easily accessible and comprehensible information in circulation.

The outcome was perceived as a very positive message to EU partners that Ireland sees her destiny as a positive player in the EU. Internally, it was perceived as an important step on the road to Ireland's economic recovery and restoration of Ireland's international reputation.

5.8 Lisbon Treaty and nominations of the EU top positions

On 1 December 2009 the Lisbon Treaty finally entered into force. The bargaining about the nomination of the high ranking positions created by the Lisbon Treaty began even before.[125] EU leaders overcame sharp divisions at the European Council on 20 November, 2009 to appoint Belgian Prime Minister Herman Van Rompuy as the President of the European Council and Baroness Catherine Ashton as High Representative of Foreign Affairs and Security policy. The compromise deal prompted surprise and bewilderment in European politics.

Valéry Giscard d'Estaing commented on this decision a day later in Le Monde:

> Yesterday, the Europeans did not choose Washington. I would have preferred a stronger President more corresponding to Washington's profile. A different choice was made; in favour of a less remarkable personality, with the qualities of conciliator. The current European leaders do not see the President above them, but rather among them: a personality representing the average of the system. We are still in a transitional period. I would have preferred a shorter one (Giscard d'Estaing 2009).

Herman van Rompuy replied to the political comments during one of his first interventions in the European Parliament, to whom he is obliged to report after every European Council:

> Some commentators have seen a great deal more in this role. Others have seen less. On the other hand, some consider the presidency of the European Council to be sort of 'Président' in the manner of an executive head of State as in, for example, France. Others, on the other hand, see it as the mere chairmanship of the Heads of Government meetings. In reality it is neither. It is certainly not a 'Président' endowed with executive powers in its own right. The incumbent must express the collective views of the Heads of State or Government (Van Rompuy, 2010).

Internationally, there was a mixed reaction. Commentators mainly observed, that the EU will continue to be represented by a plethora of high-level officials at the international

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[125] The job of the "President of Europe" was informally coveted by Tony Blair. The former British leader's bid was finally killed off when "the British Prime Minister Gordon Brown abandoned attempts to make him the inaugural holder of the post. Mr Blair's candidacy failed to gain support among other centre-left leaders of Europe, some of whom have not forgiven the former prime minister over the Iraq war" (Source: UK Independent, 20. 11. 2009, p. 2).

stage. A special adviser to US Secretary of State, Hillary Clinton, commented that "the United States will still work with European countries bilaterally and that the famous Kissinger question of who to call in Europe has not really been answered."[126] A few months later, American President Barack Obama refused to come to the 'traditional' EU-US summit in May 2010 "partly due to confusion arising from the Lisbon Treaty."[127]

Following these reactions, the European leaders made an effort to clarify the roles and get the transatlantic counterparts together. High Representative Catherine Ashton travelled to Washington D.C. to meet US Secretary of State, Hillary Clinton, who gave a more positive statement after the meeting:

> These are historic times for the EU. I expect that in decades to come, we will look back
> on the Lisbon Treaty and the maturation of the EU, that it represents a major milestone in
> our world's history, and not just in Europe and not just in the Euro-Atlantic
> community. (...) As the EU develops a more powerful and unified foreign political voice
> in the wake of the Lisbon Treaty, our transatlantic partnership will continue to grow
> (Clinton 2010).

The appointment of two 'low-profile' figures to top EU jobs clearly followed the EU practice of agreeing upon the lowest common denominator. The European leaders always work through efforts to balance their choices by political affiliation, geography and gender. With Mr Van Rompuy being a man, from a small country and from the centre-right, Ms Ashton therefore balances the scales in terms of gender, coming from the left and being from a big country. Usually the top job goes to a small country and other strategic jobs are filled by European heavyweights.[128] The EU arrangement of a multinational character clearly needs a strong element of consensus. This pattern seeks as

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[126] Richard L. Morningstar, a special advisor to US Secretary of State Hillary Clinton, commented the EU nominations at the briefing organised by the European Policy Center, a Brussels think-tank. Asked about the famous quote attributed to former US Secretary of State Henry Kissinger: 'Whom to call when I want to call Europe?' Mr Morningstar wondered "if Mr Kissinger today wishes he hadn't made that statement" (Source: Euobserver, available on http://euobserver.com/9/29010, website accessed on 12/10/2010).

[127] US State Department spokesman Philip J. Crowley told the press in Washington that "the Treaty has made it unclear as to who the US leader should meet and when. Up until recently, the summits would occur on six-monthly intervals, with one meeting in Europe and one meeting here (…) Now you have a new structure regarding not only the rotating EU presidency, you've got an EU Council President, you've got a European commission president" (Source: Euobserver, available on http://euobserver.com/18/29398, website accessed on 12/10/2010)

[128] Behind the scenes, negotiations for these top jobs showed that "France concentrated its political efforts on securing a top economic post in the next European Commission (Commissioner for Internal market and services) while Germany was aiming to install its candidate as the next President of the European Central Bank in 2011" (Source: Financial Times, 20.11.2009, p.1).

broad a consensus as possible, otherwise the Union is in danger of breaking apart exactly along the rifts upon which it was constructed. This empirical case is in line with the idea of multilevel governance (developed largely by Marks *et al.* 1996; Bache and Flinders 2004), according to which the actors involved in multilevel governance may be forced to adopt solutions that correspond to the lowest common denominator amongst them. If European policy-making is to move forward, then the actors involved at the multiple levels must find some means of bargaining across issues and across time to create more positive outcomes.

5.9 Conclusion

After many years of institutional conundrum, the European Union at last succeeded in rewriting its rule book. Overall, this European 'constitution-in-the making' has experienced problems typical of European integration, in which each step forward to a closer union of the people of Europe has been met with a half step backwards, with the concern by individual Member States for their national sovereignty.

As some scholars accurately observed (Wiener and Diez 2009) venturing into the constitutional turn meant engaging with the process of integration more directly. It has generated unwelcome results from those who had praised the constitutional convention as a prime example of democratic deliberation and transparency. Yet the language of constitutionalism has raised concerns with many European voters, and invited new Eurosceptics. Together these political forces have been able to put the brakes on and return to the probed and slow process of gradual treaty revisions, instead of engaging in bold constitutional change. The pressure of constitution-building has raised the stakes of transnational politics and revealed gaps in the constitutional and political structure of the EU as a polity, thus calling for democratic legitimization to be addressed more fully.

Research has shown that Member States control the structure of the EU through the negotiations of the Treaties, with an effective requirement for super majorities to endorse these major changes. The EU is therefore likely to advance incrementally, improving and reforming policies within the current constitutional framework.

To make a comparison with the American experience, the creation of the American Constitution was accompanied by public announcement of Alexander Hamilton in the last paper of The Federalist: "I am persuaded that [the Constitution of 1787] is the best which our political situation, habits, and opinion will admit" (The Federalist N° 85, 523).

In the same way, a conclusion can be drawn for the Treaty of Lisbon as the common dominator that European political leaders and public opinion can accept at the actual stage of the EU constitutional development. Despite the constitutional debacle of recent years, there seems to be a 'European Constitutional Settlement' – "a stable substantive, institutional, and normative plateau within which incremental EU policy-making is occurring" (Moravcsik and Schimmelfennig 2009). Although the Lisbon Treaty does not contain major substantive reforms, it marks incremental movement along a slow trend towards reforms within the existing constitutional structure.

6 THE COMPARISON BETWEEN THE U.S. CONSTITUTION AND EUROPEAN TREATIES IN TERMS OF BASIC CONSTITUTIONAL CHARACTERISTICS

6.1 Introduction

On the basis of EU constitutional development, which has been described in the empirical part, this chapter analyses more in depth the current European constitutional settlement (as it stands at present according to the Lisbon Treaty) in comparison with the U.S. Constitution. With a reference to Comparative Constitutional Theory, this chapter analyses which are the constitutional features in the Lisbon Treaty and which characteristics of the Treaty can be compared with the international treaty.

As presented in the theoretical part, the Constitution is described as a selection of the legal rules, which govern the government and which have been embodied in a document. Four important features are common to all constitutions, according to Wheare (1966). Firstly, most contain a preamble that sets forward the principles on which the government is to operate. Secondly, constitutions specify the organization of the government. Thirdly, constitutions specify individual rights. Fourthly, constitutions provide a means for making amendments.

The U.S. Constitution is a constitution in the truly substantive legal sense, whereas the rejected European Constitution and the new Lisbon Treaty could be considered as hybrids situated between the International Treaty and the Constitution.

When the European Convention ushered in the final text in June 2003, Vice-President of the Convention, Giuliano Amato exclaimed "È un maschion!" (It's a boy!). His remark plays on the fact that, in Italian, the word for "treaty" (*tratatto*) is masculine, whereas Amato would have preferred a "girl", since the word "constitution" (*constituzione*) is feminine. His remark thus implied the Convention's failure to go beyond the existing treaties and transform them into a true Constitution, as he explained later:

> Indeed, I had been hoping for a "girl" (*constituzione*). It was mainly the international nature of the procedure for making future amendments that prompted me to make my '*trattato*' remark. However, despite this, the European Constitution also has certain 'feminine genes' that could perhaps in the future allow it to blossom and realize its constitutional potential (Amato 2007).

However, from a legal perspective, the constitutional lawyers (Weiler 1999, Lenaerts and Van Nuffel 2005, Von Bogdandy and Bast 2010) argue that the EU already has a *de facto* constitution, the oft-amended Treaty of Rome.

6.2 Characteristics of the International Treaty in the Lisbon Treaty

6.2.1 Source of authority

From the point of view of a fundamental question, i.e. what authority a Constitution can claim, in the modern constitutions the people, or constituent assembly acting on their behalf, have authority to enact a constitution. In contrast, the Irish Constitution acknowledges God ("Most Holy Trinity"[129]) is the ultimate source of all authority.

Most modern constitutions have followed the American model and the legal theory that lies behind it. The supremacy of the people as a law-giver is a key element of American constitutionalism and signifies that it is the American people as a whole, who ordain and establish the Constitution. "The American innovation of the constitutional development was based on the people as a constituent power" (Palmer 1959, 215). The statement of purpose or preamble of the U.S. Constitution: »We the People of the United States… do ordain and establish this Constitution of the United States of America« created a sense of separate identity for Americans.

In the process of European constitutionality, the debate over the source of legitimacy was at the core of the question of whether a 'supranational constitution' was possible. If the Constitution was meant to confer legitimacy to the EU as a state-like entity, where does the legitimacy of the Constitution itself come from? According to the German lawyer

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[129] The Irish Constitution's preamble commences, "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred" (Constitution of Ireland, 1937).

Dieter Grimm, the 'constituent power' remains with the Member States, who, as actors within an international system, are the ultimate repositories of sovereignty in the EU legal and political system (Grimm 1995). The European treaty therefore cannot legitimize European statehood, as it, itself, presupposes some form of established statehood.

The European Constitution raised another point of controversy, intriguingly captured by the decision made by the European Convention to mix the languages of international and constitutional law, by referring to the agreed document as both a 'treaty' and a 'constitution': A Treaty establishing a Constitution for Europe. In reality, the way in which the document was both conceived and formulated was entirely within the tradition and language of international treaty-making, showing the clear intention of the framers to confirm the position of the Member States as the 'High Contracting Parties'.

From the experience of national constitutionalism, the ultimate appeal to the demos ('We the people') has played an important role as the source of legitimacy over the exercise of power by the political and legal institutions – 'the constituted powers'. In the EU case, the 'No-demos' thesis (Weiler 1999) suggests that without some kind of a European-wide public sphere there cannot be any European state. At the national level, the citizens behave as "a public body while expressing criticism (informally) and practicing control in periodic elections (formally) vis-à-vis the ruling structure organized in the form of a state" (Habermas 1964, 49). At the European level, the scholars[130] are still arguing about whether or not there is a politically functional European public sphere, which provides a Europe-wide debate in line with the Habermas' concept of the "public sphere" (Oeffentlichkeit), as an organized sphere, which mediates between society and state thus ensuring the democratic control of state activities. 'Euro-pessimists' challenge the prospect for future European integration on precisely these grounds. They argue that a European polity is impossible, because there is no European people, no common European history or common myths on which collective European identity could be built (see Grimm 1995). On the other hand, some scholars studying collective identities argue "that creating support for a stronger European state does not require a European identity that dominates national identity" (Citrin and Sides 2004, 175).

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[130] Offe (2007): "Is there, or can there be, a European society"; Habermas (1998): On the Relation between the Nation, Rule of Law, and Democracy; Schmitter (1996): Imagining the Future of the Euro-Polity; Schlesinger and Kevin (2000): Can the European Union become a sphere of publics?

European institutions used to rely on political systems based on intergovernmental negotiations in order to get decisions legitimized. Yet, this kind of indirect legitimation through national governments proved to be insufficient when political integration was put on the agenda. The rational expectation of mutual economic benefits within Europe had provided a limited legitimation for European integration 'through outcomes'. However, "economic expectations alone can hardly mobilize political support for the much riskier and more far-reaching project of a *political union*" (Habermas 2001, 2). As long as the legitimacy flows through the channels of democratic institutions within each national-state, this level of legitimation is appropriate for inter-governmental negotiations and treaties but it falls short of what is needed for supranational and transnational decision-making.

European integration was mainly pursued by stealth by political and business elites through technocratic decision-making in key policy areas, using the so-called Monnet method, which consisted of progressively building up "through practical achievement which will first of all create real solidarity, and through the establishment of common bases for economic development."[131] Its justification was primarily utilitarian and functional, with the process largely intergovernmental. It was also hugely successful. "As a result, policy-makers assumed a 'permissive consensus' among the citizens of Europe for European integration" (Bellamy and Attuci 2009).

The ratification crisis - negative referendum on the Maastricht Treaty in Denmark (1992), negative referendum on the Nice Treaty in Ireland (2001), "NON" in France, "NEE" in the Netherlands to the Treaty establishing a Constitution for Europe (2005) and yet another negative referendum on the Lisbon Treaty in Ireland (2008) - clearly revealed the lack of democratic legitimacy and the need to address the citizens directly.

According to Habermas (2001) there will be no remedy for the legitimation deficit without a European-wide public sphere – a network that gives citizens of all Member States an equal opportunity to take part in an encompassing process of focused political communication.

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[131] Quoted from the third paragraph of Preamble to the Coal and Steel Treaty, 1950.

Democratic legitimation requires mutual contact between, on the one hand, institutional deliberation and decision-making within parliaments, courts and administrative bodies and, on the other, an inclusive process of informal mass communication… A European-wide public sphere must not be imagined as the projection of a familiar design from the national onto the European level. It will rather emerge from the mutual opening of existing national universes to one another, yielding to an interpenetration of mutually translated national communications… The agenda of European institutions will be included in each of a plurality of national publics, if they are inter-related in the right way. … At the same time, a European-wide public sphere needs to be embedded in a political culture shared by all (Habermas 2001, 7).

European people therefore cannot be considered to be a "pouvoir constituent" (the people as a constituent power) in the act of European constitution-making. This fact is considered as a treaty characteristic, according to the Father of American Constitution:

I consider the difference between a system founded on the legislatures only, and one founded on the people, to be true difference between a treaty and a constitution (Madison quoted in Bowen 1986, 225).

In the European Union the Member States remain the "treaty-making constitutional legislators" (Azizi 2003).

6.2.2 Treaty structure

As far as the nature of the modern constitution is concerned, it is required that only its great outlines should be marked, its important objectives designated and an accurate detail of all subdivisions of which its great powers will be recorded, and the means by which they may all be carried out. One essential characteristic of the best ideal form of constitution is that it should be as short as possible. In the case of the rejected European Constitution all the technical details and the length suggest an international treaty. To illustrate this fact: the U.S. Constitution has only seven Articles and twenty-seven amendments, while the rejected European Constitution consisted of 448 Articles plus 36 protocols and 50 declarations. The political project of basing the European Union on a document entitled 'Constitution' eventually failed. Had this not been the case, the European Constitution would have beaten India for the record of the world's longest

constitution.[132]

From the structure point of view, the Lisbon Treaty therefore suggests an international treaty which is very detailed, exactly because it corresponds to the complex political and social basis of European integration.

6.2.3 Possibility of secession

Modern constitutions stipulate that people are supposed to be the supreme law-givers and when they accept the constitution they must not secede from the Union that has been established. The voluntary withdrawal from the European Union was not declared in the previous existing European treaties and it is therefore paradoxical that the European Convention introduced the provision, which brought about the possibility that "any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements." The Member States' right to withdraw from the European Union was retained in the Lisbon Treaty[133] and such withdrawal is not subject to any prior condition. "The possibility of secession is the crucial element distinguishing the confederal from federal model, being inherent in the contractual nature of the confederate pact" (Majone 2006, 143). Some argues that the possibility of seceding from the Union also serves the democratic principle, because "it upholds the prospect of national self-determination in the event that the dominance of the Union should appear as illegitimate" (Von Bogdandy 2010, 52).

6.2.4 Two-speed Union

The new provision about "enhanced cooperation" ("Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences…"[134]) is another example of a feature, which is not constitutional in its nature because it allows certain countries to integrate faster and deeper, which may lead to a Union moving at two speeds.

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[132] The Indian Constitution is currently the world's longest constitution, comprising 395 articles and 83 amendments.
[133] Lisbon Treaty, Article 50 of the Treaty on European Union.
[134] Lisbon Treaty, Article 20 of the Treaty on European Union.

6.2.5 Ratification and amending procedure

The ratification procedure of the European Constitution (and retained in the Lisbon Treaty) does not feature the constitution since Article 54 of the Treaty on European Union stipulates that: "Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements." The revision procedure still requires calling of intergovernmental conference. The only innovation is the formal provision for a Convention.

Some members of the Convention, led by Vice-President of the Convention Amato, sought to exploit the use of the term 'Constitution' in the title to introduce more far-reaching constitutional-type provisions, notably the introduction of majority voting for future treaty changes. Such proposals, which would have transformed the European Union into a very different body from what exists today, received no political support. The American model (where two thirds of both Houses can propose amendments to the constitution, which are valid when ratified by the legislatures of three fourths of the several States) was therefore not acceptable for the current European circumstances.

This shows that the Lisbon Treaty is not a constitution for a nation-state, but rather for a polity of states.

6.3 The constitutional characteristics within the Lisbon Treaty

6.3.1 Supremacy clause

The supremacy clause of the Constitution over the legislature is one of the important features of the modern constitutions and a classical principle in multi-layered legal orders such as federal states.[135] American constitution framers made a case for the supremacy clause and for the need to make citizens answerable to national laws.

The European constitutional framers explicitly spelled out the well settled case law of the Court of Justice that the EU law has primacy over the law of Member States.[136] However, the new "supremacy clause" that restated the primacy of EU law proved to be "too explicit" for the EU leaders, so during the Intergovernmental Conference in 2007 it was removed from the original proposal and ended up in declarations annexed to the Lisbon Treaty.[137] According to the Council's Legal Service "the fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."[138] According to some scholars (Kumm and Comella 2004) it is striking that the clause does not explicitly say that the EU law trumps the Constitutions of the Member States. The supremacy clause of the U.S. Constitution is instead crystal clear in this respect: "This Constitution, and the Laws of the United States (…) shall be the supreme Law of the Land."[139]

Therefore, in comparison with the United States, there is more ambiguity in the European context as to whether national constitutions must yield to any piece of EU law.

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[135] U.S. Constitution, Art. VI: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."
German Constitution, Art. 31: "Federal law shall have primacy over Land law"
Swiss Constitution, Art. 49: "Federal law shall have primacy over contrary cantonal law."
[136] The leading cases are ECJ case *Costa v ENEL* [1964]; Case 92/78 *Simmenthal v Commission* [1979], Case C-213/87 *Factortame* [1990]; Case C-285/98 *Kreil* [2000]
[137] Lisbon Treaty, Declaration (No 17) concerning primacy: The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.
[138] Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260), 22 June 2007.
[139] U.S. Constitution, Article VI, second paragraph.

6.3.2 Principle of direct effect

One of the constitutional features is also the principle of direct effect of the EU legal order (Treaty provisions,[140] decision,[141] directives,[142] and other legal obligations[143]), which gives individuals directly enforceable rights under EU law. This means that individuals could plead a Member State's infringement of EU law before the national court.

6.3.3 Separation of powers and implied powers

The constitutions shall embody the separation of powers and clearly state the institutions by which they may be carried into execution. The Lisbon Treaty generally fulfils that condition by clearly stating the independent institutions of the European Union, their autonomous decision-making and their separate legal order, with the implied powers.

In the federal constitutions the powers of central legislature are to be specified and residual powers are to be left with the constituent parts. In that sense, the Lisbon Treaty is genuinely constitutional in nature because it contains the fundamental rules governing the exercise of public authority at Union level, together with a well-balanced allocation of authority between the different functions (legislative, executive and judicial) and the various levels of governance (Union and Member States).

The European legal order also comprises competences based on a close connection to an explicit competence, the so-called implied powers. In all other cases, the Member States retain their powers. The exercise of supranational competences is furthermore limited by the exercise of the principle of subsidiarity.

Comparison between the separations of powers' provisions in the U.S. Constitution and in the Lisbon Treaty is the subject of a more in-depth analysis in the next chapter.

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[140] ECJ Case 26/62 *van Gend & Loos* [1963]
[141] ECJ Case 9/70 *Grad* [1970]
[142] ECJ Case 8/81 *Becker* [1982]
[143] ECJ Case 181/73 *Haegeman* [1974]

6.3.4 Fundamental rights

The declaration of rights is commonly found in modern constitutions. According to Billias (2009) written safeguard of individual rights (Bill of Rights[144]) has been widely adopted by other constitutionalists.

The European Court of Justice has already developed a rich and differentiated case law in the area of fundamental rights. In its landmark rulings since 1969[145] the ECJ affirmed that the respect for fundamental rights forms an integral part of the general principles of law. In safeguarding those rights, the ECJ draws inspiration from constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights. Treaty of Maastricht confirmed this case-law on the level of primary law and gave a special significance to the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4 November 1950).

Following the U.S. experience, the European Convention introduced a large spectrum of fundamental rights in the form of the EU Charter of Fundamental Rights. The EU Charter of Fundamental Rights goes even further than the American Bill of Rights, in particular regarding several social rights, which express the proper identity of the European social model. However, a declaration of rights is often regarded as no more than rhetoric, but when an attempt was made in practice to give effect to rights guaranteed, some countries prefer an opt-out solution[146] because they were unsure about what sanction might lay behind a declaration of rights.

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[144] Bills of Rights have a long historical tradition. In England, the line of such documents runs from the Magna Carta in 1215 through the 1628 Petition of Rights to the Bill of Rights of 1689. The Bill of Rights that completed the U.S. Constitution was viewed as linked to the French Declaration of 1789 and the English bill of rights, according to the constitutional historian Billias (2009). However, there was almost universal enthusiasm for the American version, concluded Friedrich (1967).
[145] ECJ judgment of 12 November 1969, case 29/69, Stauder, (1969) ECR, p. 419; ECJ judgment of 17 December 1970, case 11/70, Internationale Handelsgesellschaft, (1970) ECR, p. 1125; and ECJ judgment of 14 May 1974, case 4/73, Nord, (1974) ECR, p. 491.
[146] Precisely, the UK and Poland secured a protocol to the Lisbon Treaty relating to the application of the EU Charter of Fundamental Rights in their respective countries. In the negotiations leading up to the signing of the Lisbon Treaty by the Czech Republic, in October 2009, the EU leaders agreed to amend the protocol at the time of the next accession treaty so as to include the Czech Republic. Ireland got legal guarantees at the European Council in June 2009 that "nothing in the Lisbon Treaty relating to the Charter of Fundamental Rights affects the provisions of the Irish Constitution" (European Council 2009).

According to the authors of *Principles of European Constitutional Law* (Von Bogdandy and Bast 2010) the Charter of Fundamental Rights confirms constitutionalization of EU law, conveying a constitutional dimension to numerous interests.

6.3.5 Conclusion

The result of the attempt to classify the EU constitutional development is that the European constitutional order is written, it is supreme, and it contains many constitutional characteristics. On the other hand, it is important to note that the European constitutional order takes the form of the international treaty, with the Member States (High Contracting Parties) as 'pouvoir constituent'.

However, compared to other international organisations, the European Union features much more constitutional characteristics, as accurately described by Von Bogdandy (2010, 34): "In international law, most international organizations do not conceive their founding treaty as being the yardstick for the law generated by them. (…) The strict hierarchicalization is due to the ECJ. From the premise of an autonomous legal order, it deducted a paralegal development within the EU as well as any paralegal influence of the Member States; a similar constitutionalization of international organizations is still in its infancy."

7 SEPARATION OF THE POWER PROVISIONS IN THE U.S. CONSTITUTION AND THE LISBON TREATY

7.1 Introduction

Constitutions are often classified into those which embody the doctrine of the separation of powers, and those which do not, according to Wheare (1966) who concludes that "the Constitution of the United States is usually quoted as the leading example of a Constitution embodying the doctrine of the separation of powers" (Wheare 1966, 25).

The EU arguably resembles the U.S. system in possessing both a vertical (EU vs. member-states level) and a horizontal division of powers among the legislative, executive and judicial branches of the Union. An important difference occurs in a form that it was given to the institutions at the EU level (as explained more in detail later).

7.2 Vertical division of powers

7.2.1 U.S. Constitution

The most central issue of the Constitutional Convention in Philadelphia was how much power states would give up to the national government and therefore how to structure the union of American states. Given the colonists' experience under the Articles of Confederation, the framers believed that a strong national government was necessary for the new nation's survival. However, they were reluctant to create a powerful government based on the same model as Britain. The Framers viewed the division of governmental authority between the national government and the states as a means of checking power with power, and providing the people with double security against governmental tyranny. Madison highlighted the unique structure of governmental powers created by the framers: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each, subdivided amongst distinct and separate departments. Hence a double security arises for the rights of the people. The different governments will control each other, and at the

same time each one will be controlled by itself" (Federalist N°51, 1788).

The drafters of the U.S. Constitution hammered out a new system (now known as The Federal System), in which independent states are bound together under one national government and power is divided between the national government and the State governments. The debates in Philadelphia are very revealing concerning the new compromise between those who were prepared to give the national government limitless superiority and those who would keep the central government weak in order to protect the local autonomy of the component states. The Federal Frame established in Philadelphia is considered to be a significant political U.S. innovation in modern political science and thus inspired the EU constitutional framers.

7.2.2 The Lisbon Treaty

From the point of view of a *vertical division of powers*, the process of European integration was clearly inspired by the American federal system. The most explicit example showing the impact of the American system on the vertical division of powers was mirroring the 10th amendment of the U.S. Constitution.[147] Inspired by American constitutionalism, the European constitution-makers for the first time clearly stated (in the European Constitution and retailed in the Lisbon Treaty) that "the limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality."[148] The principle of subsidiarity (introduced by the Treaty of Maastricht, 1993, and significantly clarified by a special Protocol on the application of the principle of subsidiarity and proportionality in the Lisbon Treaty[149]) bears striking similarities with the American arrangement.

Moreover, the U.S. Constitution's provision of the enumerated powers found its own form in the EU principle of conferral, under which the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain

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[147] Amendment X of the Constitution of the United States: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
[148] Lisbon Treaty, Article 5 of the Treaty on the European Union.
[149] Article 5 of the Treaty on European Union: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

The principle of conferral or principal or limited or attributed competences gives the unilateral power to the European Union to commit others, but every act must have a legal basis in the Treaty. From that point of view, the European system features clear characteristics of the Federal Union. Moreover, the European Convention delegates made a step forward in clearly specifying the "exclusive" powers of the EU as the federal government (even if the word "federal" was removed), and the "shared" powers, where the Union shall share competence with the Member States and the areas in which the EU may only act in a complementary or supportive capacity.[150] These provisions bear striking resemblance to the American system of I) Federal Powers (Inherent Powers, Delegated Powers, Implied Powers, Powers to expand the Central Government) and II) The Powers of the States (Reserved Powers, Concurrent Powers).

As regards the new voting mechanism in the Council of the EU, the European Convention delegates introduced the new system, which codifies the dual sovereignty of states and people, based on the majority of states and people, in the same way as the composition of the House of Representatives and the Senate in the U.S. Constitution. In most federal systems the structure of representation is two-fold, with popular or functional interests represented directly through a direct elected lower house, while territorial units are typically represented in an upper house, whose members may be either directly elected (as in the U.S. Senate) or appointed by state governments (as in the German Bundesrat). In both of these senses, the EU already constitutes a federal system, with a constitutionally guaranteed separation of powers between the EU and Member States levels, and a dual system of representation through the European Parliament and the Council of the EU.

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[150] The Lisbon Treaty in the first six articles of the Treaty on the Functioning of the European Union defines "exclusive competence" as the areas where "only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of the Union acts". As regards the competences that the Union shares with the Member States, the Lisbon Treaty states that "the Union and the Member States may legislate and adopt legally binding acts" and – in accordance with the principle of pre-emption – that "Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising its competence." In addition Union shall have competence to carry out actions to support, coordinate and supplement actions in some areas.

Perhaps the most difficult issue is the question of the distribution of powers among the federal and state levels of governments. "Both the US Constitution and the EU treaties feature broad and flexible clauses which authorize the federal legislature to regulate interstate commerce or indeed to adopt any legislation deemed to be 'necessary and proper' in achieving the fundamental aims of the federation" (Wallace, Pollack and Young 2010, 29).

Despite the clearer delineation of powers brought about by the Lisbon Treaty, the EU and member-state authorities remain concurrent, intermixed, and therefore constantly subject to the 'arbitrary' role of the European Court of Justice.

7.3 Horizontal division of powers

7.3.1 U.S. Constitution

The shape and the nature of the American Government in terms of a horizontal division of power were heavily influenced by political philosophers, especially the French Philosopher Montesquieu and the English Philosopher John Locke. During the Philadelphia Convention, Montesquieu was often quoted regarding his proposal for the national government, i.e. 'separation of powers'. But Montesquieu's view was a separation of *functions* rather than a separation of powers, representing the organs of the State. The framers of the U.S. Constitution, by contrast, were careful to create a system in which law-making, law-enforcing, and law-interpreting functions were assigned to independent branches of government. The power of each branch of government is checked, or limited, and balanced because the legislative, executive, and judicial branches share some authority and no branch has exclusive domain over any single activity. In that sense the U.S. Constitution represents a textbook example of the above mentioned *trias politica*. Its first three Articles designate the institutions in which the particular power is vested:

Article I: The legislative power shall be vested in a Congress of the United States, which consists of a Senate and House of Representative,

Article II: The executive power shall be vested in a President of the United States of America,

Article III: The judicial power of the United States shall be vested in one Supreme Court.

Such a simplified understanding of the separation of powers is not practicable in the European Union and neither does the new Treaty indicate a clear-cut trichotomy between the legislative, the executive and the judicial branches of the European Union governance.

7.3.2 The Lisbon Treaty

Compared with the U.S. Constitution, tracing the horizontal separation of powers in the European Union is a more subtle undertaking than merely identifying the three basic organs of public authority.

When analysing a horizontal division of powers in the EU system, one should undertake a functional and not organic enquiry. This means that rather defining the organ, the function should be identified and attributed to different institutions. In the same way, the legislative acts are defined through several procedures, used for their adoption and not through a specific body that adopts it. Moreover, there is a specific feature of the EU horizontal divisions of power, which has no parallel in the U.S. system, namely the phenomena that a vertical dimension is present in the horizontal division of powers, because at the executive level the Member States are due to implement measures. This fact reflects the German notion of executive federalism, where the Bundestag adopts legislation, but implementation is up to the different Länders. For the judiciary power, the 'normal court' for proper application of enforcement of Union law is the national court. And when the national court is confronted with the problem of interpretation of Union law or validity of acts adopted by the Union institutions, it can refer to the European Court of Justice in order to obtain a preliminary ruling, which will then be binding for the national court. As a general matter, the ECJ is bestowed with jurisdiction to give preliminary rulings on the interpretation and/or the validity of Union law in accordance with the applicable provisions of the EU treaties.

The Lisbon Treaty determines what institutions should be involved in the adoption of an act and how this should take place, whereas the EU institutions present an incomplete

picture of the institutional structure that shapes the *trias politica* because the legislative function is performed almost entirely by the Community organs themselves, and the executive and judicial functions are performed to a large extent by the Member States, acting on behalf of the Community's interests.

In the EU case, the legislative function is shared by the Council of the EU and the European Parliament, with an agenda-setting role for the Commission; the executive function is shared by the Commission, the Member States, and (in some areas) independent regulatory agencies; and the judicial function is shared by the Court of Justice of the European Union (which includes the Court of Justice, the General Court and specialised courts), and a wide array of national courts bound directly to the ECJ through preliminary reference procedure (Lenaerts and Van Nuffel 2005).

Legislative and executive powers: The Council of the EU, which consists of a representative of each member state at ministerial level, is the chief legislating institution at European level (decisions are taken by a simple majority vote, a qualified majority vote, or a unanimous vote). National ministers are therefore key decision-makers in all EU policy sectors. Over the course of the 1980s and 1990s, the legislative powers of the European Parliament have grown sequentially, from the relatively modest and non-binding 'consultation procedure' through the creation of the 'cooperation' and 'assent' procedures in the 1980s, and the creation and reform of a 'co-decision procedure' in the 1990s (co-decision I introduced by the Maastricht Treaty and co-decision II reformed by the Treaty of Amsterdam). With the entry into force of the Lisbon Treaty, the EP is generally involved in the legislative process through the "ordinary legislative procedure" (the co-decision procedure in the previous treaties) which puts the Parliament on equal footing with the Council. Under the "special legislative procedures" (the consultation and assent procedure in the previous treaties) the position of the EP is not legally binding. Regarding the voting behaviour demonstrated by the Members of the European Parliament (MEP), the studies emphasized the striking fact that in spite of the multinational nature of the parliament, the best predictor of MEPs voting behaviour is not nationality but an MEP's party group[151] who demonstrate extraordinary 'party discipline' in roll-call votes.

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[151] After the 2009 European Elections, there are 7 political groups in the European Parliament: Group of the European People's Party (Christian Democrats); Group of the Progressive Alliance of Socialists and

However, the process is still largely determined by the Commission and the Council, both of which also have executive powers. The Commission possesses the monopoly of legislative initiative (except for CFSP) and plays the institutional role of the agenda setter, being similar in this respect to the committees of the U.S. Congress. Given that the power to take legislative decisions virtually always lies with the Council, it does not sit comfortably with the principle of 'separation of powers' and it should also perform executive tasks, yet not be subject to effective political supervision. In contrast, the executive function performed by the Commission is completely compatible with that institution's role in the legislative process, in so far as it consists principally of its right to initiate legislation. Where national authorities are involved in the adoption of EU legislation, the constitutional rules of each member state determine whether legislative or executive bodies are responsible for the necessary decision-making. An example is the transposition of directives into national law.

This founding institutional arrangement (with the Council of the EU as the main decision-making institution and the Parliament as consultative organ at the beginning) was clearly based upon the typical institutional structure of international organizations. Lately, the Community has been developing increasingly more federal features, with the European Commission developing into a supranational organ and the Parliament becoming a body with genuine powers of co-decision (first through the shift to direct elections and then through the gradual increase of parliamentary participation in law-making). The actual institutional arrangement of the European Union is thus characterized by a compromise between persisting Member States' 'sovereignty' (as classical state sovereignty) and direct representations at the European level (as an expression of the principle of people's sovereignty). This principle is also explicitly stated in the new provision, brought about by the European Constitution and retained in the Lisbon Treaty.[152] The EU institutional arrangement is based on a "two pillar democratic legitimation: a national one, by way of

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Democrats; Group of the Alliance of Liberals and Democrats for Europe; Group of the Greens/European Free Alliance; European Conservatives and Reformists Group; Confederal Group of the European United Left - Nordic Green Left; Europe of Freedom and Democracy Group.

[152] Lisbon Treaty, Article 10 (1) and (2) of the Treaty on European Union: 1. The functioning of the Union shall be founded on representative democracy. 2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

national parliament and governments and a Community-related one, grounded in the directly-elected European Parliament" (Oeter 2010, 66).

Judicial powers: In view of the principle of the primacy of Community law, both the Community and national courts frequently have to rule on the compatibility of national law with European law. The Court of Justice of the European Union (created by the Paris Treaty in 1951) and the Court of First Instance (created by the Single European Act in 1986 and renamed the General Court by the Lisbon Treaty) provide the cement of European integration and are the most 'federal' of the European institutions. Like the U.S. Supreme Court, the Court within the EU has become a policy-shaper in its own right. Its landmark decisions have developed the law through cases that have become as influential as the legislation itself.

Firstly, the Court of Justice of the European Union acts as *a constitutional court* when it decides about cases involving inter-institutional conflicts or a conflict about an alleged infringement by a Member State of some rule of EU law or about the division of powers between the EU and the Member States. Secondly, through the exercise of its preliminary rulings jurisdiction (both as to the interpretation of EU law and the supervision of the validity of the acts of the EU institutions), the Court of Justice performs the role of *a supreme court*. Thirdly, the Court of Justice and the General Court act as *an administrative court* whenever they are called upon by private parties to offer some form of judicial protection against illegal executive acts by EU institutions (Lenaerts, Van Nuffel 2005).

An important common feature of the U.S. and the EU judicial system is the fact that both courts act as constitutional and supreme courts at the same time.
Considering the fact that the Court's case law has always had the role of mediating EU integration through law and that it has established a key role in the development of the constitutional framework, there is a clear similarity to that of the role of the Supreme Court in the U.S. system. In both the EU and the United States, the role of courts as integrating institutions is a key aspect of decision-making.

The Court's constitutionalization of the treaty system produced profound structural changes. Amongst other things, it reconstituted the relationship amongst the ECJ, national judges, and private and public actors at the national and transnational levels. Often enough, the impact of the Court's rule-making is to effectively constrain member-state governments, both individually and collectively (Stone Sweet and Caporaso 1998, 129).

According to the judge of the European Court of Justice Ilešič, apart from these basic similarities between the U.S. Supreme Court and the European Court of Justice, there are also some particularities showing that the EU judicial system developed in its own way. The first important difference concerns the appointment of Members of the Court. While the US Supreme Court justices are appointed for life and by the American President, in the EU the judges are appointed by common accord of the governments of the Member States for six years and "chosen from persons whose independence is beyond doubt."[153] The appointment procedure might have a non-negligible impact on the political orientation or 'view of life' of such selected justices. As far as the EU judges are concerned, no political ideology could be perceived through the Court's decisions, observes Ilešič (Interview 2010). From this practice, another important difference is derived, namely the fact that there are no 'separate dissenting opinions' from one or more judges expressing disagreement with the majority opinion of the Court of Justice, while in the U.S. this is often the case.

The rulings of the European Court of Justice therefore cannot give rise to speculations about political or national orientation of any judge. In addition, the European Court of Justice is physically located far from the 'political centre' and therefore follows the principle of separation as established in some Member States (in particular Germany and France) "in order to prevent day-to-day contacts between the politicians and judges" (Ilešič Interview 2010).

Some scholars (Weiler 1994; Stone Sweet and Caporaso 1998) suggest that the Court has been able to pursue the process of legal integration far beyond the collective preferences of the member governments, partly due to the high costs to Member States in the overruling process of failing to comply with ECJ decisions, and partly because the ECJ

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[153] Lisbon Treaty, Article 19 of the Treaty on European Union.

enjoys powerful allies in the form of individual litigants and national courts which refer hundreds of cases per year to the ECJ via the preliminary ruling procedure.[154]

Presidentalism: By contrast with the U.S. Constitution, there is no equivalent of the U.S. Presidency in the existing EU Treaties. The European conventioneers tried to follow the example of the U.S. who had spoken with one voice with its President who, himself, had at his disposal a full set of decision-making instruments. In that sense, the European Constitution brought about a new provision that the European Council nominate its President for two and a half years, which would represent the European Union externally. By giving Europe a single human face, the EU would respond to the famous complaint of U.S. Secretary of State Henry Kissinger, who once remarked that he didn't know Europe's telephone number: "If I want to phone Europe, what telephone number do I call?" (Kissinger 1973). However, the position of the U.S. President cannot be compared with the EU President's role as it does not enshrine executive powers. The President of the European Council is only responsible for chairing the European Council meetings and driving forward its work on a continuous basis and representing the EU internationally at the highest level. His role is therefore to make the EU's actions more transparent and consistent, which is supposed to mark a change from the previous system, where Member States were holding the six-month EU Presidency.

The European Council, which "consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission"[155] gained the status of the fully-fledged Institution in the Lisbon Treaty. However, in terms of separation of powers, the European Council has no parallel in any of the federal or confederal systems. According to the Treaty it "shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof."[156] The European Council increasingly initiates EU policy and some constitutional lawyers argue that it "often decisively shapes legislative projects, places itself outside the constitutional order and beyond legal and political responsibility" and

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[154] Lisbon Treaty, Article 267 of the Treaty on the Functioning of the EU: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of the acts of the institutions, bodies, offices or agencies of the Union.
[155] Lisbon Treaty, Article 15 (2, 3) of the Treaty on European Union.
[156] Lisbon Treaty, Article 15 (1) of the Treaty on European Union.

compare it with "the king in the constitutional regimes of the nineteenth century, [who] is not answerable to any other institution and can do no wrong" (Von Bogdandy 2010, 34).

The same argument occurs concerning the role of the President of the European Council, namely that this position is 'outside' the constitutional order, which is also reflected in the fact that the President does not take an oath before the Court, as it is required for the American President to swear an oath to support the Constitution.[157] Even the European Commissioners make an oath in front of the European Court of Justice 'swearing' to defend European Law.

A specific form of the horizontal division of powers at EU level therefore reflects a different objective of constitution-makers in the EU and U.S. system. While the framers of the U.S. Constitution deliberately created three prominent branches of government (Congress, President, Supreme Court) traditionally associated with statehood, the EU constitution-makers from the outset defined the functions (law-making, law-enforcing, and law-interpreting) rather than the organs of government, pursuing a different objective - a Union of states and not a nation-state. The EU division of powers thus resulted in a different form with unique phenomena, for which there is no analogy in the U.S. system, namely the vertical aspects in the executive and the judicial function at the Union level.

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[157] U.S. Constitution, Article Two, Section One, Clause Eight: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

8 MAIN FINDINGS ON HYPOTHESIS-TESTING

This dissertation sought to validate the main hypothesis about the indirect and direct influence of constitutionalism on the constitution-making process of the European Union, particularly in terms of the separation of powers.

The sub-hypothesis claims, however, that this influence has been limited and that the borrowed features often resulted in a "transformed" solution due to constraints linked to the European political and cultural circumstances. Overall, the claims can be validated empirically. The resulting hypotheses are summarized in Table 8.1.

Table 8.1: EU process of transformed borrowing from the U.S. Constitution

WHAT (borrowed features from the U.S. Constitution)	WHY (reasons for seeking 'good practices' abroad)	HOW (process of borrowing, adoption, rejection or adaptation)	RESULT (transformed EU solution)
Constitutionalization and judicial review	EU followed the global post WWII trend in which the democracies in supra-national entities increasingly turned to constitutionalization and judicialization of politics.	Constitutionalization of the EU was judicially driven mainly through some landmark decisions of the ECJ, in particular the doctrine of supremacy and autonomy of European Law, the doctrine of direct effect, implied powers, and human rights protection. The European Convention was called into existence to provide a forum for the legitimization of the European constitutional order that had been developed thus far.	European Constitutional Law in the form of International Treaty

Constitutional Convention	Revision of the EU treaties (through IGC) proved to be ineffective, publicly denounced as too 'secretive and elitist' → EU constitution-makers turned to a new method of revising of the treaties. The self-reinforcing institutions (European Commission and Parliament) pushed for a broader composition with a clear interest of reinforcing their own position during the treaty negotiations.	Inspired by the successful U.S. Constitutional Convention and European Convention on Human Rights (2000) a more pluralistic method of amending treaties was applied.	European Convention as the first level bargaining chip and the IGC along with the popular vote as the second level of negotiations for the treaty amendment.
Federalism	Concerns how to keep a balance of power → search for the suitable form of the EU based on functional model.	At the beginning of European integration the main debate amongst those favouring the unification of Europe was over the issue of federalism versus confederalism. The federal vision suffered setbacks throughout European integration and also at the European Convention. The principle of supremacy Dual representation of people (House of Representatives) and federal states (Senate)	*Sui generis* form of 'supranational' integration, between the classic poles of 'federal statehood' and 'confederation'. → The principle of primacy of EU law → Dual representation of people (EP) and Member States (Council)

Vertical division of powers	'Eagerness' of EU institutions to acquire new competences often by 'stealth' → negative feedback and two successive negative referenda (on the Maastricht Treaty in Denmark in 1992 and on the Nice Treaty, in Ireland in 2001), a low turnout in the European elections → increased demands for clearer delineation powers.	Creation of supranational institutions prompted guidance from the American Constitution with a clear distinction between Federal Powers and the Powers of the States. Moreover, the division of powers was considerably 'refined' with the new provision of "early warning system" and direct democracy (Citizens' Initiative).	Constitutionally guaranteed separation of powers between the EU and Member States and division of competences (exclusive powers, shared powers and complementary powers of the EU) governed by the principle of subsidiarity and proportionality.
Horizontal divisions of powers	EU decision-making and legal order had been incrementally developed in a way that the *legislative* power is shared by the Council and the EP, with an agenda setting role of the Commission; the *executive* function is shared by the Commission and Member States; the *judicial* power is shared by the European Court of Justice and national courts.	Inspired by doctrine of separation of powers, *trias politica*, and "checks and balances" in the U.S. Constitution the European Convention tried to re-balance power.	Incomplete picture of *trias politica* in the EU form of the "institutional triangle" of the Council, Parliament and Commission. European Council as political institution has no parallel in the U.S. or any other (con)federal system.
Bicameral system	Too complex allocation of Member States voting power in Council → European Convention charged to find a new way of power weighting.	Inspired by U.S. bicameral system, Giscard proposed to establish a Congress of Peoples of Europe (like U.S. Congress), which was rejected.	Double majority voting system, establishing the dual sovereignty; of people and Member States.

Bill of Rights	Demands to redress the claim of individual rights against the control of supra-national institutions and thus complete the balance of power between people and Union. German Constitutional Court warned against any further transfer of competence to the EU level without strengthening of fundamental rights protection.	The idea of incorporating the EU Charter of Fundamental Rights (adopted in 2000) into the Treaty, was inspired by the U.S. constitutional process (first ten amendments to the U.S. Constitution)	EU Charter of Fundamental Rights goes even further than the American Bill of Rights, in particular with regard to several social rights, which express the proper identity of the European *social* model, to underline European social market tendency in contrast with the American liberal model.
Dual citizenship	European constitutional law became a legal system, whose subjects are not only the Member States but also their citizens. → 'Market Citizens' (holder of economic freedoms of Common Market) proved to be too reduced concept → Need for Union Citizen status, according to which citizens should enjoy the same treatment in law irrespective of their nationality.	Inspired by the U.S. Constitution, the Maastricht Treaty (1993) brought about the notion of dual citizenship. European Convention changed the paradigm by taking a step forward from state-oriented obligations towards genuine subjective rights of a constitutional character.	European Citizenship (complement and not replace national citizenship)

Presidentialism	Lack of EU leadership, bad performance and inconsistency of six-month rotating presidencies → negative feedback → pressure for change.	Despite inspirations from U.S. system, EU constitution-makers established a position, which has no equivalent in the U.S. Constitution and only partly addressed the problem of EU external representation.	President of the European Council and High Representative of the Union for Foreign Affairs and Security Policy.
Global power	Lack of international credibility of 'Europe' → Respond to the Kissinger's assertion and international criticism that the EU fails to speak with one voice.	Searching for a model (similar to the U.S.) of a unified representation of the EU within the international community.	EU Member States retain their prerogatives in international relations. EU Member States are individual members of the United Nations.

The process of transformed borrowing is based on a multicausal framework, which shows various areas of American influence on the EU system, and explains the relative importance of actors in the constitutionalization process of the European Union. The main theoretical approach is therefore actor-oriented, which focuses on the motivation of different actors rather than the unintended dynamics of broad structural processes (as explained by Functionalism and Neofuncionalism, which tend to treat European integration as an unintended consequence and the resulting change over time, in the form of "spill-over").

A long constitution-making process which led to a complex outcome has been disaggregated into more tractable parts of negotiations marked by endogenous and exogenous constraints. In addition, the outcome is explained in the causal sequence, which explains the constraints imposed by previous stages. In order to weigh the relative importance of the competing theories (explained in Chapter One) the empirical part tests which theory best explains the process and the outcome of the transformed EU solution.

In line with comparative constitutional theory, the EU followed the global post World War II trend in which the democracies in supra-national entities increasingly turned to constitutionalization and judicialization of politics. Similarly to the role of the U.S. Supreme Court (in particular under Chief Justice John Marshall, who over three decades 1801-1835 shaped American constitutional law and made the Supreme Court a centre of power), the European Court of Justice played the leading role in early constitutionalization.

First of all, the ECJ was envious of the American situation where the principle of supremacy was firmly set down by the U.S. Founding Fathers in the U.S. Constitution: "This Constitution ... shall be the supreme law of the land". The Court of Justice's power to make "federal common law" established the principle of supremacy through case-law (the seminal case Costa vs Enel 1967), which gained more explicit treaty provision in the Lisbon Treaty. Moreover, the ECJ jurisprudence developed other constitutionalizing doctrines such as direct effect, implied powers and an "unwritten bill of rights" encompassing its entire fundamental rights jurisprudence. The European Convention was therefore called to provide a forum for *(ex-post)* legitimization of the European constitutional settlement which had been developed thus far without public participation.

However, the process of EU constitutionalization resulted in a transformed solution, in which European Constitutional Law takes the form of an International Treaty, featuring constitutional provisions and characteristics of international organisation.

The second area, where EU constitution-makers found inspiration in the American model was the constitutional convention. Treaty amendment negotiations through IGC lost much credibility and were publicly denounced as too "secretive and elitist". Here the theory of Historical Institutionalism best explains the fact that due to negative feedback EU leaders were obliged to accept a new method of the revision of the treaties. In line with Historical Institutionalism, the institutions are self-reinforcing when they generate positive feedback, whereas they become self-undermining when they get negative feedback. The self-reinforcing institutions (European Commission and Parliament) pushed for the broader composition with the clear interest of reinforcing their own position during the treaty negotiations. Following the model of the successful U.S. Constitutional Convention and European Convention on Human Rights (2000) a more pluralistic method of

amending treaties was eventually applied with a broader composition (representatives of the national governments, parliaments, European Parliament and European Commission).

Eventually, the European Convention proved to serve as the first level bargaining chip, while the IGC as well as the popular vote came at the second stage of negotiations for the revision of the treaties, which again shows the transformed solution which best fitted European circumstances.

The third area of American influence concerns Federalism which was a powerful normative ideal and which motivated many of the founders of the European Union. Federalism was also an important ideological motivation behind some decisions at the European Convention. However, the federal vision suffered setbacks and the EU resulted in a *sui generis* form of supranational integration, which can be placed between the classical poles of federal statehood and confederation, characterized by supranational and intergovernmental features.

The area of vertical and horizontal division of powers has been most significantly influenced by the U.S. system. First of all the principle of conferral (according to which the exercise of Union competences is governed by the principles of subsidiarity and proportionality) followed the idea of the 10th amendment to the U.S. Constitution, which has also been the most commonly quoted provision by those who hold states' rights above federal powers.

The theory of Historical Institutionalism shed some light on the reasons for transnational borrowing in the area of vertical division of powers. The European Union institutions manifestly impinged on national sovereignty and acquired more and more powers, something which provoked negative feedback and increased demands for clearer delineation and limitations of powers. The Member States sought a rebalancing and some even a devolution of power back to themselves.

Creation of supranational institutions prompted guidance from the American Constitution with a clear distinction between Federal Powers and the Powers of the States. Similarly, the EU constitution-makers for the first time explicitly listed the areas of exclusive, shared and coordination competence of the Union in the Lisbon Treaty. Moreover, the division of powers was considerably adapted to the European context with the Länder-inspired new provision of "early warning system" giving the national parliaments power

of prior scrutiny (which has no parallel in the U.S. decision-making process) and Swiss-inspired provision of direct democracy in form of Citizens' Initiative, giving European citizens the possibility to petition the European Commission in order to propose a new policy proposal. Moreover, the EU Member States now have the possibility to *reduce* the competences of the Union.

Similarly, there were strong demands for clearer separation of the horizontal division of powers. The EU institutions, decision-making and legal order had been incrementally developed in a way that the *legislative* power is shared by the Council and the European Parliament, with an agenda setting role of the Commission; the *executive* function is shared by the Commission and Member States; the *judicial* power is shared by the European Court of Justice and national courts. Inspired by the doctrine of the separation of powers, *trias politica,* as well as the "checks and balances" of the U.S. system, the European Convention tried to establish the so-called "institutional triangle", which eventually resulted in an incomplete picture of *trias politica* of the Council, Parliament and Commission. Moreover, the establishment of the European Council as a political institution made the EU system even more incomparable to the U.S. or any other (con)federal system.

During the negotiations related to the horizontal division of powers the European Convention President Giscard d'Estaing attempted to mirror the U.S. bicameral democratic systems, by creating the second chamber, called the Congress of Peoples of Europe, bringing together members of the European Parliament and members of the national parliaments. His proposal, however, was rejected by some power holders (the Members of the European Parliament and EU leaders), something which again showed the constraints imposed by the existing political reality in which the constitution-makers had to find an acceptable solution. Instead, Giscard d'Estaing proposed introducing the system of double majority voting thereby establishing the principle of dual sovereignty, of people and the Member States, basically following the same idea as that of the composition of the House of Representatives and the Senate in the U.S. Constitution.

Another area of American influence was the protection of fundamental rights. First of all, through the European Court of Human Rights (guardian of the European Convention on Human Rights and Fundamental Freedom) many precedents of jurisprudence from the U.S. Supreme Court have been introduced indirectly into the European framework, as the

European Court of Justice has regularly made reference to the convention. Similarly to the U.S. experience where some states ratified the U.S. Constitution on condition that the Bill of Rights was incorporated to the U.S. Constitution (which finally took place in 1789), the idea of incorporating the EU Charter of Fundamental Rights (adopted in 2000) was one of the key demands for treaty revision, in particular by Germany, whose Constitutional Court warned against any further transfer of competences to EU level without the strengthening of fundamental rights protection.

The EU Charter of Fundamental Rights goes even further than the American Bill of Rights, in particular regarding several social rights, which expresses the proper identity of the European *social* model, and underlines the European social market tendency in contrast to the American liberal model.

The notion of European citizenship also bears a striking resemblance to the concept of dual citizenship developed by the American constitutional framers. European constitutional law became a legal system, whose subjects are not only the Member States but also their citizens. The concept of 'Market Citizens' (holder of economic freedoms of Common Market) proved to be too diminishing as a definition, which created the need for Union Citizen status, according to which citizens should enjoy the same treatment in law irrespective of their nationality. Inspired by the U.S. Constitution, the Maastricht Treaty (1993) brought about the notion of Union citizenship. The individual appears to have been placed in the centre of Union law. The European Court of Justice stressed this change in paradigm in emphasising that "Union citizenship is designed to be the fundamental status of nationals in the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality."[158] One of the objectives of the European Convention was to strengthen the ties between the Union and its citizens. Instead of addressing the provisions to the Member States, the Lisbon Treaty now name citizens as subjects of the Union's policies, principles and obligations. The Lisbon Treaty thus changed the paradigm by taking a step forward from state-oriented obligations towards genuine subjective rights of a constitutional character.

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[158] Case C-184/99 Grzelczyk [2001] ECR I-6193, para 31.

The establishment of the President of the European Council and High Representative of the Union for Foreign Affairs and Security Policy is probably one of the features, which was very much influenced by the American model, but which in the end resulted in a very transformed solution, which has no equivalent in the U.S. Constitution and only partly addressed the problem of EU external representation. Contrary to the U.S. President, the President of the European Council is not endowed with executive power in his own right as he has to express the collective views of the Heads of State or Government of the Member States. Moreover, the European Council has no parallel in any of the federal or confederal systems. It is a political institution created to give "general political directions" and is thus placed outside the constitutional order and beyond legal responsibility.

Moreover, Henry Kissinger's and others criticism about the lack of EU leadership, and that the EU fails to speak with a single voice, pushed the EU leaders to search for a model (similar to the U.S.) of a unified representation of the EU on the international scene. The US is a sovereign state and a member of the international community. By contrast, in the framework of the European Union "the Member States continue to maintain classic international relations: each one has diplomatic and consular representations in the other Member States" (Ziller 2004, 20). EU Member States therefore retain their prerogatives in international relations and Member States are individual members of the United Nations (France and the UK keep their 'privileged' seat at the UN Security Council, despite the talks of the EU seat). As part of efforts to boost its role on the world stage in line with its Lisbon Treaty, the EU made an attempt to upgrade its status at the United Nations in order to be able to speak at the assembly through its permanent officials, rather than the ambassador of the country holding its rotating presidency. However the EU failed in a first bid to lift its diplomatic standing at the UN General Assembly.[159]

When looking into which theory best explains the *reasons* for borrowing by EU constitution-makers from the U.S. system, it seems that Historical Institutionalism provides a lot of explanatory tools, because the EU constitution-makers sought the inspiration of the U.S. system in all those areas of the European system that had provoked negative feedback and pressure for change. For example - the inefficiency of the

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[159] The EU resolution, which would have given the EU a stronger observer status, led to intense negotiations and it was finally frustrated by a motion, which called for an end of the debate, passed by 76 votes to 71 at the assembly session on 14 September 2010. (Source: Reuters, 14.09.2010)

traditional method of treaty revision through IGC, unclear delineation of powers (vertical division between the EU and Members States as well as horizontal division between the legislative, executive and judicial branches), a bad performance of rotating EU Presidency - all these areas provoked negative feedback and thus pressure for change, and therefore the need to seek good practices abroad and eventually to borrow from the U.S. Constitution.

In most cases, however, the EU constitution-makers had to adapt the borrowed provisions to the given European political and cultural context. When looking into which theories best explain *transformational* borrowing in the US-EU case, the theories such as Intergovernmentalism, Liberal Intergovernmentalism and in particular the theory of transnational constitutional borrowing, seem to help us better explain the influence of endogenous and exogenous constraints, which pushed for transformed and contextualized borrowing. The outcome of the negotiations indeed depends on national preferences, intergovernmental bargaining and the choice to create some institutions in order to reduce uncertainty about each other's future preferences. This partly explains why the EU constitution-makers could not simply borrow features from the U.S. Constitution, but had to adapt or even reject them during the long process of negotiations.

However, these theories have a limited explanatory power for the constitution-making process of the European Union. This dissertation further develops a theory of transformed and contextualized borrowing: the dissertation contends that the underlying reason for transformational borrowing is the fact that the European constitution-makers were pursuing a different objective, i.e. *ratio constitutionis* (compared to the U.S. framers) when developing the European constitutional order, which has been created for a European polity (the political community and its institutions) and not for a nation-state.

Table 8.2: *Ratio constitutionis* of the U.S. and EU constitution-makers

| United States of thirteen colonies | → | Fully-fledged Constitution for an "indivisible" nation-state |
| European Union of sovereign states | → | Constitutional settlement for a polity of states and citizens "united in diversity" |
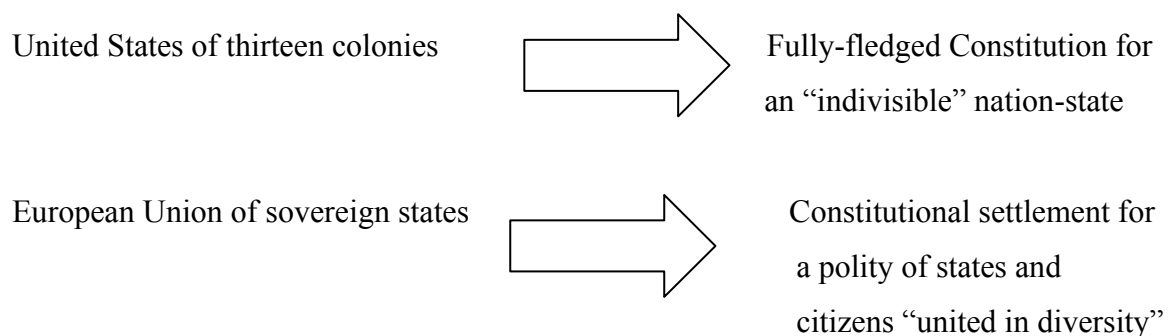
U.S. Constitution framers started their deliberations in a peculiar situation, expressed by one of the Philadelphia Convention delegates: "We are neither the same nation nor different nations" (Elbridge Gerry quoted in Bowen 1986, 32). And yet, a common conclusion after the successful ratification of the U.S. Constitution was reportedly "We have become a nation", particularly because the U.S. Constitution created a strong national government (Bowen 1986, 310).

Conversely, the pursuers of European constitutional settlement were already sovereign and independent European states, so the objective of the EU constitution-makers was not to form a nation-state, but rather a constitutional settlement for a polity of states.

9 CONCLUSION

The EU constitutionalization process was evidenced as the universal trend in the post-World War II period, when many countries, as well as several supra-national entities, turned to constitutionalization which was mainly driven by judicial review.

The tendency of European constitutional framers to look abroad for guidance was particularly understandable in the light of the European predicament after the war. Under these conditions, seeking guidance from the experience of a well functioning constitutional system presented attractive possibilities for achieving constitutional coherence. Therefore the main impetus for adopting some American legal infrastructure arose out of the need for a political settlement for a Europe recovering from two World Wars. This created a political opening for the transformed use of borrowing of some fundamental features of the division of power at the European level. Thus the soil had been properly 'seeded' for incorporating more and more constitutional features, in particular in the context of international borrowing from the American constitutional experience, which was perceived as a universal norm.

The dissertation contends that this constitutional importation should be conceptualized as a gradual evolution, which calls for an assessment of the whole of European integration and all constitutional framers (leading European statesmen, Justices of the European Court of Justice, parliamentarians, EU officials etc.).

The research provides the evidence of the American influence on European integration, federalism, constitutionalization, creation of constitutional convention, vertical and horizontal division of powers, fundamental rights protection, establishment of European Citizenship, creation of new positions of President and High Representative of the Union for Foreign Affairs and Security Policy.

European Union Law is the product of a process of transformation. The analysis shows that every area of American influence on the European Union construction developed in a specific way. For example the federal paradigm (of the EU founding fathers and later the federalist camp in the European Convention) encountered the resistance of national politics (in particular the ultimate location of sovereignty) and thus was forced to adopt a much more modest approach i.e. 'cautious incrementalism'. The dominant paradigm

resulted, however, in the European Union as a mixed system with strong traits of federal, confederal and international arrangement.

The constitutionalization of the EU Treaties was largely driven by jurisprudence of the European Court of Justice establishing the main doctrines of the constitution. A significant constitutional moment occurred in the run up to the biggest EU enlargement, when the European Union was pushed not only to much needed institutional reform but also to legitimization of constitutional politics developed thus far without significant public involvement. In this context, a constitutional convention (inspired by the successful Philadelphia Convention) was offered as a panacea for all the shortcomings of the previous treaty revision by secretive diplomatic circles.

Inspired by the U.S. Constitution, where the "supremacy clause" makes the Constitution the "supreme law of the land" the European Convention delegates for the first time enshrined the principle that the "Treaties have primacy over the law of Member States." However, for some EU leaders, the principle of "primacy of the EU law" was too associated with the federal system, so the principle of primacy was eventually included just as a Declaration in the Lisbon Treaty, which shows resistance of some Member States, regardless of the fact that the principle is well established by the existing case-law of the Court of Justice.

When analyzing more deeply the specific choices borrowed from the U.S. system, a common mechanism crystallized, which showed that the EU constitution-makers sought inspiration from the U.S. example in all those areas of the European system that had provoked negative feedback and pressure for change.

While the European Commission and Parliament became significantly self-reinforcing (during European integration and in particular in the European Convention, when they were for the first time involved in the treaty negotiations), other institutions seemed to generate self-undermining reactions. For example, the Presidency of the European Council held by a different country every six months attracted negative feedback and provoked a revision. Here comes the American influence, through Kissinger's sardonic question of an earlier decade that 'resounded' in the European statesmen minds for decades after. Although an American style presidency was not instituted, the American model considerably motivated and paved the way for a model that suited European needs,

in the form of a new President of the European Council. However, the European political circumstances had not reached the point for a popularly elected European President (like the U.S. President). Instead, the European leaders, have, in conformity with European traditions, nominated a full time President of the European Council, as a collective Head of State (as opposed to a government), somewhat between a ceremonial president (as in Germany) and an executive head of state (as in France).

Another area of concern was the supranational pretention of the Community Institutions to acquire more and more powers, something which in turn led to negative public voting. As in other federal systems, the Union has engaged in a vast EU-wide project of economic regulation, driven largely by the desire for the creation and maintaining of the "internal market". The adoption of far-reaching centralised regulations has taken the Union into areas with a centralisation of powers not originally envisaged by the framers of the treaties, generating significant controversy and increasing demands for a clearer delineation of powers. Principles of conferral, subsidiarity and proportionality were widely invoked during the European Convention as a means of limiting the European Union's competence. The fact that these principles find a parallel in the U.S. Constitution, suggests a clear American influence. However, the borrowing was again transformed and adapted to suit the European context, containing Länder-inspired provisions of the an early warning system (giving national parliaments a significant power of prior scrutiny) and the Swiss-inspired provision of direct democracy in the form of a Citizens' Initiative (meaning that one million people can petition the European Commission to bring forward a new policy proposal).

The vertical, as well as horizontal division of powers were clearly inspired by the U.S. system, but again transformed into a complex system adapted to the EU context. A vertical division of powers in the U.S. and the EU are similar by virtue of the fact that the supranational level holds only enumerated (conferred) powers and leaves to the states a residuary and inviolable sovereignty over all other areas. Horizontal powers, however, are divided in a different way: European constitution-makers were careful not to create strong branches of government, as is the case in the United States (Congress, President, Supreme Court) but rather define *trias politica* by function (legislative, executive and judicial function) with different national and supranational institutions involved in each of the functions, thus reflecting that the Union is a "compound of states" and not a uniform

nation-state. Legislative function is performed almost entirely by the Union organs themselves, and the executive and judicial functions are performed to a large extent by the Member States, acting on behalf of the Union's interest.

Consequently, European Law has developed as a hybrid between the constitution and the international treaty, featuring both the constitutional features (supremacy clause, principle of direct effect, implied powers, fundamental rights protection) as well as the characteristics of the international treaty (Member States as source of authority, treaty structure, possibility of secession, possibility of enhanced cooperation leading to "two-speed Union", unanimous ratification of treaty amendments).

In some cases, looking abroad or farther afield (without necessarily bringing anything home) may also be helpful in sharpening the awareness of constitutional particularity (*sui generis* nature of the EU) and enhancing self-understanding. This was the case, when the President of the European Convention floated the idea of creating a bicameral system (like the U.S. Congress) which was met by the opposition from all constituent groups in the Convention, some of whom feared a weakening of their power (EP and national parliament), while others referred to the limited role of the Upper House (i.e. House of Lords in the UK, Sénat in France etc).

 As one constitutional lawyer points out "Culture usually tends to resist borrowing" (Osiatynski 2003). Culture is there to be understood in a broad sense as a collectively shared system of meanings. In that context, the famous statement expressed by Monnet can explain the issue at stake: "Si c'était à refaire, je commençerais par la culture" - "If I were starting over, I would begin with culture" (Monnet quoted and translated in Judt 2007, 701). Cultural pluralism and linguistic variety are often referred to as substantial obstacles to a politically functional European public sphere, which would create the necessary support for a stronger European state. The Union is based on the diversity of European culture and has accepted this as the most important heritage, which "forms part of the *acquis culturel* of the Union" (Kadelbach 2010, 473).

The empirical study done on the European Convention confirms the claim that the final compromises were influenced by a variety of factors embracing first *endogenous constraints* and forces: i.e. the Convention agenda setting with the predominant role of its Chairman with personal ambitions, various delegates' preferences driven by motivation

of duty, and the rigid institutional structure of the EU in relation to the vertical and horizontal division of power. Moreover, *exogenous constraints* were imposed by various holders of power, i.e. the EU institutions pursuing an institutionalized perspective, member state leaders fighting for state sovereignty, and European citizens expressing their discontent through referenda. For the European constitution framers, the main challenge was to work within the constraints of the existing political and cultural reality and not to trespass on the mandate which was to create a functional constitutional settlement for a Union of sovereign states and not a unified nation-state.

The constitutional essentials of the European polity were therefore forged out of the tension between national and supranational forces. This brought into the forefront the distinctiveness of the European constitutional experiment. Against this background, the global economic and financial crisis that hit Europe in 2008 put additional strains on European negotiations. On the one hand, there was a tendency in many Member States' governments to become inward-looking, more protectionist, while on the other, the Commission's President observed that "a crisis can accelerate decision-making when it crystallises political will. As the history of European constructions reminds us, it is usually in times of crisis, that we can make progress in the European project" (Barroso 2010).

The *suis generis* nature of the European Union is created to serve the Member States, who are deeply rooted nation-states, aware of their national identity and who, although advocating a European polity, do not want to mutate into a European federal state. The nation-states that founded the Union want to remain the bearers of genuine statehood and symbols of national identity, which also explains why the EU symbols (for example the flag, the anthem and the slogan) proposed by the European Convention, were later scrapped by the EU leaders as being too associated with statehood. Indeed, constitutions according to the model of federal statehood always contain a strong dose of 'creation of unity' and statehood. Conversely, the European citizens do not want a unitarization, in the sense of a forced 'nation-building'. After all, a unified nation-building has never been the main driving force behind European integration according to the most notable President of the European Commission:

> There will never be a United States of Europe... I refuse to identify myself with those who promote the disappearance of the nation-state... I seek instead a federation among strong nation-states (Jacques Delors, quoted in Moravcsik 1998, 472).

Even though European constitutionalism draws on the American model, this mostly gave rise to emulation rather than imitation. European constitutionalism can be considered as autochthonous, that it springs from European soil, but is influenced by other constitutional traditions, and thus grafted onto the main roots.

The European Convention turned out to be an assertion of constitutional autonomy by the Union. In the end, a constitutionally structured process of oscillation between states and EU governance lead Europeans in a direction of their own, creating *sui generis* European settlement. The European Union has developed into a new multi-level form of political and legal order, which is reflected in its own constitutionalism, autonomous from the legal order of its Member States on the one hand and from international law on the other.

10 PROSPECTS FOR FUTURE EU CONSTITUTIONALIZATION IN THE LIGHT OF AMERICAN CONSTITUTIONAL DEVELOPMENT

The issue of finality plays a fundamental role: the European Union is an association of States and Citizens and not a super-state. European integration brought about some constitutional moments, but mostly in an incremental way. The most recent constitutional conundrum again suggests the hypothesis that further EU constitutional development is likely to advance incrementally, improving and reforming policies *within* the current constitutional framework. According to the Director-General of the Council's legal department the Lisbon Treaty in many ways "marks a halt to the ambitions of the federalists. It might even be seen as a 'containment' of the powers of the European Union" (Piris 2010, 331).

However, the process of the new European rules through treaty implementation, secondary legislation, and the ECJ's jurisprudence will continue. In particular, the European Court of Justice operates to expand the integration project by serving as an arena for transnational political action carried out by national and supranational policy actors. The Court's activism in the 1970s is now widely accepted as having transformed the Treaty of Rome, an international treaty governing nation state economic co-operation, into a 'supranational constitution' granting rights to individual citizens (Lenaerts 1990; Weiler 1991).

It remains to be seen how EU elected elites, national political elites, interest groups and political parties will continue to utilize courts strategically to advance their preferred policy outcomes and provide credible commitments for certain types of political development.

The American constitutional development, which has been evolving over the last two centuries, offers some hypotheses for further constitutional development at the EU level.

In the early nineteenth century, the U.S. Supreme Court (Marshall Court) was perceived as a "bastion of hard-core Federalists". In the United States, there is also a long tradition

of marginalized groups utilizing the courts as an opportunity to challenge existing governance structure. Most notable are the activities of the early civil rights movement on issues such as school segregation and also a host of other social movements, including the American labour movement, the women's movement, the welfare movement, and the animal rights movement (Cichowski 2007, Gillman 2008).

The U.S. Supreme Court's decisions on civil rights and liberties was also a reflection of the favourable political climate within which those decisions were made (Klarman (2004) and the perceived imperatives of the developing regulatory state (Kersch 2004).

In the European Union it is expected that supranational institutions and interest groups will utilize the Court strategically to advance the protection of human rights and fundamental freedoms.

First of all, a whole set of questions arises in connection with the "values" of the Union, which reached its realisation in the new treaty provision: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights belonging to minorities."[160] "Symbolically, it is a very strong concept to insert this notion that people draw their rights from a common set of European values" observed one scholar, and compared this to "the way the U.S. functions and especially its judicial power" (Teasdale Interview 2009).

The impact of the precise wording of the Union values "will depend in large part on how the formulation are used in practice by the Institutions and, above all, on how they are interpreted by the Court of Justice" (Ziller 2004, 52).

An example of how the political actors can use these rather abstract values in concrete situations was highlighted after France decided to dismantle several hundred camps made by Roma migrants and deport them back to Bulgaria and Romania over the summer 2010. Apart from the Commission's warnings that France might be in violation of EU law (notably the Free Movement Directive) the Commission's President Barroso for the first time evoked one of the common values from the treaty: "Human dignity is a sacred value of the EU"[161] he said and referred to the fact that national authorities who discriminate

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[160] Treaty on European Union, Article 2
[161] The statement of the President of the European Commission José Manuel Barroso at the Press conference after the European Council, 16.09.2010. Available on:

against ethnic groups in the application of EU law, are also violating the EU Charter of Fundamental Rights**.**

In particular, the legally binding EU Charter of Fundamental Rights will provide new opportunities that actors will be motivated to exploit. Policy-wise institutionalization can be measured in the future in terms of whether the EU rules and procedure become more binding and enforceable. The Court might reinforce its capacity to act as a bulwark of human and fundamental rights protection. It is expected that these "new rights" provide the foundation for subsequent litigation strategies at the national and EU level. This will make the policy process more open to activist movement.

Moreover, the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is likely to expand the meaning of EU law. According to constitutional lawyer Ciril Ribičič (2010, 122) "the accession to the ECHR is very important for the European Court of Human Rights and for the uniform and coordinated human rights protection all over Europe."

By submitting the Union's legal order fully and formally to the external judicial control, exercised by the European Court of Human Rights in Strasbourg, it is likely that judicial decisions will have the impact of developing this area and may even adapt rather abstract norms to concrete situations. Similar to the U.S. tradition, litigation at EU level will enable individuals and groups, who are disadvantaged within their own legal systems, to gain their rights at the highest 'federal' level.

Accession to the ECHR can be considered as the crowning achievement of European cooperation, which was evolving on two dimensions after the Second World War. It started within the Council of Europe with a rather too ambitious idea of the United States of Europe, which suffered setbacks and led to a more concrete area of protection of human rights and fundamental freedoms, which means that the European Court of Human Rights in Strasbourg "for the last forty years has been working as Europe's constitutional court" (Zupančič 2008, 353) and it has developed a "European Bill of Human Rights" (Zupančič 2008, 367). A 'parallel' European co-operation involved piecemeal progressing of European integration and EU institution-building, governing economic and

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http://www.youtube.com/watch?v=PRrdaAo32Ws&feature=youtube_gdata (Website accessed on 12/10/2010).

political cooperation through "concrete achievements", such as customs union, the internal market, the single currency etc.

As Ribičič accurately describes, human rights protection is now subject to the "European triangle: Constitutional Court – European Court of Human Rights – European Court of Justice" and the most important thing now is to establish a "keen competition to assert higher standards of rights protection for Europeans" (Ribičič 2010, 109).

It is a historical moment as these two rather separate, but very fruitful dimensions are now 'coming into play' in a way that brings the promise of developing the highest possible human and fundamental rights protection in the world. In the eyes of European citizens, the European Union might therefore become more 'popular' in particular by granting more rights to *individual* citizens. The EU political system might thus attain a higher level of political legitimacy and at the same time improve its visibility.

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13 POVZETEK

Doktorska disertacija *Vpliv Ustave Združenih držav Amerike na ustavni sistem Evropske unije* potrjuje izhodiščno tezo, da so večstoletne izkušnje ustavnega razvoja ZDA posredno in neposredno vplivale na proces konstitucionalizacije pravnega reda Evropske unije, torej na proces preoblikovanja ustanovnih pogodb EU v pravne akte ustavne narave. Teza temelji na relevantnih zgodovinskih virih, ki govorijo o ameriškem vplivu tako na proces evropskega povezovanja (zlasti s politično in finančno podporo ZDA), kakor tudi na t. i. ustavne trenutke Evropske unije, ki so pripeljali do ustavno-pravnega diskurza in do formalnega procesa konstitucionalizacije evropskega pravnega reda v okviru Konvencije o prihodnosti Evropske unije (odslej Evropska konvencija).

Empirična raziskava Evropske konvencije potrjuje *temeljno hipotezo* disertacije, da je ameriški ustavni sistem vplival zlasti na določbe, ki opredeljujejo vertikalno (EU - države članice) in horizontalno delitev oblasti (zakonodajna, izvršna in sodna veja). Poleg tega raziskava utemeljuje *posebno hipotezo*, ki trdi, da je bil vpliv ameriškega ustavnega sistema omejen zaradi drugačnih političnih in kulturnih razmer v Evropi, drugačnih aspiracij držav, ki se združujejo v Evropski uniji, in vpletenosti EU v ustavne sisteme držav članic, kar je nazadnje pripeljalo do prevzemanja ameriških ustavnih določb v močno prirejeni obliki.

Poleg zgodovinskih virov disertacija temelji na primarnih virih, ki osvetljujejo zakulisje Evropske konvencije in kažejo na analogijo s filadelfijsko ustavno konvencijo (odslej Ameriška ustavna konvencija), iz katere se je leta 1787 rodila Ustava ZDA. Cilj raziskovanja je bil torej osvetliti vsa področja ameriškega vpliva, zlasti z empirično raziskavo Evropske konvencije, v okviru katere so bili v času intenzivnega posvetovanja od februarja 2002 do julija 2003 objavljeni obsežni dokumenti, ki osvetljujejo stališča 220 konvencijskih delegatov.[162] Poleg konvencijskih dokumentov disertacija temelji na

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[162] Poleg predsednika in dveh podpredsednikov je Evropsko konvencijo sestavljalo 15 predstavnikov šefov držav in vlad držav članic (eden iz vsake države članice), 30 članov nacionalnih parlamentov (dva iz vsake države članice), 16 članov Evropskega parlamenta in dva evropska komisarja. Države kandidatke (Ciper, Češka, Estonija, Madžarska, Latvija, Litva, Malta, Poljska, Slovaška, Slovenija) so bile v celoti vključene v delo konvencije. Zastopane so bile enako kot tedanje države članice (en predstavnik vlade in dva člana nacionalnega parlamenta) in so lahko sodelovale pri delu, vendar pa niso mogle preprečiti, da bi države članice dosegle soglasje. Člane konvencije so lahko zaradi njihove odsotnosti zamenjali le nadomestni člani, ki so bili imenovani enako kot polnopravni člani. Predsedstvo konvencije so sestavljali: predsednik

ekskluzivnih intervjujih s predsednikom konvencije (Valéryjem Giscardom d'Estaingom), z obema podpredsednikoma (Giulianom Amatom in Jean-Lucom Dehaenom), s predstavniki vseh štirih sestavnih skupin konvencije in še z evropskimi sodniki ter uradniki EU, ki so bili vključeni v revizijo temeljnih pogodb EU. Raziskava kot ciljno skupino preučevanja obravnava vsako od štirih skupin konvencije (skupina vladnih predstavnikov, predstavniki nacionalnih parlamentov, člani Evropskega parlamenta in Evropske komisije), saj so omenjene štiri sestavne skupine konvencije zastopale vse zainteresirane strani (nacionalne oblasti, nadnacionalne institucije ter nevladne interesne skupine).

Tovrstni metodološki pristop (analiziranja vsake od ciljih skupin) tako predstavlja reprezentativni vzorec za utemeljitev stališč in oceno vplivov omenjenih skupin na končni dogovor v obliki Pogodbe o Ustavi za Evropo (odslej Evropska ustava). Pogovori z delegati konvencije tudi potrjujejo, da so se pogosto zgledovali po ameriški izkušnji, med njimi zlasti predsednik Giscard d'Estaing in pravni strokovnjaki, ki so pripravljali pogajalska izhodišča, v katerih so pogosto navajali ameriško ustavno prakso.[163]

V empirični raziskavi je opravljena tudi analizira pogajanj v okviru Evropskih svetov in Konference predstavnikov vlad držav članic (odslej Medvladna konferenca), ki so privedla do končnega dogovora v obliki Lizbonske pogodbe.

Disertacija dokazuje ameriški vpliv na desetih različnih področjih: politična in finančna podpora evropske integracije preko Marshallovega načrta; konstitucionalizacija EU

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in oba podpredsednika ter devet članov Konvencije, ki so bili izbrani izmed predstavnikov vseh vlad, ki so predsedovali Svetu v času konvencije, predstavnikov nacionalnih parlamentov, predstavnikov Evropskega parlamenta in predstavnikov Komisije. Trije predstavniki Ekonomskega in socialnega odbora s tremi predstavniki evropskih socialnih partnerjev, šest predstavnikov iz Odbora regij ter Evropski varuh pravic so bili povabljeni k udeležbi kot opazovalci. Predsednika Evropskega sodišča in Računskega sodišča sta bila prav tako povabljena, da nagovorita konvencijo.

[163] Pravni strokovnjaki Univerze v Firencah, ki so svetovali podpredsedniku Amatu, so se po navedbah Jacquesa Zillerja (v intervjuju z avtorico) pogosto zgledovali po Ustavi ZDA; na primer, pri predlogu o večinskem (in ne več soglasnem) načinu sprejemanja in ratifikacije pogodb (ta predlog ni dobil zadostne podpore); priprava zakonov in okvirnih zakonov (tudi ta predlog je bil bistveno preoblikovan) in predvsem pri delitvi pristojnosti (izključne pristojnosti Unije, deljene pristojnosti med Unijo in državami članicami, dopolnitveni ukrepi Unije).
Pravni svetovalec in sodnik Sodišča EU Koen Lenaerts je v intervjuju prav tako potrdil, da je kot svetovalec belgijskega predsedstva (ki je decembra 2001 sprejelo Laekensko izjavo s temeljnim mandatom Evropske konvencije) in pozneje kot svetovalec Predsedstva Evropske konvencije prispeval k vključitvi predlogov, ki so v Ameriški ustavi jasno opredeljeni, kot na primer načelo prenosa oblasti (*principle of conferral),* načelo primarnosti EU prava (*primacy of EU law)* in pri tem svetoval na podlagi izkušenj, ki jih je pridobil v času komparativnega študija na Harvard Univerzi.

pravnega reda preko sodne revizije po zgledu Vrhovnega sodišča ZDA; ustavodajna konvencija po zgledu filadelfijske ustavne konvencije; federalizem; vertikalna in horizontalna delitev oblasti; listina pravic; državljanstvo Unije; ustanovitev funkcije predsednika in prizadevanje za enotno evropsko vodstvo na mednarodnem prizorišču. Prvo področje ameriškega vpliva je utemeljeno z zgodovinskimi viri, ostala področja pa predvsem z empirično raziskavo.

1) Vpliv Marshallovega načrta na proces Evropske integracije

Prvo področje neposrednega ameriškega vpliva je bilo evidentirano neposredno po drugi svetovni vojni, ko so ZDA vplivale na evropsko integracijo z idejo »Združenih držav Evrope«[164] in jo politično in celo finančno podpirale (v obliki Marshallovega načrta, 1947). Zgodovinski viri dokazujejo, da je bil Marshallov načrt projekcija ameriškega korporativizma v Evropo in da je bil tako načrt v skladu z ameriškimi cilji izgradnje novega gospodarskega sistema doma in po svetu. Težnja sooblikovalcev Evropske unije po prevzemanju primerov dobre prakse od drugod in zlasti iz ZDA, je bila torej razumljiva glede na težavi položaj Evrope po dveh rušilnih vojnah.

2) Konstitucionalizacija pravnega reda EU in sodna revizija

Preoblikovanje evropskega pravnega reda v ustavno ureditev se umešča v svetovni trend v obdobju po drugi svetovni vojni, ko so tako številne države kot tudi naddržavne tvorbe sledile procesu razvoja ustavnih sistemov, katerega gonilo je bila zlasti sodna revizija. V tem obdobju se je sistem EU navdihoval tako po univerzalnih ustavnih atributih kot po Ustavi Združenih držav Amerike, kot najstarejši veljavni pisani ustavi v svetu. Po zgledu ameriškega Vrhovnega sodišča (ki je predvsem v času Vrhovnega sodnika Johna Mashalla v letih 1801-1835 utemeljilo ameriško ustavno pravo in utrdilo status sodišč kot sistema avtonomne veje oblasti) je Sodišče Evropske unije v dobrih petdesetih letih evropske integracije izoblikovalo temeljna ustavna načela; in sicer načelo primarnosti

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[164] Idejo Združenih držav Evrope je prvič uporabil književnik Victor Hugo v govoru na Mednarodnem mirovnem kongresu v Parizu leta 1949, pozneje, leta 1946 pa še Winston Churchill v odmevnem govoru v Zürichu.

prava EU[165], neposredne uporabnosti[166], neposrednega učinka[167] in varstva temeljnih pravic državljanov EU.

Zlasti pristojnost »predhodnega odločanja« daje Sodišču EU izključno pravico razlage pogodb, aktov EU institucij ter statutov organov EU. Sodišče s t. i. predhodnimi odločbami zavezuje vse akterje v procesu odločanja. Sodišče je ustanovne pogodbe EU v sodbi leta 1986 tako označilo za akte ustavne narave.[168]

Podobno kot ameriško Vrhovno sodišče tudi Sodišče EU deluje tako kot ustavno sodišče (ko presoja delitev pristojnosti med Unijo in državami članicami ali morebitno kršitev prava EU s strani držav članic ali institucij) kakor tudi kot vrhovno sodišče (ko razlaga pogodbe in akte Unije preko postopka za predhodno odločanje).

3) Ustavodajna konvencija

Sodišče Evropske unije je tako preko sodne revizije pogosto sprejemalo ustavne odločitve, ki bi jih moral demokratično sprejeti ustavodajni organ. Razlog za oblikovanje ustavodajne konvencije, po zgledu Ameriške ustavne konvencije, je bila torej predvsem potreba po kodifikaciji doseženega ustavnega razvoja.

Glede na vse večje očitke o demokratičnem deficitu naj bi ustavodajna konvencija zlasti z bolj transparentno razpravo in s širšo zastopanostjo interesov zapolnila vrzel v demokratični legitimnosti. V Evropsko konvencijo so bili tako vključeni neposredno izvoljeni člani Evropskega parlamenta in nacionalnih parlamentov ter imenovani predstavniki vlad držav članic in Evropske komisije. Ta okvir za revizijo pogodb je bil bistveno bolj demokratičen, kot je bila praksa dotlej v okviru Medvladnih konferenc (ki so vključevale le predstavnike držav članic – najprej diplomate, ministre in nato šefe držav ali vlad). Eden od ciljev Evropske konvencije je bil torej preko javne razprave *(ex-post)* doseči legitimnost evropske ustavne ureditve, ki se je brez vključitve ljudstva

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[165] V skladu z načelom primarnosti ima pravni red EU prednost pred pravom držav članic (Zadeva Costa vs Enel, 1964 in druge, gl. Avbelj 2009).
[166] Načelo neposredne uporabnosti zagotavlja, da se pravo EU uporablja enotno in istočasno za vse subjekte, na katere se nanaša, na teritoriju vseh držav članic (Zadeve Leonesio vs Italija, 1971 in druge, gl. Avbelj 2009).
[167] Načelo neposrednega učinka omogoča posameznikom (fizičnim in pravnim osebam), da se lahko neposredno sklicujejo na določbe pravnih aktov (Zadeva Van Gend & Loos, 1963 in druge, gl. Avbelj 2009).
[168] Zadeva C-294/83, Les Verts, 1986

razvila v več kot petdesetih letih povezovanja, kajti Evropska integracija se je preveč naslanjala samo na nacionalne države in premalo na državljane, nacionalne parlamente ter lokalne in regionalne skupnosti.

Vendarle pa je metoda medvladnega pogajanja (prevladujoča v zgodovini Evropske integracije) v veliki meri prevladala nad metodo ustavodajne konvencije, kar je zopet posebnost procesa odločanja na ravni EU. Zlasti po negativnem referendumu v Franciji (maja 2005), na Nizozemskem (junija 2005) ter na Irskem (junija 2008) se je pogajalska tehtnica prevesila v prid medvladnemu pogajanju in predvsem okrepila pogajalsko moč držav s problemi z ratifikacijo.

4) Federalizem

Federalna ureditev oziroma iskanje federalnega ravnovesja med Evropsko unijo in njenimi članicami se je vse od začetka evropskega povezovanja navdihovala pri ameriški izkušnji. Po zgledu ene najpomembnejših določb Ustave ZDA, po kateri so zvezna ustava in zakoni zveznega kongresa »vrhovno pravo države« *(Supremacy Clause),* so člani Evropske konvencije prvič vnesli v pogodbo določbo, da imajo »pogodbe in pravo EU prednost pred pravom držav članic«. To načelo primarnosti se povsem približa t.i. načelu *supremacije*, ki ureja odnose med zvezno in državno ravnijo v federalnih državah. Kljub temu, da je primarnost prava EU del ustaljene sodne prakse Sodišča EU (od leta 1964)[169], je bilo za nekatere evropske voditelje načelo preveč povezano s federalno ureditvijo in zato politično ni bilo sprejemljivo, da se eksplicitno vnese v Lizbonsko pogodbo in so jo tako dodali v prilogo.[170]

Vsekakor Evropska unija izraža federalne značilnosti v določbah, ki razmejujejo oblast med federalno (EU) ravnijo in oblastjo držav članic ter dvojno zastopanostjo preko Sveta (predstavljajoč vlade držav članic) in preko neposredno voljenega Evropskega parlamenta (zastopajoč državljane).

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[169] Zadeva C-64/64, Costa proti Enel, z dne 15. julija 1964
[170] Izjava o primarnosti je tako 16. od skupaj 65 izjav, ki so bile priložene Sklepni listini Medvladne konference, ki je sprejela Lizbonsko pogodbo: »Konferenca opozarja, da imajo v skladu z ustaljeno sodno prakso Sodišča Evropske unije pogodbe in pravo, ki jih Unija sprejme na podlagi Pogodb, prednost pred pravom držav članic, in sicer pod pogoji, določenimi v navedeni sodni praksi.«

Federalizem pa je tudi ena od najbolj kontroverznih ideologij evropskega povezovanja. Vse od Schumanove deklaracije 9. maja 1950, ki vsebuje predlog za Skupnost premoga in jekla, ki naj bi »pripeljal do uresničitve prvega dejanskega temelja Evropske federacije«[171] so bile federalne ideje vseskozi navzoče v evropskih federalističnih krogih. Mirovni kongres v Haagu leta 1948 je pod karizmatičnim vodstvom Churchilla ustanovil Evropsko gibanje, katerega cilj je bilo oblikovanje federalne Evropske unije. Vendar pa so ideje oblikovanja EU v skladu s federalno ureditvijo naletele na odpor zlasti zaradi nekritičnega zgledovanja po modelu, ki se je razvil v drugačnih razmerah različnih evropskih in ameriške federacije, kar se zrcali tudi v različni percepciji federalizma med različnimi narodi: medtem ko na federalizem v Veliki Britaniji in v nekaterih drugih evropskih državah gledajo kot na fragmentacijo, pa implicira popolno nasprotje v Nemčiji in Združenih državah Amerike.

Edinstveni model EU *sui generis* je torej kompromisna oblika zveze (nekje med klasičnim polom federacije in konfederacije), ki je izpeljana iz potreb in različnih interesov držav članic.

5) Vertikalna delitev oblasti

Nedvomna podobnost pri vertikalni delitvi oblasti v ZDA in EU je v tem, da nadnacionalna raven poseduje samo prenesene pristojnosti, medtem ko države članice ohranijo vse pristojnosti, ki s pogodbo niso dodeljene Uniji. Pri iskanju jasnejše razmejitve oblasti med nadnacionalno (EU) in nacionalno ravnjo so se delegati Evropske konvencije dokazano navdihovali po ameriški ureditvi, ko so prvič izrecno vnesli »načelo prenosa pristojnosti« *(principle of conferral),* ki omejuje pristojnosti Unije in določa, da za izvajanje pristojnosti Unije veljata načelo subsidiarnosti in sorazmernosti.

Pravni red EU se je pri oblikovanju načela subsidiarnosti neizpodbitno zgledoval po desetem amandmaju k ameriški ustavi, ki določa, da so pristojnosti, ki z ustavo niso dodeljene Združenim državam in tudi niso prepovedane državam, pridržane tem državam in njihovim državljanom. Načelo subsidiarnosti, ki je bilo v evropskih pogajanjih prvič omenjeno v sedemdesetih letih in formalno vneseno v Amsterdamsko pogodbo leta 1993,

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[171] Deklaracija z dne 9. maja 1950. Dostopno prek: http://europa.eu/abc/symbols/9-may/decl_sl.htm (12. oktober 2010).

je kot temeljno načelo omejitve naddržavne oblasti, torej oblasti EU, močno prevladovalo tudi v razpravah Evropske konvencije. V javnem mnenju držav članic je namreč vse bolj prevladoval občutek, da si »Bruselj« na tiho in samovoljno jemlje nove pristojnosti na račun držav in da je treba pristojnosti Evropske unije jasno razmejiti enkrat za vselej. Pogajanja so torej privedla do bistveno jasnejše razmejitve pristojnosti Unije v določbi, ki pravi, da »Unija deluje le v mejah pristojnosti, ki so jih s Pogodbama nanjo prenesle države članice za uresničevanje ciljev, določenih v Pogodbah. Države članice ohranijo vse pristojnosti, ki niso s Pogodbama dodeljene Uniji«.[172] Poleg tega Lizbonska pogodba prinaša bistveno podrobnejšo razlago načela subsidiarnosti in sorazmernosti.[173]

Ena od nalog Evropske konvencije je bila tudi odpraviti sive cone in jasno določiti *področja* pristojnosti med Unijo in državami članicami. Po zgledu Ustave ZDA, ki jasno razmejuje »federalno oblast« *(Federal Powers)* in »pristojnost držav« *(Powers of the States),* so člani Evropske konvencije prvič taksativno našteli a) področja na katerih ima Unija izključno pristojnost, b) področja, na katerih si Unija deli pristojnost z državami članicami, in c) področja, kjer je Unija pristojna le za izvajanje ukrepov za podporo, uskladitev ali dopolnitev ukrepov držav članic.[174] S tem pogodba jasneje določa meje pristojnosti organov Unije in preprečuje, da bi le-ti presegali svoja pooblastila z vmešavanjem v zadeve, ki jih je najbolje mogoče reševati na nacionalni, regionalni ali lokalni ravni.

Še več, na pobudo nekaterih evroskeptičnih držav članic je bilo v zadnji fazi medvladnega pogajanja v pogodbo prvič vneseno načelo (ki, mimogrede, ni dobilo politične podpore v času Evropske konvencije), da se lahko predstavniki vlad držav članic, ki se sestanejo na medvladni konferenci, odločijo »zmanjšati pristojnosti, dodeljene Uniji«.[175]

Nadalje so pogajanja prinesla še eno novost, ki pravzaprav nima primere v ameriškem sistemu in tako znova odraža posebnost evropskega sistema odločanja. Evropska konvencija je v proces odločanja na EU ravni prvič neposredno vključila organe zunaj dotedanjega sistema EU. Na podlagi t. i. sistema zgodnjega opozarjanja (»rumeni karton«) imajo nacionalni parlamenti osem tednov časa za ugovor, če menijo, da ni

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[172] Lizbonska pogodba, 5. člen Pogodbe o Evropski uniji.
[173] Lizbonska pogodba, Protokol (št. 2) o uporabi načel subsidiarnosti in sorazmernosti.
[174] Lizbonska pogodba, čl. 1-6 Pogodbe o delovanju Evropske unije.
[175] Lizbonska pogodba, Izjava (št 18) o razmejitvi pristojnosti.

primerno predlog obravnavati na ravni EU. Pri ugovoru vsaj tretjine nacionalnih parlamentov je tako mogoče predlog spremeniti ali umakniti. Za nekatere države članice to ni bilo dovolj in so v zadnji fazi pogajanj predlagale še »oranžni karton«, ki v primeru, če več kot polovica nacionalnih parlamentov nasprotuje osnutku zakonodajnega akta, Komisijo obvezuje, da utemelji skladnost z načelom subsidiarnosti in ga predloži Svetu in Evropskemu parlamentu. V praktičnem smislu to pomeni, da lahko večina (55%) članov Sveta ali navadna večina v Evropskem parlamentu izniči zakonodajni predlog Komisije. Z okrepitvijo vloge nacionalnih parlamentov so tako oblikovalci evropskega sistema oblasti ugodili predvsem zahtevam nacionalnih parlamentov, ki so v času Evropske konvencije opozarjali na nedopustno vrzel, ki je nastala s prenosom vedno več pristojnosti na nadnacionalno (evropsko) raven, v katero so vključene vlade držav članic, medtem ko nacionalni parlamenti niso bili neposredno vključeni v proces odločanja in so lahko le opazovali izvrševanje zakonodaje z neposrednim učinkom.

Glede na to, da je proces odločanja na ravni Unije temeljil predvsem na medvladnem sodelovanju, je bila premajhna vloga namenjena tudi neposrednemu vplivu državljanom, kar so delegati Evropske konvencije delno popravili z uvedbo »državljanske pobude«, ki prinaša možnost, da lahko državljani (v primeru, da zberejo najmanj milijon podpisov) Evropsko komisijo pozovejo, naj predloži nov zakonodajni predlog na področju politike v okviru izvajanja temeljnih pogodb.

Vertikalna delitev oblasti med Unijo in državami članicami se je tako razvila v kompleksno strukturo, ki odraža različne interese med državami članicami v procesu povezovanja. Sedanji sistem delitve oblasti je torej kompromisna oblika med interesi zagovornikov nacionalne suverenosti ter zagovorniki prenosa večjega dela suverenosti na naddržavni sistem medvladnega sodelovanja.

6) Horizontalna delitev oblasti

Poleg obsega naddržavne (EU) oblasti je člane Evropske konvencije zelo zaposlovalo tudi vprašanje horizontalnega razmerja med zakonodajno, izvršno in sodno oblastjo na EU ravni. Kljub temu, da se je Evropska unija z oblikovanjem t. i. institucionalnega trikotnika

(Komisija, Svet, Parlament) zgledovala po modelu *trias politica* v Ustavi ZDA,[176] pa je bilo prevzemanje spet preoblikovano na način, ki je bolj ustrezal evropski politični tradiciji. Oblikovalci evropske ustavne ureditve so namreč pazili, da niso ustvarili močnih organov oblasti kot v primeru ZDA (Kongres, Predsednik, Vrhovno sodišče) in so tri veje oblasti raje razmejili po *funkciji* izvajanja oblasti (zakonodajna, izvršna in sodna funkcija) in v vsako od teh funkcij vključili različne nacionalne in nadnacionalne institucije. Tako se zakonodajna funkcija na ravni EU odvija skoraj popolnoma preko institucij EU (Komisija ima monopol predlaganja osnutkov zakonodaje, Parlament pristojnost predlaganja amandmajev in Svet ključno vlogo v zakonodajnem postopku), izvršno funkcijo si delijo Komisija in države članice, sodno funkcijo pa si delijo Sodišče EU in nacionalna sodišča.

Tovrstna razmejitev kaže na vpliv evropske politične filozofije delitve oblasti po funkciji (Montesquieu), pri čemer je v izvajanje vsake od funkcij vključenih več organov oblasti. To je privedlo do preoblikovanega prevzemanja določb in razvilo edinstveni fenomen (brez primere v ZDA), in sicer prisotnost vertikalne dimenzije v horizontalni delitvi oblasti. Na t. i. izvršni ravni so namreč države članice pristojne za uresničevanje EU zakonodajnih aktov in ne zvezna oblast, kot je to v primeru ZDA. Primer kaže tudi na vpliv nemškega koncepta t. i. izvršnega federalizma, v skladu s katerim Bundestag sprejme zakonodajne akte, ki jih nato implementirajo (izvajajo) nemške zvezne dežele (Länder). Prav tako so v primeru sodne veje oblasti nacionalna sodišča zadolžena za uveljavitev evropskega prava, in Sodišče EU po postopku predhodnega odločanja izda zavezujoče prehodne odločbe samo, kadar imajo nacionalna sodišča težave z interpretacijo.

Tudi t. i. sistem »zavor in ravnovesij« *(checks and balances)* se je v preoblikovani različici odrazil v Lizbonski pogodbi, ko se je predsednik konvencije Giscard d'Estaing zgledoval po ameriški ustavni ureditvi, ki zahteva »mnenje in soglasje« *(advice and consent)* Senata za predsednikove odločitve.[177] V tem duhu je tako Evropska konvencija

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[176] Prvi trije členi Ustave ZDA nedvoumno opredeljujejo organe zakonodajne, izvršne in sodne vejo oblasti: »Vsa z Ustavo dodeljena zakonodajna Oblast se prenese na Kongres Združenih fržav, ki ga tvorita Senat in Predstavniški Dom« (Člen 1, Razdelek 1). »Izvršilna Oblast se prenese na Predsednika Združenih Držav Amerike« (Člen 2, Razdelek 1). »Sodna Oblast Združenih držav se prenese na eno vrhovno Sodišče in na tista nižja Sodišča, ki jih sme od časa do časa odrediti in ustanoviti Kongres« (Člen 3, Razdelek 1). (Vsi navedki iz prevoda Ustave ZDA, Toplak 2006).
[177] Ameriški predsednik ima z ustavo pristojnost imenovati ljudi na vodilna mesta v izvršni veji oblasti, senat pa ima možnost, da se z njimi ne strinja ali jih zavrne. Podobno ima predsednik možnost sklepanja

predlagala, naj bo odslej potrebno soglasje Evropskega parlamenta za imenovanje predsednika Evropske komisije, kakor tudi za mednarodne sporazume.

Giscard d'Estaing se je navdihoval po ameriški ustavi tudi ko je predlagal ustanovitev dvodomnega sistema, t. i. kongresa evropskega ljudstva, ki bi združeval parlamentarce nacionalnih parlamentov (zastopnike ljudstva) in člane Evropskega parlamenta (zastopnike držav). Predlog je bil zavrnjen zlasti zaradi šibke vloge zgornjih domov parlamenta v nekaterih državah članicah (House of Lords v Veliki Britaniji in Sénat v Franciji). Pozneje pa je ideja dvojne zastopanosti ljudstva in držav vseeno v prirejeni različici našla svoje mesto v eni od določb Evropske ustave (ohranjene v Lizbonski pogodbi), in sicer v t.i. sistemu dvojne kvalificirane večine, v skladu s katerim se odločitev na ravni EU sprejme, če jo podpre 55 % članov Sveta (zastopnikov držav članic), ki predstavljajo vsaj 65 % evropskega prebivalstva. Po Giscardovem mnenju to načelo dvojne legitimnosti zrcali ameriško ureditev Kongresa, kjer so v Predstavniškem domu zastopani interesi ljudstva, v Senatu pa interesi zveznih držav.

Z vsako revizijo EU pogodb je v proces sprejemanja in implementacije odločitev vključenih več akterjev, kar je evropski ustroj razvilo v model *sui generis*, brez primere v federacijah, konfederacijah ali mednarodnih organizacijah.

7) Listina pravic

Delegati Evropske konvencije so se prav tako zgledovali po ameriški tradiciji dopolnitve ustave z določbami o človekovih pravicah. Podobno kot je v ameriškem primeru nekaj držav zavračalo ratifikacijo ustave, dokler jim ni bilo zagotovljeno, da bo ustava dopolnjena z določbami o pravicah *(Bill of Rights)*, se je Nemčija (na podlagi svaril nemškega ustavnega sodišča) uprla kakšnemu koli prenosu dodatnih pristojnosti na raven EU brez zagotovil o varovanju temeljnih pravic. Evropska konvencija o človekovih pravicah je leta 2000 tako sprejela Listino Evropske unije o temeljnih pravicah, eden od glavnih predlogov Evropske konvencije pa je bil vključitev listine v temeljne pogodbe kot pravno zavezujočega dela.

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mednarodnih pogodb s tujimi državami, vendar mora te pogodbe potrditi senat. Predsednik lahko da veto na sprejeti zakon, vendar ga kongres lahko z dvema tretjinama članov kongresa preglasuje (Ustava ZDA, 2.člen).

Vpliv ameriške sodne prakse varovanja človekovih pravic pa je bilo zaznati že prej, in sicer preko Evropskega sodišča za človekove pravice v Strasbourgu (varuha Evropske konvencije o človekovih pravicah), ki je uveljavljalo precedense iz sodne prakse Vrhovnega sodišča ZDA. Glede na to, da se je Sodišče EU v Luksembourgu pogosto sklicevalo na sodbe Evropskega sodišča za človekove pravice, to pomeni, da je posredno sprejemalo standarde varovanja človekovih pravic iz ameriške sodne prakse. Sistem varstva pravic se bo še okrepil s pristopom EU k Evropski konvenciji o človekovih pravicah, kar prav tako omogoča Lizbonska pogodba.

Evropa je tako razvila raznovrstni sistem varstva človekovih svoboščin in pravic, ki je v mnogočem celo avantgarden, zlasti na socialnem področju. Poleg tega je EU spodbujala boj zoper nacionalizem, ksenofobijo in nestrpnost do vsakršnih manjšin. Delno se to načelo strpnosti v vsestranski raznolikosti zrcali tudi v sloganu »združeni v raznolikosti«, čeprav je bil ta pozneje skupaj z ostalimi simboli, kot so zastava, himna, minister, zakoni odpravljen iz predloga Evropske ustave, saj so za večino voditeljev držav to atributi državnosti insimbolno nakazujejo na nastanek nad-države.

8) Državljanstvo Unije

Potreba po državljanstvu Unije ne glede na nacionalnost je sledila zgledu dvojnega državljanstva, ki je prav tako inovacija Ameriške ustavne konvencije. Razlog za uvedbo možnosti, da so Američani tako državljani ZDA kot države, v kateri prebivajo, je bila potreba po zagotovitvi enakih pravic za vse državljane unije. Podobno institut državljanstva Evropske unije, ki je bil uveden Maastrichtsko pogodbo (1993), pomeni, da vsi državljani držav članic avtomatično pridobijo tudi status državljana Unije, na katerega so vezane nekatere pravice, zagotovljene za vse evropske državljane. Institut državljanstva EU zahteva od države članice, da na področjih, ki spadajo v vsebinsko pristojnost prava EU, državljanov drugih držav članic, ki legalno bivajo na njenem ozemlju, ne smejo obravnavati slabše kot lastne državljane. Predvsem preko sodne prakse Sodišča EU je bilo doseženo, da je vsaj na področjih, ki spadajo v pristojnost Unije, diskriminacija na podlagi državljanstva prepovedana.

Ena od glavnih nalog Evropske konvencije je bila okrepiti vezi med Unijo in njenimi državljani, ki naj bi bili postavljeni v središče evropskih politik. Na pobudo Evropske

konvencije tako Lizbonska pogodba v mnogih pogledih spreminja paradigmo, ko državljane (in ne več držav članic in institucij) obravnava kot subjekt politik, načel in dolžnosti Evropske unije.

Ta prehod od koncepta držav kot subjektov evropskega prava (značilnega za mednarodne pogodbe) k neposrednemu naslavljanju državljanov kot nosilcev pravic in dolžnosti vezanih na EU pravo prinaša bistveno simbolno spremembo z ustavno dimenzijo.

9) Predsedništvo

Na člane Evropske konvencije so vplivale tudi Kissingerjeva opazka in mednarodne kritike, da Evropa ne govori z enotnim glasom, na katere so se odzvali z ustanovitvijo novih funkcij predsednika Evropskega sveta in visokega predstavnika Unije za zunanje zadeve in varnostno politiko.

Vendar pa komparativna analiza pokaže, da imata funkciji predsednika zelo malo skupnega. Medtem ko ima ameriški predsednik široko paleto izvršilnih pooblastil, predsednik Evropskega sveta skrbi le za pripravo in kontinuiteto dela Evropskega sveta z iskanjem soglasja med voditelji držav članic, in nima pravne odgovornosti (v nasprotju z ameriškim predsednikom ne priseže pred ustavnim sodiščem).

Poleg tega Evropski svet kot polnopravna institucija nima primere v ustavnem sistemu ZDA ter je prav tako zunaj ustavnega sistema EU in s tem zunaj pravne odgovornosti. Evropski svet je bil oblikovan v sedemdesetih letih kot politični organ, v okviru katerega so najvišji izvoljeni politični predstavniki držav članic (predsedniki vlad ali predsedniki držav članic z izvršilnimi pooblastili) sprejemali politične usmeritve in določali prednostne naloge EU.

Predlog Evropske ustave in končno Lizbonska pogodba torej deloma povečuje kompleksnost evropskega procesa odločanja, zlasti zaradi novih političnih organov, izven klasičnega ustavnega okvira.

10) Prizadevanja za enotno evropsko vodstvo na mednarodnem prizorišču

Enotno nastopanje Evropske unije na mednarodnem prizorišču je bil močan idejni cilj vse od začetka evropske integracije in se je bistveno okrepil zlasti v času globalizacije, ki je močneje pokazala na potrebo po oblikovanju Evrope kot globalne sile. Vendar pa je prav to področje povezano s prenosom prerogativ suverenosti, ki jih države članice najtežje prenesejo na naddržavno raven, in sicer področje zunanje in varnostne politike.

Posledica tega je, da bilateralna diplomacija ostaja prevladujoča v mednarodnih odnosih, države članice ostajajo individualne članice Združenih narodov in Francija ter Velika Britanija ohranjata svoj sedež v Varnostnem svet OZN, čeprav so se zelo pojavljale zamisli o enotnem sedežu EU.

Raziskava ugotavlja, da je na končni kompromis evropske ustavne ureditve (kot trenutno obstaja v skladu z Lizbonsko pogodbo) vplivala vrsta dejavnikov, na primer t.i. *endogeni* (notranji) izzivi: prevladujoča vloga predsednika konvencije z možnostjo določanja agende *(agenda setting),* različne preference delegatov glede na njihovo institucionalno pripadnost (poslanci nacionalnih parlamentov, vladni predstavniki, nadnacionalni akterji). Poleg tega so bile v času konvencije in zlasti v procesu medvladnih pogajanj in ratifikacije zelo močne *eksogene* (zunanje) omejitve: EU institucije so vseskozi narekovale nadnacionalno perspektivo, medtem ko so voditelji držav članic večinoma zagovarjali suverenost držav, zlasti po tem, ko so evropski državljani izrazili nezadovoljstvo na referendumih.

Za oblikovalce ustavne ureditve je bil torej največji izziv delovati v okviru omejitev obstoječega političnega konteksta in tako ne preseči mandata, ki je obsegal oblikovanje delujoče ustavne ureditve za Unijo suverenih držav in ne za uniformno nacijo.

Disertacija se pri iskanju razlogov za t. i. preoblikovano prevzemanje določb ameriške ustave opira na teoretične modele evropske integracije in na ustavne teorije. Osrednji analitičen pristop disertacije se osredotoča na akterje in njihove motive v ozadju določenih odločitev, zato teorije o funkcionalizmu in neo-funkcionalizmu za to raziskavo niso posebej relevantne, ker evropsko integracijo večinoma obravnavajo kot gospodarsko in tehnično sodelovanje s samodejnim prelivanjem (*spill-over*) iz enega sektorskega

področja na drugega zaradi medsebojne prepletenosti.

Empirična raziskava dokazuje, da je do bistvenega zasuka od ekonomske in politične integracije do ustavnega diskurza prišlo v obdobju t. i. evro-skleroze (inercija institucij, nevarnost blokade sprejemanja odločitev po največji širitvi EU, demokratični deficit, izzivi globalizacije), kar je ustvarilo enega najpomembnejših ustavnih trenutkov v zgodovini evropske integracije in privedlo do ustanovitve Evropske konvencije z mandatom konstitucionalizacije pogodb EU.[178]

Za pojasnitev *razlogov* za zgledovanje po Ameriški ustavi ima veliko pojasnjevalno moč predvsem teorija historičnega institucionalizma, saj so delegati Evropske konvencije iskali zglede ameriške prakse predvsem na tistih področjih, ki so se na evropski ravni izkazala za neučinkovita in zahtevala spremembe. V skladu s historičnem institutionalizmom poglabljanje integracije ustvarja asimetrična razmerja moči, pri čemer nekatere institucije ustvarjajo »pozitivni odziv« (*positive feedback*) in utrjujejo obstoječi sistem in politike, medtem ko druge izzovejo »negativni odziv« (*negative feedback*), ki ustvarja pritisk po institucionalni spremembi. Tako je na primer postopek reforme pogodb EU preko Medvladnih konferenc doživel toliko kritik javnosti (zaradi tajne narave konferenc) in strokovnih krogov (zaradi pogajanja v slogu kravjih kupčij), da je privedel do sklica ustavodajne konvencije z bolj pluralistično zastopanostjo in s transparentnejšim načinom odločanja preko javne razprave. V mandatu Evropske konvencije za reformo evropskega sistema pa lahko opazimo še druga področja, ki so se izkazala za neučinkovita in so zahtevala reformo, na primer nejasna delitev pristojnosti med EU in državami članicami, slabo delovanje šestmesečnih rotirajočih predsedovanj Uniji in s tem neenotno nastopanje EU na mednarodnem prizorišču.

Historični institucionalizem tudi pojasni posledice asimetričnega razvoja institucij, kar pomeni, da se po eni strani nekatere vedno bolj krepijo *(self-reinforcing institutions)* na drugi strani pa nekatere institucije same sebe spodkopavajo s slabim delovanjem *(self-undermining institutions)*. V skladu s tem modelom raziskava pojasnjuje vedno večjo moč Evropske komisije in Evropskega parlamenta, zlasti v času Evropske konvencije, ko sta

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[178] Laekenska izjava o prihodnosti Evrope, sprejeta na Evropskem svetu decembra 2001, je odprla številna ključna vprašanja glede prihodnosti EU, med drugim tudi možnost "Ustave za evropske državljane". Dostopno prek: http://www.evropa.gov.si/si/lizbonska-pogodba/ustava-za-evropo/konvencija-za-prihodnost-evrope/laekenska-izjava-o-prihodnosti-evrope/ (12. oktober 2010).

bili ti dve instituciji tako rekoč prvič enakovredno zastopani za pogajalsko mizo, katere cilj je bil revizija temeljnih pogodb EU, kar jim je bilo pred tem onemogočeno (v okviru Medvladnih konferenc). To pomeni, da se evropske vlade prvič v zgodovini evropske integracije enakopravno delile nalogo revizije temeljnih pogodb s predstavniki nadnacionalnih institucij (Evropskega parlamenta in Komisije) in s predstavniki nacionalnih parlamentov.

Na vseh problematičnih področjih je bila torej Evropska unija odprta za vplive drugih ustavnih praks. Delegati Evropske konvencije so se v veliki meri zgledovali po ameriški ustavni tradiciji, vendar pa ustavnih določb niso dobesedno prepisali, temveč temeljito preoblikovali. Pri pojasnjevanju t.i. *transformiranega* prevzemanja nekaj izhodišč ponuja teorija medvladnega pristopa (*intergovernmentalism*), teorija liberalnega intergovernmentalizma in predvsem teorija transnacionalnega ustavnega prevzemanja. Predvsem (liberalni) intergovernmentalizem pojasnjuje razloge za preoblikovano prevzemanje, saj je vsaka odločitev je morala skozi večstopenjsko pogajanje s številnimi akterji: na prvi stopnji se izoblikujejo nacionalne preference, ki se na drugi stopnji soočijo v medvladnih pogajanjih med državami z različno relativno pogajalsko močjo; v tretji fazi nastopi oblikovanje odločitev in nadnacionalnih institucij predvsem z namenom zmanjšanja stroškov meddržavnega dogovarjanja, boljšega dostopa do informacij in izboljšanja kredibilnosti meddržavnih dogovorov. Pogajanja za Evropsko ustavo in pozneje Lizbonsko pogodbo so se torej odvijala skoraj deset let na različnih nivojih, v katera so bili vključeni delegati Evropske konvencije, voditelji držav članic in celo evropski državljani preko referenduma.

Ustavni temelji evropske oblike vladanja so bili torej izklesani iz napetosti med nacionalnimi in nadnacionalnimi silami in ob soočenju dveh nasprotujočih si vizij o evropskem ustroju: na eni strani težnje zagovornikov unije kot federalne države in na drugi strani zagovornikov unije z značilnostmi »komunitarnega modela« (metoda odločanja, po kateri Komisija, Svet in Parlament sodelujejo pri sprejemanju zakonodaje in uživajo politično avtonomijo in avtoriteto) in medvladnega sodelovanja (v katerem prevladujejo tradicionalne države, ki ohranijo suverenost in medsebojno sodelujejo na določenih področjih).

Delno razloge za prevzemanje ustavnih načel pojasnjuje tudi teorija transnacionalnega

ustavnega prevzemanja, ki prinaša dokaze o svetovnem trendu pretoka in prevzemanja univerzalnih ustavnih načel in predvsem vplivu ameriške ustave, ki je v več kot dvesto letih služila kot podlaga številnim piscem ustav.

Vendar pa omenjeni teoretični modeli ne pojasnijo temeljnega razloga za *transformirano* prevzemanje ameriških ustavnih določb.

Glavna ugotovitev disertacije je v tem, da predvsem različen *ratio constitutionis (finalité ultime)* oziroma končni cilj ustavne reforme pojasnjuje, zakaj je konstitutionalizacija privedla do dveh različnih sistemov na obeh straneh Atlantika. Medtem ko so oblikovalci Ustave ZDA skovali ustavo, kjer pred tem nobena ni obstajala, za »en narod pod Bogom, nedeljiv« (kot pravi slovesna zaobljuba zvestobe Združenim državam Amerike), so evropski ustavodajalci oblikovali ustavni sistem v kontekstu že obstoječih ustavnih tradicij držav članic in temelje ustavne ureditve postavili na načelo »združeni v raznolikosti«.

Iz tega izhaja t. i. teorija transformiranega oziroma kontekstualnega prevzemanja, ki trdi, da je osnovni razlog za t. i. preoblikovano prevzemanje določb Ustave ZDA torej v tem, da si Evropska unija ne prizadeva postati uniformna nacija, ampak se je razvila v obliko mednacionalnega vladanja (kot politična skupnost z nadnacionalnimi institucijami). S sprejetjem in ratifikacijo Ustave ZDA so države začele delovati kot nacija, medtem ko države članice EU še vedno delujejo kot suverene države, ki so prenesle ali delegirale le del prerogativ suverenosti na EU za uresničevanje svojih skupnih ciljev.

Medtem ko po eni strani raziskava kaže na to, da se je evropska ustavna struktura občutno navdihovala po ameriški ustavni ureditvi, je po drugi strani bistveno različen *ratio constitutionis* vodil člane Evropske konvencije in voditelje držav članic do preoblikovanja nekaterih ameriških ustavnih določb na način, ki je bolj ustrezal specifični evropski obliki vladanja, brez oblikovanja nad-nacionalne države. Prav to poudarja posebnost evropskega ustavnega eksperimenta, katerega namen je najti najboljši dogovor za služenje skupnemu interesu držav članic, ki so globoko ukoreninjene nacije in ki ne želijo mutirati v evropsko federalno državo. Nacionalne države ustanoviteljice Evropske unije želijo ostati nosilke državnosti in simbolov nacionalne identitete.

Evropski pravni red se je torej razvil v hibridni sistem med ustavo in mednarodno pogodbo, z značilnostmi, ki kažejo tako na ustavno naravo (načelo *supremacije* oz. načelo primarnosti prava EU, načelo avtonomnosti prava EU, neposredne uporabnosti, neposrednega učinka in varstva temeljnih pravic državljanov EU), kakor tudi na značilnosti mednarodne pogodbe (države članice kot »visoke pogodbenice« in ustanoviteljice EU, struktura mednarodne pogodbe, možnost prostovoljnega izstopa iz Unije, možnost okrepljenega sodelovanja, ki lahko pripelje do Unije dveh hitrosti, soglasna ratifikacija revizij pogodbe).

Tako lahko povzamemo, da je evropski pravni sistem po svojem izvoru, strukturi in načinu sprejetja ter revizije podoben mednarodni pogodbi, po načinu delovanja oziroma učinkovanja pa ustavi.

Proces integracije suverenih držav z globoko ustaljeno nacionalno identiteto in lastno ustavno tradicijo je tako izoblikoval evropsko ustavno ureditev *sui generis*, po eni strani jasno razmejeno od pravne ureditve držav članic, po drugi strani pa razmejeno od mednarodnega prava.

Ratio constitutionis evropskega povezovanja je tudi temeljno izhodišče za napoved vplivov ameriške ustavnosti v prihodnje, ko bodo dozoreli pogoji za naslednje korake konstitucionalizacije Evropske unije. Evropski pravni red se je razvil postopoma na priraščen način, zato lahko v luči ponesrečenega poskusa prehitre vzpostavitve evropske ustave pričakujemo, da se bo postopen razvoj nadaljeval tudi v prihodnje, in sicer v okviru *obstoječega* ustavnega okvira. Predvsem Sodišče EU preko sodne revizije razširja projekt integracije, s tem ko deluje kot arena za transnacionalno politično dejavnost nacionalnih in nadnacionalnih akterjev. Vsesplošno je namreč znano, da je aktivizem Sodišča EU v sedemdesetih letih preoblikoval Rimsko pogodbo iz mednarodne pogodbe (ki je urejala gospodarsko sodelovanje med državami) v »kvazi supranacionalno ustavo«, ki podeljuje številne pravice individualnim državljanom.

Zanimivo bo torej spremljati kako bodo evropske elite, nacionalne izvoljene elite, politične stranke in interesne skupine strateško izkoristile sodišče za to, da bo dosežen napredek na področju določene politike in da se bodo obenem izoblikovale kredibilne zaveze za določen tip političnega razvoja.

Ameriški ustavni razvoj, ki se je dopolnjeval in izgrajeval skozi dve stoletji, ponuja nekaj hipotez za prihodnji ustavni razvoj na ravni Evropske unije. V zgodnjem devetnajstem stoletju je ameriško Vrhovno sodišče veljalo za branik »odločujoče manjšine federalistov«. Ameriški ustavni razvoj pozna tudi dolgo tradicijo gibanj, s katerimi so marginalne skupine koristno uporabljale sodišča za oporekanje obstoječi vladni strukturi. Najbolj znana so gibanja za državljanske pravice (na primer glede segregacije v šoli), in socialna gibanja (na primer ameriško delavsko gibanje, ženska gibanja, gibanja za socialno blaginjo ter gibanja za pravice živali). Napredek ameriškega Vrhovnega sodišča v razvoju državljanskih pravic in svoboščin je obenem odražal spremenljivo politično klimo in razvijajočo se regulativno državo.

V Evropski uniji lahko pričakujemo, da bodo nad-nacionalne elite in interesne skupine strateško uporabile sodišče zlasti za napredek v varstvu človekovih pravic in svoboščin.

Prvič, veliko vprašanj se postavlja v zvezi z »vrednotami Unije«, ki so prvič izrecno navedene v Lizbonski pogodbi, kar pomeni, da državljani črpajo svoje pravice iz skupnega kataloga vrednot: »Unija temelji na vrednotah spoštovanja človekovega dostojanstva, svobode, demokracije, enakosti, pravne države in spoštovanja človekovih pravic, vključno s pravicami pripadnikov manjšin«.[179] Praktičen primer za opazovanje, kako lahko politični akterji uporabijo navidez abstraktne vrednote v konkretnih situacijah, se je ponudil poleti 2010, in sicer po odločitvi Francije o zrušitvi romskih naselij in vrnitvi Romov v Bolgarijo in Romunijo. Poleg opozoril Komisije glede kršitve Direktive o prostem pretoku, je zgovoren nastop predsednika Barrosa, ki se je prvič skliceval na eno od skupnih vrednot pogodbe, ko je poudaril, da je »človekovo dostojanstvo sveta vrednota Evropske unije« in da nacionalne avtoritete, ki diskriminirajo etnične skupine pri izvrševanju evropskega prava kršijo tudi Listino EU o temeljnih pravicah.

Drugič, na področju pravno zavezujoče Listine EU o temeljnih pravicah lahko v prihodnje merimo, v kolikšni meri se bo to področje institucionaliziralo v smislu zavezujočih pravil in procedur EU. Sodišče EU bo s pogumno, ustvarjalno in razvojno razlago določb v korist razvoja človekovih pravic še okrepilo pozicijo branika človekovih

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[179] Pogodba o Evropski uniji, Člen 2.

pravic in temeljnih svoboščin. Upravičeno je torej pričakovati, da bodo te »nove« pravice služile kot podlaga za sodne postopke na nacionalni in evropski ravni, kar bo prispevalo k dvigovanju ravni njihovega varstva.

Tretjič, pristop Evropske unije k Evropski konvenciji o varstvu človekovih pravic (EKČP) in temeljnih svoboščin bo vnesel novo dimenzijo v pravno ureditev EU. Po mnenju ustavnega pravnika Cirila Ribičiča je pristop k EKČP »velikega pomena za Evropsko sodišče za človekove pravice in za enotno usklajeno varstvo človekovih pravic v vseh evropskih državah« (Ribičič 2010, 122).

S formalno podreditvijo evropskega pravnega reda zunanjemu pravnemu nadzoru, ki ga izvaja Evropsko sodišče za človekove pravice v Strasbourgu, je upravičeno pričakovati, da bodo pravne odločitve to področje razvile v smeri prilagoditve navidezno abstraktnih pravic v konkretne odločitve. Podobno kot je praksa v Ameriki, bodo sodni spori na ravni EU posameznikom in interesnim skupinam, ki so prikrajšani v svojem pravnem sistemu, omogočili uveljavitev pravic na višjem, t. j. federalnem nivoju.

Pristop Evropske unije k EKČP lahko označimo za »krono« evropskega sodelovanja, ki se je po drugi svetovni vojni praktično razvijalo na dveh ravneh. Sodelovanje se je najprej začelo v Svetu Evrope s precej ambicioznimi idejami o Združenih državah Evrope, kar je naletelo na odpor in posledično ubralo bolj konkretno področje varstva človekovih pravic in svoboščin. Po mnenju Boštjana M. Zupančiča, sodnika Evropskega sodišča za človekove pravice, je to sodišče zadnjih petdeset let delovalo kot evropsko ustavno sodišče in razvilo »Evropski katalog človekovih pravic«. Tako rekoč vzporedno evropsko sodelovanje se je razvijalo postopoma v okviru Evropske unije, in sicer z gospodarskim in političnim sodelovanjem preko »konkretnih dosežkov« (kot na primer carinska unija, skupni trg, skupna valuta ipd.).

Kot ugotavlja Ribičič je varstvo človekovih pravic odvisno od razmerij znotraj evropskega trikotnika: Ustavno sodišče - Evropsko sodišče za človekove pravice v Strasbourgu - Evropsko sodišče v Luksemburgu, pri čemer je zdaj pomembno »tekmovanje v tem, katero bo uveljavilo višje standarde varstva pravic Evropejcev« (Ribičič 2010, 125).

Pravzaprav gre za zgodovinski dogodek, ko se ti dve navidez ločeni, pa vendarle zelo uspešni dimenziji evropskega sodelovanja združujeta na način, ki prinaša obete o razvoju najvišje možne ravni varstva človekovih pravic in svoboščin na svetu. V očeh evropskih državljanov lahko tako Evropska unija pridobi na popularnosti zlasti z dodelitvijo več pravic posameznim državljanom. Evropski politični sistem lahko na ta način izboljša tudi politično legitimnost in razpoznavnost.