

## *Soft Institutions*

ANTJE WIENER\*

### INTRODUCTION<sup>1</sup>

James Tully points out that the social dimension that expressed the “customary” in ancient institutions has been eliminated with arguable success from modern institutions.<sup>2</sup> “[T]he Greek term for constitutional law, *nomos*, means both what is agreed to by the people and what is customary.” It comprises “the fundamental laws that are established or laid down by the mythical lawgiver and the fitting or appropriate arrangement in accord with the preceding customary ways of the people.”<sup>3</sup> Constitutional law, then, entails two types of practices; the first entails the process of reaching an agreement about the definition of the core principles, norms and procedures which guide and regulate behaviour in the public realm of a polity. The second type of practice refers to day-to-day interaction in multiple spaces of a community. Both types of practices are interactive and by definition social; as such they are constitutive for the “fundamental laws, institutions and customs” recognised by a community.<sup>4</sup> I will call the former ‘*organisational*’ and the latter ‘*cultural*’ practices. It can therefore be argued that ancient constitutionalism encompasses the social constitution of the *nomos*. In turn, modern constitutions are designed to provide

\* Antje Wiener holds the Chair in International Relations at the School of Politics, International Studies and Philosophy and is the Director of the Jean Monnet Centre of Excellence at the Queen’s University of Belfast.

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<sup>2</sup> See J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995), 59.

<sup>3</sup> See Tully, above n 2, 60.

<sup>4</sup> *Ibid.*

guidelines for the organisation of a polity.<sup>5</sup> Tully therefore proposes to reconstruct multicultural dialogues by “looking back to an already constituted order under one aspect and looking forward to an imposed order under the other.”<sup>6</sup> To accommodate diversity based on cultural recognition, the customary dimension needs to be brought back in.

This chapter highlights the impact of the societal underpinning of evolving constitutional law beyond the State. In doing so, it builds on Tully’s insights and, indeed, shares the now increasingly familiar view that “the problems of the European Constitution are simply reflections of the limits of national constitutionalism”<sup>7</sup>. It differs, however, from Tully’s focus on accommodating cultural diversity within the constitutional framework of *one State* (Canada), by addressing recognition in a constitutional framework *beyond the State* (European Union). That is, in addition to the vertical time axis in Tully’s reconstruction of constitutional dialogues, a horizontal space axis requires analytical attention. Once constitutional norms are dealt with outside their socio-cultural context of origin, a potentially conflictive situation emerges. The conflict is based on de-linking the two sets of social practices that form the agreed-upon political aspect, on the one hand, and the evolving customary aspect of a constitution, on the other. The potential for conflict caused by moving constitutional norms *outside the bounded territory of states* (i.e. outside the domestic polity and away from the inevitable link with methodological nationalism) lies in decoupling the customary from the organisational. It is through this transfer between contexts, that the meaning of norms becomes contested as differently socialised actors such as politicians, civil servants, parliamentarians or lawyers trained in different legal traditions seek to interpret them. In other words, while in supranational contexts actors might well agree on the importance of a particular norm, say e.g. human rights matter, the agreement about a type of norm does not allow for conclusions about the meaning of that norm. As in different domestic contexts that meaning is likely to differ according to experience with “norm-use,”<sup>8</sup> it is important to recover the crucial interrelation

<sup>5</sup> According to Francis Snyder, four meanings of a constitution are possible including: first, the way in which a polity is, in fact, organised; secondly, the totality of fundamental legal norms of a legal order; thirdly, the fundamental legal act that sets forth the principal legal norms; and, fourthly, the written document as outcome of deliberations instead. See F Snyder, ‘The Unfinished Constitution of the European Union’ in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (2003), 56; see also A Stone Sweet, ‘Institutional Logics of Integration’ in *id.*, W Sandholtz and N Fligstein (eds), *The Institutionalization of Europe* (2001), 227; see also C Moellers in this volume for further details on distinct modern constitutions.

<sup>6</sup> See Tully, above n 2, 60–1.

<sup>7</sup> M Póiares Maduro, ‘Europe and the Constitution: What if This is as Good as it Gets?’ in Weiler and Wind, above n 5, 75.

<sup>8</sup> F Kratochwil, *Rules, Norms, and Decisions* (1989), 18; see also R Dworkin, *Taking Rights Seriously* (1973).

between both types of social practices, the cultural practices that generate the customary and organisational practices facilitated by public performance that interprets the norm for political and legal use. Both contribute to the interpretation of meanings that are entailed in constitutional norms.

To agree on a transnational constitutional law for the EU therefore requires awareness of multiplicity in meaning and subsequently mechanisms which allow for ongoing exchange about the multiple meanings of norms. This awareness depends on the proper analytical tools to capture how the complex interplay between the customary and the organisational is linked. To that end, this chapter proposes a focus on the role of institutions and how they facilitate and/or constrain the interpretation of meaning. It intends to facilitate an understanding of the flexible and contested role of institutions in relation to context and social practices. Following Peter Hall, institutions are defined as “formal and informal procedures, routines, norms and conventions embedded in the organisational structure of the polity or political economy.”<sup>9</sup> The chapter elaborates on the dual challenge of accommodating diversity within modern constitutional frameworks that are, in addition, moved outside the territorial boundaries of modern states. While the title of this chapter suggests the discussion of the most important organs of the Union, I do however raise more substantial questions, focusing on the phenomenon of European constitutional law as such from a political science perspective. The respective organs of the Union are treated as “hard” institutions elsewhere in this book. In turn, the emergence of “soft” institutions such as ideas, social and cultural norms, rules and routinised practices and their impact on the evolution and success of the institutions of constitutional law are at the centre of this chapter. The first section identifies basic assumptions in political science in order to highlight differences between role and understanding of institutions offered by political science and law. The second section discusses the analysis of institutions in the process of European integration with a particular emphasis on the development of institutions until today’s European constitutional debate from the changing political science perspective. Three phases can

<sup>9</sup> For this ‘historical institutionalist’ definition of institutions, see P Hall and R Taylor, ‘Political Science and the Three New Institutionalisms’ (1996) XLIV *Political Studies* 938. See also Lieber’s definition of institutions, cited by Nicholas Onuf: ‘[I]t always forms a prominent element in the idea of an institution, whether the term be taken in the strictest sense or not, that it is a group of laws, usages and operations standing in close relation to one another, and forming an independent whole with a united and distinguishing character of its own. Even today, it would be difficult to improve on this definition, which makes rules working together “through human agents” the central feature of any institution’: N Onuf, ‘Institutions, Intentions and International Relations’ (2002) 28 *Review of International Studies* 218 with reference to F Lieber, *On Civil Liberty and Self-government* (1859), 305.

be distinguished: first, integration through supranational institution-building, second Europeanisation through domestic institutional adaptation, and third, late politicisation as the more complex process of socio-cultural and legal institutional adaptation in vertical and horizontal dimensions. The third section discusses the role of institutions and their potential for accommodating diversity in the constitutional process. The two cases of European Union citizenship and the constitutional debate are introduced as examples to illustrate that role.

#### I. POLITICAL BEHAVIOUR AND THE ROLE OF INSTITUTIONS

At first sight, institution building in the integration process appears to rely most decisively on the founding treaties and their periodical revision at intergovernmental conferences. Yet, while the acts of treaty-making and revision are always exclusively submitted to final decisions within the institutional framework of the Council which grants voice and vote to the signatories of the treaties, the actual substance of treaty revisions is usually discussed, conceptualised and prepared by other European political organs. In particular the Commission as the guardian of the treaties, the Committee of Permanent Representatives, and increasingly the European Parliament as well as inter-institutional groups such as the Reflection Group and lobby groups had exerted considerable influence on treaty revisions during the negotiations prior to the Maastricht summit. In addition to producing factual accounts of institutional change regarding the four central organs of the EU, i.e. the Council, the Commission, the Court of Justice and the Parliament, it is therefore interesting for political scientists to identify and explain which actors' interests were most decisive in the process, and what motivated the changes, to what end and with which consequences for power relations. That is, in addition to identifying and categorising types of institutional change, it is deemed important to analyse the role of other actors, processes and organisational structures with a view to identifying interest aggregation, identity-formation and the transfer of action potential.

Within the framework of a volume which includes exclusively German approaches to European constitutional law, this chapter stresses the flexibility of political science analysis compared with the often dogmatically restricted interpretations of German law in particular. At the same time, it will also be demonstrated that the flexibility of political science analysis lies less in the discipline's generally favourable attitude and readiness towards questioning theoretical assumptions of specific approaches and more in the constant contestation of approaches in national and international discussions and debates between different schools of thought. The ongoing contest between different political science approaches is demonstrated particularly well in the discussion about "hard" and "soft" institutions

within the framework of neoinstitutional approaches<sup>10</sup> in particular and most recently, in relation with the debate on constructivism in theories of international relations.<sup>11</sup> Different from law, political science can not begin from a general systemic approach entailing clearly defined rules for interpretation. Instead, it observes regularities or, indeed, laws that allow for systematic comparative or critical analysis of political behaviour with reference to polity, policy and politics.<sup>12</sup> A range of differing—and often not only contravening but heatedly debated—assumptions about legitimate research questions (epistemological focus) and/or convincing approaches and research objects (ontological focus) set the framework for the debate.<sup>13</sup> In the field of institutional analysis, it is helpful to roughly distinguish among agency oriented rational actor models, structural approaches and interactive approaches. Usually, agency oriented approaches work with the assumption that rational interests inform strategic behaviour based on exogenous preference formation<sup>14</sup> that is independent from societal or cultural factors. Political scientists who share this view work with the basic assumption that individual interest in increasing, stabilising or at the least, maintaining power motivates behaviour, based on the law that *A* is motivated by her interest in power over *B*. The central research question posed by this approach is therefore directed towards identifying the condition *X* under which that interest can be most effectively pursued. By contrast, structural approaches see actors as influenced by additional—structural—context conditions created by social, institutional and/or cultural environments and/or mechanisms. Structures, they argue, exert additional constitutive

<sup>10</sup> A Stone Sweet, *Judicialization and the Construction of Governance* (1996); J March and J Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52 *International Organization* 943; W Powell and P DiMaggio, *The New Institutionalism in Organizational Analysis* (1991); K Thelen and S Steinmo, 'Historical Institutionalism in Comparative Politics' in S Steinmo, K Thelen and F Longstreth (eds), *Structuring Politics—Historical Institutionalism in Comparative Analysis* (1992), 1; P Hall and R Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 *Political Studies* 936; P Pierson, 'The Path to European Integration: A Historical Institutional Analysis' (1996) 29 *Comparative Political Studies* 123; MA Pollack, 'The New Institutionalism and EC Governance: The Promise and Limits of Institutional Analysis in Governance' (1996) 9 *International Journal of Policy and Administration* 429; G Schneider and M Aspinwall (eds), *The Rules of Integration: Institutional Approaches to the Study of Europe* (2001).

<sup>11</sup> F Kratochwil and JG Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40 *International Organization* 753; B Zangl and M Zürn, 'Argumentatives Handeln bei internationalen Verhandlungen: Moderate Anmerkungen zur post-realistischen Debatte' (1995) *Zeitschrift für Internationale Beziehungen* 341; P Katzenstein (ed), *The Culture of National Security* (1996); T Risse, 'Let's Argue! Communicative Action in World Politics' (2000) 54 *International Organization* 1.

<sup>12</sup> For a systematic assessment of how these three areas matter for the analysis of European integration, see T Diez and A Wiener, 'The Mosaic of Integration Theory' in A Wiener and T Diez (eds), *European Integration Theory* (2003), 18.

<sup>13</sup> For an overview of the various theoretical positions involved in this debate, see in particular PC Schmitter, 'Neo-Neofunctionalism' in Wiener and Diez, above n 12, 48.

<sup>14</sup> See Thelen and Steinmo, above n 10, 9.

and/or regulative impact on behaviour. Actors thus behave in a power oriented and rational way, however, the additional variable of structure needs to be considered as influential for interest and preference formation. This approach seeks to identify the structures that are relevant for action, recognising their stability on the one hand, and critical junctures that are likely to induce possibilities for changing them, on the other. A third approach works with the assumption that interrelation between structure and agency is the key element. This approach emphasises the role of social interaction and cautions against the valuation of structure over agency, or vice versa, focusing on the concept of intersubjectivity. One key issue here is the additional consideration of changing identities and their influence on preference formation; another is the analytical challenge to conceptualise the mutual constitution of institutions and actor identities based on interaction.

The important insight conveyed by these approaches is that institutions are assigned different roles according to different academic perceptions of political behaviour. Different approaches to institutions thus develop significantly divergent arguments. While institutions are conceptualised as enabling for actors in that they entail an extension of behavioural options, they are, in principle, also considered as hard to control and therefore constraining behaviour. According to the respective basic assumptions and analytical framework, research questions and research design demonstrate considerable variation, a conceptual starting point which might come as a surprise to dogmatic lawyers. In European integration research, institutional analysis has gained importance not only since the Europolity's design depends crucially on supranationally constructed and evolving institutions, but also as a theoretical spill-over from the elaboration of institutional analysis in international relations theory and sociology as disciplines which share an interest in the expanding processes of governance beyond that nation-State.<sup>15</sup> Nonetheless, European integration crucially challenged the realist assumption of an international society of states that involves independent sovereign states governed by the principle of anarchy.<sup>16</sup> It raises questions about states' interest in institution building and co-operation, and in the influence exerted by these new institutions on structural constraints and opportunities for State behaviour.<sup>17</sup> The following sections summarise four substantially different approaches to institutional analysis in political science.

<sup>15</sup> See, eg J Jupille, JA Caporaso and JT Checkel, 'Integrating Institutions: Theory, Method, and the Study of the European Union' (2003) 36 *Comparative Political Studies* 7.

<sup>16</sup> See Hobbes' 'state of nature' as 'an institution that cannot become something else', Onuf, above n 9, 216. According to Hobbes it follows that 'deliberate action is the only hope', cf Onuf, above n 9.

<sup>17</sup> Theoretical discussions in political science integration research present the basic controversy entailed in these respective questions. See for example L Cram, 'Integration Theory and the Study of the European Policy Process' in J Richardson (ed), *European Union—Power and Policymaking* (1996).

## 1. Actor Oriented Approaches: Institutions as Strategic Context

Actor oriented approaches<sup>18</sup> like rational choice theory work with the “individualism assumption” which “treats individuals as the basic (elemental) units of social analysis. Both individual and collective actions and outcomes are explicable in terms of unit-level (individual) properties.”<sup>19</sup> Accordingly, it is assumed that political institutions like international organisations, conventions, co-operation agreements, treaties or committees are established in order to provide manageable information for political actors in decision making processes. In other words, institutions are understood as providing a monitoring role. This view is based on the assumption that institution building is initiated as a consequence of actors’ interests. It is therefore considered as potentially reversible.<sup>20</sup> Examples for this approach in political science, and to some extent, economics, are game theory and negotiation theory.<sup>21</sup> This approach has been challenged by work which identified path-dependent institutional impact on behaviour. That is, the strategic pursuit of interest was found to be constrained through lock-in effects produced by institutions which had been created following the strategic interests of actors whose was informed by different material resources.<sup>22</sup> Thus, a key problem has emerged e.g. from the routinisation of institutions beyond the time period in which they were considered appropriate and desirable. That is, while institution building at a point in time (*t1*) might reflect the interest of particular actors, it is likely that at another point in time (*t2*) interests, resources and power constellations have changed.<sup>23</sup> Subsequently, institutions may turn out as having a constraining impact on behaviour. Importantly then, the reversibility of institution building cannot be assumed as a given factor in institutional

<sup>18</sup> For approaches on agency-oriented institutionalism, see in particular the work by R Mayntz and FW Scharpf, *Regieren in Europa: Effektiv und demokratisch?* (1999), 10.

<sup>19</sup> See Jupille *et al.*, above n 15, 12.

<sup>20</sup> JE Alt and KA Shepsle, *Perspectives on Positive Political Economy* (1990); G Garrett, ‘International Cooperation and Institutional Choice: The European Community’s Internal Market’ (1992) 46 *International Organization* 533 *et seq.*; G Garrett and G Tsebelis, ‘An Institutional Critique of Intergovernmentalism’ (1996) 50 *International Organization* 269 *et seq.*; G Garrett and BR Weingast, ‘Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market’ in J Goldstein and RO Keohane (eds), *Ideas & Foreign Policy: Beliefs, Institutions and Political Change* (1993), 173 *et seq.*

<sup>21</sup> RM Axelrod, *The Evolution of Cooperation* (1984); M Zürn, ‘Jenseits der Staatlichkeit: Über die Folgen der ungleichzeitigen Denationalisierung’ (1992) 20 *Leviathan* 490 *et seq.*; F Scharpf, ‘The Joint-Decision Trap: Lessons from German Federalism and European Integration’ (1988) 66 *Public Administration* 239.

<sup>22</sup> See Pierson, above n 10.

<sup>23</sup> DC North, ‘The Path of Institutional Change’ in DC North (ed), *Institutions, Institutional Change and Economic Performance* (1990); Pierson, above n 10.

<sup>24</sup> As Onuf writes, ‘[T]he alternative to institutions by design are those that arise as the unintended consequences of self-interested human action’: Onuf, above n 9, 212.

analysis.<sup>24</sup> Actor oriented approaches work with the logic of consequentialism.<sup>25</sup> European integration research has documented this particular aspect of institutions most convincingly during the second and third phase of European integration.

## 2. Structure Oriented Approaches: Institutions as Guidelines for Social Behaviour

As opposed to the primacy of agency, structural approaches analyse institutions as structures with guiding and/or prescriptive impact on behaviour. Accordingly, “institutions constrain and shape politics through the construction and elaboration of meaning.”<sup>26</sup> These approaches are based on macro-sociological and organisation sociology<sup>27</sup> which consider institutions as aggregated “rules” or, as sociological constructivists put it, as “single standards of behaviour.”<sup>28</sup> The chapter turns to this difference in more detail later on; at this point, it is important to note that structural socio-cultural factors matter for behaviour, even in the absence of legal or formal political organs. It is assumed that social norms defined as “collective expectations for the proper behavior of actors with a given identity” guide behaviour.<sup>29</sup> International relations theorists are particularly interested in those institutions which have a significant impact on shaping actors’ interests. Empirical research seeks to identify the role and function of specific institutions in this process.<sup>30</sup> Two types of institutions and their respective impact can be differentiated. On the one hand, international institutions are assigned the role of creating interactive spaces for elites who take an active role in diffusing norms, ideas and values through their interactions back

<sup>25</sup> See, eg, JG March and JP Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (1989); TA Börzel and T Risse, ‘When Europe Hits Home: Europeanization and Domestic Change’ (2000) 4 *European Integration online Papers* No 15 <<http://eiop.or.at/eiop/texte/2000-015a.htm>> (5 July 2004); H Müller, ‘Arguing, Bargaining, and All That: Reflections on the Relationship of Communicative Action and Rationalist Theory in Analysing International Negotiation’ (2004) 10 *European Journal of International Relations* 395.

<sup>26</sup> See March and Olsen, above n 25, 39.

<sup>27</sup> See Powell and DiMaggio, above n 10; A Kieser, *Organisationstheorien* (1993).

<sup>28</sup> M Finnemore and K Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 89.

<sup>29</sup> See P Katzenstein, ‘Introduction’ in Katzenstein, above n 11, 5; Finnemore and Sikkink, above n 28; March and Olsen, above n 10.

<sup>30</sup> So far this work has mainly focused on the role and function of institutions without putting much emphasis on their emergences. Thus, Ruggie writes, for example, that ‘the origins of identities and other normative factors need to be better theorized’; see JG Ruggie, *Constructing the World Polity* (1998), 16; see also the critical question ‘If norms are important, a second question naturally emerges: Where do norms themselves come from? While the preceding essays devote considerable effort to answering the first question, they rarely address the second one’ raised by P Kowert and J Legro, ‘Norms, Identity, and Their Limits’ in Katzenstein, above n 11, 468; RA Payne, ‘Persuasion, Frames and Norm Construction’ (2001) 7 *European Journal of International Relations* 37.



into their respective domestic contexts. On the other hand, norms such as human rights norms are assigned regulative and constitutive influence themselves. For instance, drawing on organisational theory March and Olsen argued convincingly that under specific conditions actors behave according to the “logic of appropriateness”<sup>31</sup>. Institutions are considered as emerging within a particular socio-cultural environment; they are labelled as “soft institutions” or “social facts” (ideas, principled beliefs, social facts).<sup>32</sup>

Examples for the impact of such institutions have been provided by sociological constructivist work in international relations and international law as well as, more recently, by research on European integration. This work pursues the basic question of why actors obey the rules set by such soft institutions in the absence of legally binding rules and without decisive material push factors.<sup>33</sup> They demonstrate the diffusion of types of norms and cultures such as, e.g. administrative culture and co-operation on the one hand and the acceptance of a leading role of norms such as human rights norms, environmental and labour standards on the other.<sup>34</sup> Thus, John Meyer and his colleagues were able to demonstrate that the types of public administration, constitutional practices, educational institutions, welfare-State policies and even the role of particular branches of defence ministries were diffused into the domestic context of a number of states despite an absence of a plausible necessity for the implementation of these norms and practices.<sup>35</sup> For scholars who study institutional change in the context of European integration questions about the role of supranational institutions in diffusing and stabilising the emergence of norms and routinised practices are of particular interest. For example, studies on the “Europeanisation” of

<sup>31</sup> See March and Olsen, above n 25.

<sup>32</sup> See Katzenstein, above n 11; Ruggie, above n 30; Kratochwil, above n 8; A Wendt, *Social Theory of International Politics* (1999). See the original application of the concept of ‘*fait social*’ (sociological facts) and the discussion about diverting opinions on this central term in Durkheim’s ‘*Les règles de la méthode sociologique*’, see E Durkheim, *Die Regeln der soziologischen Methode* (1999), 38.

<sup>33</sup> A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Regimes* (1995); HH Koh, ‘Why do Nations Obey International Law?’ (1997) 106 *Yale Law Journal* 2599; JT Checkel, ‘The Constructivist Turn in International Relations Theory’ (1998) 50 *World Politics* 324.

<sup>34</sup> On the effect of norm diffusion through international organisations see in particular the world-polity approach of the Stanford School around John Meyer, for example the work of YN Soysal, *The Limits of Citizenship: Migrants and Postnational Membership in France* (1994); D Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (1996); M Finnemore, ‘Norms, Culture and World Politics: Insights from Sociology’s Institutionalism’ (1996) 50 *International Organization* 325; M Finnemore, *National Interests in International Society* (1996); for an excellent overview in German see T Wobbe, *Weltgesellschaft* (2000).

<sup>35</sup> The establishment of ‘constitutional forms, educational institutions, welfare policies, human rights conventions, defense ministries in states that face no threat (including navies for landlocked states)’ as well as ‘science ministries in countries that have no scientific capability’ offers evidence of this type of norm diffusion as Ruggie points out, above n 30, 15.

norms such as citizenship, water directives and environmental standards have demonstrated first that norms which entail prescriptive rules emerge through processes of learning and diffusion in supranational institutions, and second how these norms are diffused often with the additional pressure of advocacy groups. In sum, norms are found to exert pressure leading to policy change in domestic contexts of EU Member States.<sup>36</sup>

### 3. Intersubjective Approaches: Institutions Constituted Through Practice

Intersubjective approaches to institution building have been further developed as part of the literature that evolved around the “constructivist turn”<sup>37</sup> in international relations theories. These constructivist approaches proceed from the assumption that political action, identities and institutions are mutually constitutive. Institutions are not only assigned a regulative role in relation to behaviour, they are also considered as constitutive for actors’ identities. Different from the rational actor approach which perceives institutions as exogenous factors that are mobilised according to actor’s interests in decision making processes, the intersubjective approach questions that analytical separation of institutions, interests and identities. Instead, all three are considered as interrelated through, if strategic, yet communicative action.<sup>38</sup> The conceptual framework is offered by an, albeit selective reference to Habermas’s theory of communicative action, based exclusively on communication as strategic action—not as a societal theory.<sup>39</sup> Communication, these approaches argue, is particularly important for exploring the impact of soft

<sup>36</sup> For an overview see the introduction to MG Cowles, JA Caporaso and T Risse-Kappen, *Transforming Europe: Europeanization and Domestic Change* (2001). For the focus on behavioural prescriptions in the case of European citizenship see eg Checkel’s work on the extension of citizenship rights in Germany towards the inclusion of dual citizenship: JT Checkel, ‘The Europeanization of Citizenship?’ in *ibid*, 180. On the role of advocacy groups see in particular the work of A Klotz, ‘Norms Reconstituting Interests’ (1995) 49 *International Organization* 451; K Sikkink, ‘The Power of Principled Ideas’ in Goldstein *et al*, above n 20, 161; ME Keck and K Sikkink, *Activities Beyond Borders* (1998); B Locher, *Trafficking in Women in the European Union* (Unpublished, 2002).

<sup>37</sup> AE Wendt, ‘The Agent-structure Problem in International Relations Theory’ (1987) 41 *International Organization* 335; AE Wendt, ‘Anarchy Is What States Make of It’ (1992) 46 *International Organization* 391; Katzenstein, above n 11; E Adler, ‘Seizing the Middle Ground: Constructivism in World Politics’ (1997) 3 *European Journal of International Relations* 319; Checkel, above n 33. For a recent overview see E Adler, ‘Constructivism in International Relations’ in W Carlsnaes, T Risse and BA Simmons (eds), *Handbook of International Relations* (2002); for a critical perspective see S Guzzini, ‘A Reconstruction of Constructivism in International Relations’ (2000) 5/6 *European Journal of International Relations* 147; as well as S Guzzini and A Leander, ‘Alexander Wendt’s Social Theory for International Relations’ (2001) 4 *Journal of International Relations and Development*.

<sup>38</sup> F Schimmelfennig, ‘Rhetorisches Handeln in der internationalen Politik’ [1997] *Zeitschrift für internationale Beziehungen* 219; and F Schimmelfennig, ‘The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union’ (2001) 55 *International Organization* 47; as well as Risse, above n 11.

<sup>39</sup> See J Habermas, *Theorie des kommunikativen Handelns* (1981).

institutions such as e.g. norms. On the one hand, they demonstrate the complex framework of implementation and compliance with supranational norms;<sup>40</sup> on the other, they try to demonstrate that shared references are constructed arguing and bargaining in negotiating situations. Following Habermas, it is assumed that the negotiators are ready to be persuaded by the better argument brought to the fore through controversial debate. The rationale for norm-following then is considered as the logic of arguing.<sup>41</sup> This approach offers a helpful research platform for analysing ongoing and potentially long-lasting discussions about a European Constitution. In principle, and at its best, this approach could be developed towards a reflexive approach to norms.<sup>42</sup> After all, the full “constructivist ethic and politics relies on argumentation according to the dialogue model: conflicting goals and norms are clarified through communicative action, guiding norms are agreed. The *Grundnorm* works along the lines of the Kantian moral reasoning. In reconstructing the Kantian principle of moral reason, the principle of trans-subjectivity makes it possible to avoid subjective and arbitrary norm-setting.”<sup>43</sup> By and large, however, despite the inclusion of speech, language, and controversy in the form of a principled yet open-ended argument, this approach tends to leave the impact of socio-cultural origin and generation of norms which would ultimately allow accounting for the customary dimension of the *nomos*, to one side. The *meaning* of norms therefore remains analytically disconnected from the very practices that are claimed to influence their identification and change.<sup>44</sup> Thus, little attention is paid to the social embeddedness of arguing processes about norm validity and facticity and hence the normative philosophical dimension of communicative action stressed by Habermas. Yet, it is precisely the analytical appreciation of societal embeddedness which offers information about the “customary” dimension of constitutional law. Analytically, its reconstruction develops from a precise understanding of evolving soft institutions in the process of constitutionalisation.

<sup>40</sup> For a general perspective on rule following within the context of international law, see Chayes and Chayes, above n 33; and with reference to the growing legalisation of environmental policy, see M Zürn, ‘The Rise of International Environmental Politics’ (1998) 50 *World Politics* 617; C Joerges and M Zürn (eds), *Compliance in Modern Political Systems* (2004).

<sup>41</sup> See Risse, above n 11.

<sup>42</sup> For an elaboration of the reflexive link between the ‘individual’ and ‘sociality’, see in particular Kratochwil, above n 8; Guzzini, above n 37; A Wiener, ‘Contested Compliance: Interventions on the Normative Structure in World Politics’ (2004) 10 *European Journal of International Relations* 189.

<sup>43</sup> D Nohlen, R-O Schultze and SS Schüttemeyer, ‘Keyword “Verfassungsgerichtsbarkeit”’ in D Nohlen (ed), *Lexikon der Politik*, vol 7, Politische Begriffe (1998), 274 (author’s translation).

<sup>44</sup> For an elaboration of this critical assessment of the logic of arguing see A Wiener, ‘The Dual Quality of Norms: Stability and Flexibility’, Paper presented at the Workshop *Habermas and IR Theory* (University of Birmingham, 17 May 2004); Payne, above n 30.

#### 4. Reflexive Approaches: Contested Meanings of Institutions

A reflexive approach presupposes that meanings—while stable over long periods of time and within particular contexts—are always in principle contested.<sup>45</sup> The analytical assessment of conflictive potential leads beyond a mere assessment of procedures and norms as causes for behaviour that tends to leave actors the role of “cultural dupes” with little impact on social change.<sup>46</sup> Social practices in context are therefore conceptualised as key factors for the assessment of social change. Shared cultural contexts are expected to produce shared interpretations of meaning and, therefore, high social legitimacy of rules. The analytical focus on social practices draws on critical observations about the structural inflexibility of the logic of arguing (see section II. 3) which, it is held, facilitates more information about the role of different types of norms than about the impact of variation in the meaning of one single type of norm. Most importantly for that undertaking is an understanding of the role of “*social context* within which identities and interests of both actor and acting observer are formed.”<sup>47</sup> In sum, the argument borrows from reflexive sociology.<sup>48</sup>

The reflexive approach builds on the central assumption about the dual quality of structures as constituted by and changed through social practices, which has been developed by Anthony Giddens, Pierre Bourdieu and Charles Taylor. For example, according to Giddens’ concept of structuration, the duality of structures stems from a procedural perception of practices. Taylor takes this notion further, noting that “the practice not only fulfils the rule, but also gives it concrete shape in particular situations. Practice is ... a continual “interpretation” and reinterpretation of what the rule really means.”<sup>49</sup> To assess the meaning of a rule therefore implies going back to the practices that contributed to its creation. Importantly, these practices involve contestation by way of discursive intervention. They imply an ongoing process of (re-)construction. Guzzini summarises the interrelation between rules and practices with reference to political systems beyond the State. Thus, the

international system ... is still a system whose rules are made and reproduced by human practices. Only these intersubjective rules, and not some unchangeable

<sup>45</sup> A turn towards reflexive sociology has, for example, been suggested by studies of ‘law in context’: see eg F Snyder, *New Directions in European Community Law* (1990); and constructivist approaches to international relations to assess how ‘cultural context shapes strategic actions’ and is shaped by them, M Barnett, ‘Culture, Strategy and Foreign Policy Change’ (1999) 5 *European Journal of International Relations* 8; Guzzini, above n 37; Payne, above n 30.

<sup>46</sup> See Barnett, above n 45, 7.

<sup>47</sup> See Guzzini, above n 37, 149.

<sup>48</sup> As Guzzini observes correctly, ‘[R]eflexivity is then perhaps the central component of constructivism, a component too often overlooked’: above n 37, 150.

<sup>49</sup> C Taylor, ‘To Follow a Rule’ in C Calhoun, E LiPuma and M Postone (eds), *Bourdieu: Critical Perspectives* (1993), 57.

truths deduced from human nature or from international anarchy, give meaning to international practices.<sup>50</sup>

International relations scholars have addressed this empirical problem by focusing on discourse as the “structure of meaning-in-use,” conceptualising discourse as “the location of meaning.”<sup>51</sup> Empirically, this focus implies studying social practices as discursive interventions, e.g. in official documents, policy documents, political debates, and media contributions. As Milliken observes “discourses do not exist ‘out there’ in the world; rather, they are structures that are actualised in their regular use by people of discursively ordered relationships.”<sup>52</sup> Discursive interventions contribute to establish a particular structure of meaning-in-use which works as a cognitive roadmap that facilitates the interpretation of norms. This structure exerts pressure for institutional adaptation on *all* involved actors; at the same time, discursive interventions that refer to this structure have an input on its robustness. This assessment of norms leads beyond a neo-Durkheimian perception of norms as social facts that exert structural impact on behaviour. It means studying norms as embedded in socio-cultural contexts that entail information about how to interpret a norm’s meaning in context. The reflexive approach assumes that norms entail a dual quality. They are both constructed and structuring. Hypothetically, the meaning of norms evolves through discursive interventions that establish a structure of meaning-in-use. Compliance therefore depends on the overlap of that structure in the reference by norm setters and norm followers. It follows that studying social practices in context opens analytical access to the interpretation of meaning which is constitutive for sustained compliance with norms. The process of contestation sheds light on different meanings of a norm. It thus enhances the probability of establishing mutually acceptable understanding or shared meanings of that norm.

## II. THREE PHASES OF CONSTITUTIONALISATION

Before turning to selected examples and subsequently focussing more in detail on the current constitutional debate, a distinction between different phases of constitutionalisation offers a systematic framework for explaining the role of institutions in the process of European integration. It reflects

<sup>50</sup> See Guzzini, above n 37, 155.

<sup>51</sup> See J Milliken, ‘The Study of Discourse in International Relations’ (1999) 5 *European Journal of International Relations* 231; and R Huelse, *Metaphern der EU-Erweiterung als Konstruktionen europäischer Identität* (2003), 39, respectively.

<sup>52</sup> See Milliken, above n 51, 231; for an effectively similar, if methodologically less explicit, view of the importance of recovering meaning from discourse for constitutional analysis in the EU, see eg Weiler’s interest in ‘the normative values of which the constitutional and political discourse is an expression’ in Weiler and Wind, above n 5, 13.

the attempts by various political science approaches to systematically assess massive institutional change beyond the State in an area which is traditionally assumed to be governed by the principle of anarchy in the absence of global government.<sup>53</sup> The following distinct research goals emerged during different phases of integration thus reflecting significant changes of research questions, often shifting emphasis of integration research from one sub-discipline to another. For example, during the first “integration” phase institutional changes on the supranational level, i.e. the establishment of “hard” institutions such as the European political organs and treaties, mattered most to researchers. In turn, during the second “Europeanisation” phase institutional change in domestic contexts such as adaptation, harmonisation and regulation mattered most. Finally the current phase of “late politicisation” has triggered an enhanced constitutional debate in relation with the impending massive enlargement process. It brings the issues of finality, enlargement, fundamental rights and democracy to the fore, thus raising questions about the robustness of theoretical assumptions generated to study institutional change during the first two phases, especially regarding the post cold war changes and the massive eastern enlargement.

According to **table 1**, the integration process is assessed as entailing three phases in which different research questions dominate the field. The phases are distinguished with reference to significant changes in *type*, *place* and *dynamics* of integration that caused institutional change within the European multi-level governance system. Accordingly the first phase is characterised by bottom-up institutional building, the central research interest being about more or less integration; the core theories involved the debate over “grand theory” among neo-functionalist and intergovernmentalist approaches in international relations theories. The second phase is distinguished by a top-down research perspective on institutional adaptation. Here research interest focused on the question of more or less

**Table 1:** *Three Phases of European Constitutionalisation*

Phase	Type	Place	Dynamic	Institutions
I	Integration (more/less)	Supranational Level	bottom-up	hard
II	Europeanisation (more/less)	Domestic, regional level in member and candidate countries	top-down	hard/soft
III	Politicisation (more/less)	Euro-polity; transnational spaces	trickle-across, bottom-up, top-down	hard/soft

<sup>53</sup> See K Waltz, *Theory of International Politics* (1979); H Bull, *The Anarchical Society* (1977); J Rosenau and EO Czempel (eds), *Governance without Government* (1992).

Europeanisation. Theoretical reference for this perspective is provided by the potpourri of the descriptive and increasingly all-encompassing multi-level governance approach, organisation theory, the various neo-institutionalisms, and regime theory as well as constructivist research; theoretically, this phase brought a shift from international relations towards comparative governance and public administration. The third phase is characterised by the increasingly complex challenge of reintegrating bottom-up institution building, i.e. the changing institutional basis of the European political organs, as well as the parallel and interrelated process of top-down Europeanisation of formal institutions in politics, the market, and the legal and administrative structures in the respective candidate countries. Furthermore, in the face of massive enlargement this third phase also involves the necessity to reconsider, evaluate and define the role and meaning of values and norms that lie at the core of European governance and—most importantly—the possibilities of their eventual expression within a distinctly defined constitutional framework. The characterisation of “late politicisation” stresses the often conflictive and controversial processes and the lack of shared instruments or values to guide conflict solution and set shared standards of behaviour. During this phase, interdisciplinary theoretical work bringing together law, political science and sociology and, though still much less established, cultural studies has begun to tackle the more substantial normative, functional, legal and political questions of European integration as a process that might have surpassed its dynamics of institution-building and expansive potential as a process of consolidation both in domestic and world political matters. According to historical institutionalist analysis, among the expected outcomes of this phase are feed-back loops which result from a lack of norm resonance between different socio-cultural contexts, and unintended consequences of institution-building. Such feed-back loops follow strategic norm setting expressed by the accession *acquis*. Thus, it has been demonstrated that e.g. the protection of minority rights which had been added exclusively to the accession *acquis* for security reasons, are expected to develop contested meanings that will loop back into the western normative structure of the EU. Such strategic norm setting is likely to produce a boomerang effect of delayed political conflict.<sup>54</sup> According to these three phases and taking into account the push and pull factors of institution building, it is possible to distinguish between patterns of motivation for the actors involved. While push factors are constituted by structures or path-dependency such as decisions about institutional change made in the past which evolve towards exerting influence on present and future decision-making processes, pull factors develop through interest constellations of dominant actors with influence on the direction and development of the

<sup>54</sup> A Wiener and G Schweltnus, ‘Contested Norms of European Enlargement’ in G Bermann and K Pistor (eds), *Law and Governance in an Enlarged Europe* (2004), 455.

integration process. Controversies among political science approaches, in particular among the North American variety, have focused on the role and impact of these different factors early on as the ongoing debate among neo-functionalists and intergovernmentalists about interest formation and decision-making in the process of integration demonstrates.<sup>55</sup> While the empirical focus of theoretical debates among political scientists has been adapted over time according to the phases of integration, the central controversy regarding the difference in analytical perception of the structure/agency relation continues to exist. While neo-functionalist, constructivist and historical approaches understand actors as socially embedded,<sup>56</sup> intergovernmentalists and rational choice institutionalists work with the assumption that actors are in principle socially isolated, and accordingly operate based on individual rationally perceived interests which may or may not involve the choice of reference to institutions as monitoring or, in any case, information providing elements in the decision-making process.<sup>57</sup> The following elaboration on the three phases of integration is intended to summarise research interests which cumulated at particular times. It is not meant to work as an exclusive pattern. Instead it seeks to offer a frame of reference for assessing the key questions raised about the integration process and which coined the respective phase. The distinction according to phases does not necessarily preclude overlapping research issues and *foci*. The overlap is particularly relevant with a view to the sequence of the second and third phases of Europeanisation and late politicisation, respectively.

<sup>55</sup> For most recent contributions to this ongoing debate, see EB Haas, 'Does Constructivism Subsume Neofunctionalism?' in T Christiansen, KE Jørgensen and A Wiener (eds), *The Social Construction of Europe* (2001), 22; PC Schmitter, 'Neo-Neo Functionalism' in Diez and Wiener, above n 12; F Schimmelfennig, 'Liberal Intergovernmentalism' in Diez and Wiener, above n 12. On the analysis of 'push' and 'pull' factors in the implementation of European legal norms in domestic contexts, see in particular A Sbragia, 'Environmental Policy: The "Push-Pull" of Policy-making' in H Wallace and W Wallace (eds), *Policy-Making in the European Union* (1996), 235, as well as A Lenschow, 'Variation in EC Environmental Policy Integration' (1997) 4 *JEPP* 109.

<sup>56</sup> EB Haas, 'The Study of Regional Integration' (1970) 24 *International Organization* 607; A Sbragia (ed), *Euro-politics: Institutions and Policymaking in the 'New' European Community* (1992); JA Caporaso, 'Changes in the Westphalian Order' in JA Caporaso (ed), *International Studies Review: Continuity and Change in the Westphalian Order* (2000), 1; Pierson, above n 11; J Peterson, 'Decision-Making in the European Union' (1995) 2 *JEPP* 69; SJ Bulmer, 'New Institutionalism, The Single Market and EU Governance' (1997) 25 *Working Paper ARENA*; S Bulmer and M Burch, 'The "Europeanisation" of Central Government: the UK and Germany in Historical Institutional Perspective' in Aspinwall and Schneider, above n 10; T Christiansen, KE Jørgensen and A Wiener, 'The Social Construction of Europe' (1999) 6 *JEPP* 528; M Jachtenfuchs, 'Theoretical Perspectives on European Governance' (1995) 1 *European Law Journal* 115; B Koch and M Jachtenfuchs (eds), *Regieren in der Europäischen Union* (1996); C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes' (1997) 3 *ELJ* 273.

<sup>57</sup> S Hoffmann, 'Reflections on the Nation-State in Western Europe Today' (1982–83) 21 *JCMS* 21; A Moravcsik, 'Negotiating the Single European Act' (1991) 45 *International Organization* 19; Garrett, above n 20; Garrett and Tsebelis, above n 20; Pollack, above n 10; Schimmelfennig, above n 55.



### 1. Integration (1960–1985)

During the first two decades, the integration process raised questions about the motivation for building supranational institutions in a Hobbesian world, i.e. about European integration as such. Motives and the rationale behind the process were identified on the level of national governments based on security and economic interests, i.e. on establishing institutions which would stabilise peace based on integrated coal and steel industries and the Euratom Treaty.<sup>58</sup> Yet, neo-functionalists such as Ernst Haas, Karl Deutsch, Leon Lindberg and Philippe Schmitter stressed transnational and supranational interest formation by elites and their impact on the integration process.<sup>59</sup> While, as Andrew Moravcsik pointed out later on, the State interests were informed by societal preference formation, e.g. by domestic interest groups, the key decisions were nonetheless always taken on the level of intergovernmental negotiations, i.e. at the State level.<sup>60</sup> The question about more or less integration is hence ultimately pinned down on State interests according to the traditional neorealist perception of States as the only influential political actors in world politics. These interests were informed by interstate relations and bargaining, yet, institutions were considered as enabling rather than constraining behaviour (actor oriented approach). Contrary to this rather clear cut perception of interest formation, role and input, neo-functionalists took the theoretical challenge of regional complexity on board, understanding the integration process as pushed and informed by elites, yet as a process which was not exclusively subject to change according to strategic interests. Instead, integration was pushed by the dynamic of spillovers between policy areas that complicated parsimonious theorising considerably. Integration is understood as pushed by the interests of societal and business elites which are able to strategically use the new supranational institutions and, in doing so, at times unintendedly cause further integration due to the spillover effect that linked different policy areas with one another.

### 2. Europeanisation (since 1985)

While during the integration phase the influence of international relations theory was particularly salient, especially in the context of US-American work, the re-launch of the integration process and the “internal market 1992” initiative during the commission presidencies of Jacques Delors (1985–95)<sup>61</sup>

<sup>58</sup> See eg the intergovernmentalists that followed and expanded on the seminal work by Hofmann, above n 57.

<sup>59</sup> See Haas, above n 55; L Lindberg and S Scheingold (eds), *Europe's Would-Be Polity: Patterns of Change in the European Community* (1970).

<sup>60</sup> See Moravcsik, above n 58; A Moravcsik, ‘Preferences and Power in the European Community’ (1993) 31 *JCMS* 473; A Moravcsik, *The Choice for Europe* (1998).

<sup>61</sup> W Sandholtz and J Zysman, ‘Recasting the European Bargain’ (1989) 41 *World Politics* 95; G Ross, *Jacques Delors and European Integration* (1995).

contributed to a shift of emphasis in academic research as well. With the increasing density of regulations and decision-making procedures that followed from the Single European Act in 1986, the sub-disciplines of comparative government, public policy and public administration gained influence in integration research.<sup>62</sup> This administrative turn led to a closer focus on “Europeanisation” understood as the capacity for institutional adaptation with European conditions of regulation within the various EU Member States. In the beginning this research was primarily interested in identifying the conditions and the question of whether or not domestic institutions were “fit” to implement European directives within the common market initiative.<sup>63</sup> Building on the growing volume and density of regulations of domestic politics through European policy initiatives, questions of political participation, co-determination, transparency, and political organisation gained importance in political science integration research.<sup>64</sup> Overall, this phase of integration research demonstrates a significant change of focus from international relations theories towards comparative politics. However, it is important to note that this phase has not necessarily produced a convincing or generally accepted systematisation in theoretical approach. After all, different from the integration phase which was clearly structured by opposing theoretical positions of two camps and strongly influenced by the US-American sub-discipline of international relations, the second phase of integration is more clearly characterised by an absence of analytical clarity. Due to the enormous empirical breadth and diversity in research issues, research programs stand to be further consolidated. In addition, the frequently used term of “good governance” and/or “multi-level governance”<sup>65</sup> which is all too often applied as a catch-all approach that inevitably raises more questions than offering convincing theoretical answers. An important change in analytical perspective is the growing interest in the EU as a political system and not, as in the previous phase, as an international organisation.

It was not until recently that this phase has generated more systematic approaches which offer a more succinct analytical focus on the question of Europeanisation as a consequence of integration politics. Thus, it has been

<sup>62</sup> RM Czada and A Windhoff-Heritier, *Political Choice: Institutions, Rules, and the Limits of Rationality* (1991); G Majone, ‘The Rise of the Regulatory State in Europe’ (1994) 17 *West European Politics* 77; Scharpf, above n 21; Wallace and Wallace, above n 55.

<sup>63</sup> See Sandholtz and Zysman, above n 61; Wallace and Wallace, above n 55; K Armstrong and S Bulmer, *The Governance of the Single European Market* (1998); W Wessels, *Die Öffnung des Staates: Modelle und Wirklichkeit grenzüberschreitender Verwaltungspraxis 1960–1995* (2000); Richardson, above n 17.

<sup>64</sup> E Grande, ‘Demokratische Legitimation und europäische Integration’ [1996] *Leviathan* 339; PC Schmitter, *How To Democratize the EU And Why Bother?* (2000); B Kohler-Koch (ed), *Regieren in entgrenzten Räumen* (1998).

<sup>65</sup> See Kohler-Koch, above n 64; L Hooghe and G Marks, ‘The Making of a Polity: The Struggle over European Integration’ (1997) 1 *European Integration online Papers* No 4 <<http://eiop.or.at/eiop/texte/1997-004a.htm>> (6 July 2004) respectively.

convincingly demonstrated that situations of institutional or structural “mis/fit” caused institutional adaptation, hence justifying the term Europeanisation understood as institutional adaptation due to pressure which has been generated by European rules and norms, i.e. directives and regulations of the expanding *acquis*.<sup>66</sup> Consequently, pressure for Europeanisation is likely to be higher in those Member States with policy sectors that entail institutions (norms, rules procedures) which are not readily compatible with European institutions. However, the Europeanisation effect was found to differ in the area of identity politics. For example, research on variation in the impact of national identity options in the process of Europeanisation demonstrated that the Europeanisation of national “identity-options” was higher in Member States with a higher (rather than a lower) compatibility of socio-cultural tradition with European integration. In the end, Europeanisation research has produced a plethora of Europeanisation approaches.<sup>67</sup> While each offers sufficiently systematic elaboration on the issue, the numerous and often descriptive and empirically rich policy studies in the 1980s and 1990s still remain considerably fragmented.

### 3. Late Politicisation (since 1993)

With the constitutional turn which had been triggered by the impending eastern enlargement process and which was manifested by the Amsterdam Treaty, a new phase which I call late politicisation has, if gradually, taken shape in the process of European integration.<sup>68</sup> Enhanced, and possibly triggered, by German Foreign Minister Joschka Fischer’s Humboldt Speech in Berlin in 2000, a pluralist debate about political finality and its constitutional frame has been brought to the fore of academic and public discourse. The Convention on the Future of Europe was one institutional expression of this process. Questions raised by the constitutional debate are above all directed to the forthcoming decision about either simplifying the treaties without changing their status, or revising them with the goal of creating a constitutional text. The constitutional debate is more interested in the judicial and political form than in the substance, i.e. contents and meanings of the final text. As a member of the European Parliament notes, “despite

<sup>66</sup> T Börzel, ‘Non-compliance in the European Union: Pathology or Statistical Artifact?’ (2001) 8 *JEPP* 803; Börzel and Risse, above n 25.

<sup>67</sup> M Marcussen *et al*, ‘Constructing Europe? The Evolution of French, British and German Nation-State Identities’ (1999) 6 *JEPP* 614. On a general assessment of research on Europeanisation, see JP Olsen, ‘The Many Faces of Europeanization’ (2002) 20 *JCMS* 581.

<sup>68</sup> See eg the overview of the legal, regulative and political thrust of these phases of integration offered by Joerges: see C Joerges ‘The Law in the Process of Constitutionalising Europe, Arena Annual Conference’ ARENA Oslo (2002), <<http://www.arena.uio.no/events/Conference2002/Papers.html>> (6 July 2004).

being agreed as international treaties, the treaties are something akin to the Constitution of the European Union. Therefore they accomplish the role of a constitution. For me the question is not, whether Europe has a constitution, but whether Europe has the constitution it needs. That is precisely the question. That's what this is all about. And ... the answer is clear: the European Union does not have the constitution it needs."<sup>69</sup>

In light of the first and second phases which made little reference to political processes and the respective societal contexts in which they were generated,<sup>70</sup> the constitutional debate was characterised by the added time pressure to produce a successful outcome; i.e. drafting a constitutional document that was acceptable to the 2004 IGC, within a relatively short period of time, appears as a puzzle. The old and often repeated issues of the role of the public sphere and public opinion, legitimacy and democracy as well as the appropriate means for establishing and safe-guarding these principles politically are reposed in a hurry. The answers, which were, e.g. offered by the European commission's White Paper on Governance<sup>71</sup> as well as numerous proposals regarding the reorganisation of European political organs, demonstrate the scarcity of conceptually convincing and politically feasible approaches to constitutional change. To lawyers, projects which aim to achieve the "constitutionalisation of the treaties"<sup>72</sup> after years of integration through law and a prospering practice of law in Europe, come as a surprise. After all, constitutionalisation has been an ongoing process for decades. The following elaborates on the late politicisation phase, focusing on the role of institutions.

After the shift in the analytical area from *politics* of integration to *policies* of institutional adaptation, i.e. Europeanisation, including constitutionally important changes brought about by the Maastricht and Amsterdam Treaties and the pressure to enlarge the EU at the end of the cold war, students of European integration are eventually pushed to face the *polity*

<sup>69</sup> Interview with a member of the European Parliament, Brussels, 29 August 2001. This interview and the following are cited anonymously; they are on file with the author.

<sup>70</sup> With the exception of neo-functionalists' interest in social interaction; yet this work received little attention during the 1970s and 1980s; see PC Schmitter, 'Three Neo-functional Hypotheses about International Integration', (1969) 23 *International Organization* 162; Lindberg and Scheingold, above n 59; EB Haas, 'Turbulent Fields and the Theory of Regional Integration' (1976) 30 *International Organization* 173.

<sup>71</sup> For a detailed view, see European Commission, *European Governance: A White Paper*, COM(2001) 428 final, <[http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001\\_0428en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf)> (6 July 2004); for critical assessments see the contributions in C Joerges, Y Meny and JHH Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* (2001); in particular the contributions by FW Scharpf, 'European Governance: Common Concerns vs. The Challenge of Diversity' 1, and J Shaw, 'European Union Governance and the Question of Gender', 129.

<sup>72</sup> See eg the report by the European Parliament's Committee of Institutional Affairs, 2000: European Parliament, *Report on the Constitutionalisation of the Treaties*, Final A5-0289/2000, PE 286.949.

dimension. Questions of identity, democracy and security among others have been brought to the fore with the introduction of Union citizenship and the communitarisation of the Schengen agreement to abolish internal border controls. Foreign policy changes such as the Kosovo crisis, the attack on the World Trade Centre and the political crisis in the Middle East have increased the challenges confronting the EU on the world stage. In addition, the process of enlargement with new accession criteria settled in Copenhagen in 1993 has increased the pressure for institutional adaptation in the candidate countries, the European political organs and the Member States as well. The current phase of late politicisation presents a context of complex institutional change characterised by multiple processes of institutional adaptation. In addition to the familiar bottom-up and top-down perspectives on institutional change (compare table 1) the future-oriented debate over fundamental issues of political responsibility and a revised constitutional framework has gained precedence over day-to-day policy issues.<sup>73</sup> As a consequence, the EU is now approached as a political system. According to Joschka Fischer in his Humboldt speech, “the whole is at stake”, and hence the pressure to face finality both in constitutional and political terms is on the rise. The underlying security and financial interests that informed the choice and definition of the Copenhagen accession criteria (e.g. in the areas of minority policy, agricultural policy, visa policy, and fundamental freedoms) raised questions about the political constitution, the leading principles and the value system within the EU as a polity. In this phase, legal work on European integration gains importance for political science approaches and *vice versa*. The largely hidden link between “integration through law”<sup>74</sup> as an approach that offered explanatory guidance for lawyers during the first phase of integration, on the one hand, and “integration through policy” which had substantiated political science research during the second Europeanisation phase, on the other,<sup>75</sup> stands to be scrutinised with a new focus on “integration through politics” in academic research during the late politicisation phase.

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

Following the overview about central questions and research areas of European integration raised by political science, this section turns to the third—“late politicisation”—phase of European integration and, more in detail, to the process of evolving constitutional law in selected policy areas.

<sup>73</sup> See also J Habermas, ‘Warum braucht Europa eine Verfassung?’, *Die Zeit* (29 June 2001); later published in J Habermas, *Zeit der Übergänge* (2001), 104.

<sup>74</sup> See M Capelletti, M Seccombe and JHH Weiler (eds), *Integration Through Law* (1985).

<sup>75</sup> See Wallace and Wallace, above n 55.

In concluding, it raises critical questions about the analytical capacity to grasp the political impact of the constitutional process, in particular, the speedy process of drafting a constitutional document and the outcome of the negotiations leading up to the 2004 Intergovernmental Conference. In the following I draw on both analytical dimensions addressed in the first two sections of this chapter, including first, the distinction between the “customary” and “organisational” dimensions of the *nomos*; secondly, I apply the distinction between the three different types of action i.e. the rational actor model, the structural approach and the intersubjective approach. The argument builds on Tully’s reference to ongoing “dialogue” under conditions of equality. I thus return to the core argument developed in this chapter about bringing the customary back into modern constitutions and its relevance for transnational constitutional settings. I suggest conceptualising the principle of contestedness as a fourth normative perspective on—constitutionally established—institutions. The principle follows the assumption of the analytical and political impact generated by the *dual quality of norms* as both socially constructed through interaction as well as structuring actors’ behaviour.<sup>76</sup> It proposes the extension of institutional analysis towards the assessment of the origin and transformation of soft institutions in order to reconstruct the interpretation of their meaning. The model is based on the assumption that these norms are not sufficiently legitimised by exclusive reference to their facticity, i.e. the recognition of the powerful prescriptive rules they entail. In addition, successful norms entail socio-culturally generated validity.<sup>77</sup> Absent this validity, the likelihood of sustained norm resonance decreases. The principle of contestedness draws on theoretical arguments developed by deliberative approaches in political theory as well as in integration research.<sup>78</sup> It stresses the lack of a more pronounced and systematic empirical focus on the impact of socio-cultural trajectories on norms.<sup>79</sup> In addition, multiple path-dependencies of soft institutions are considered as gaining in importance and impact on the meaning and role of norms. The following paragraphs introduce a more detailed application on the impact, possibilities and change of institution building based on two examples of evolving norms and their respective

<sup>76</sup> The approach draws on the concepts of ‘structuration’: A Giddens, *Central Problems in Social Theory* (1979); ‘constitutional recognition’, see Tully, above n 1; see also J Tully, ‘The Unfreedom of the Moderns in Comparison to their Ideals of Constitutionalism and Democracy’ (2002) 65 *MLR* 204, as well as the facticity-validity tension as a *Grundnorm* based on Habermas’s work: J Habermas, *Zur Logik der Sozialwissenschaften* (1985); and *id.*, *Faktizität und Geltung* (1992).

<sup>77</sup> See Habermas (1992), above n 76, 35.

<sup>78</sup> J Cohen, ‘Deliberation and Democratic Legitimacy’ in J Bohman and W Rehg (eds), *Deliberative Democracy* (1997), 67; S Benhabib, *Democracy and Difference Contesting the Boundaries of the Political* (1996); Joerges and Neyer, above n 56.

<sup>79</sup> See eg Habermas (1992), above 76, 629, ‘[e]ven if the wording of norms remains the same, their interpretations are fluid’.

contested meanings in Europe. The first example refers to European citizenship, the second to the constitutional debate.

The starting point of this analysis is the assumption of a link between the social construction of institutions and the successful implementation of law. It draws on a sociological concept of constitutionalisation which is based on the culturally embeddedness of constitutional dynamics.<sup>80</sup> I thus seek to recover the customary aspect of constitutional law based on a reflexive approach to soft institutions favouring a thick concept of the *nomos* rather more closely than the lean concept of modern constitutional law.<sup>81</sup> While the gradual and rather long-lasting process of constitutionalisation in its interchange with the advancing progress of European integration entails both types of constitutionalisation,<sup>82</sup> this chapter's sociological understanding of constitutionalisation comprehends the concept as involving two types of institutions. First, constitutions offer an institutional context for the political community as a whole; second, they consist of an aggregation of institutions themselves.<sup>83</sup> Proposing to extend modern constitutionalism towards the customary offers a shift of focus from analysing the expanding formal *acquis* towards understanding the *acquis* as "socially embedded".<sup>84</sup> It conceptualises institutions as created through social practices within particular contexts. Absent social interaction, rules and norms do not exist. In addition, legal and social institutions are interrelated insofar as the former require the latter in order to be meaningfully implemented, or for that matter, in order to resonate with their respective context of implementation. This approach allows for the analytical inclusion of multiple socio-cultural trajectories which produce and transform the meaning of "European" ways and structures in analyses of constitutional issues based on the Aristotelian understanding of a constitution as "institution of institutions".<sup>85</sup> Crucially,

<sup>80</sup> See Habermas (1992), above n 76, 629; for an elaboration of this approach, see also the contributions in A Wiener and J Shaw (eds), *The Evolving Norms of Constitutionalism*, (2003) 9 *ELJ* Special Issue; A Wiener, 'The Embedded *Acquis Communautaire*: Transmission Belt and Prism of New Governance' (1998) 4 *ELJ* 294. See also contributions to the 'new legal dynamics' strand of British European lawyers, ie N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *MLR* 317, as well as the contributions in G De Burca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (2000); and P Beaumont, C Lyons and N Walker (eds), *Convergence & Divergence in European Public Law* (2002).

<sup>81</sup> See for a helpful overview P Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7 *ELJ* 125.

<sup>82</sup> See eg E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *AJIL* 1; explicitly see Case 294/83 *Les Verts v Parliament* [1986] ECR 1339; Opinion 1/91, *EEA* [1991] ECR I-6079; AG Lagrange speaks already of a 'genuine constitution' of the European Communities in Case 6/64 *Costa* [1964] ECR 1255 at 1289.

<sup>83</sup> As Onuf writes, for example '[C]onstitutions institutionalize the whole even as they themselves consist of an aggregate of institutions': Onuf, above n 9, 218 *et seq.*, with reference to Lieber, above n 9, 343.

<sup>84</sup> See Wiener (1998), above n 80; M Merlingen, C Mudde and U Sedelmeier, 'The Right and the Righteous: European Norms, Domestic Politics and the Sanctions Against Austria' (2002) 39 *JCMS* 59.

<sup>85</sup> See Onuf, above n 9, 222.

it allows to focus on constitutional norms as evolving through social practices even before a constitutional text is identified as a constitution and labelled accordingly.

The late politicisation phase with its focus on the finality debate follows a long period of constitutional politics carried out without any particularly defined political goal for the Europolity. As one of the many unintended consequences of institution-building in the process of European constitutionalisation, the finality debate encapsulates the breathless constitutional process which is likely to generate even further unintended consequences. In the process, normative concerns against a European Constitution that would lead beyond the simple re-organisation of the treaties are raised.<sup>86</sup> In this context the understanding of institution building and its often path-dependent impact is crucial. In other words, the meaning of institutions and hence their constitutive and regulative influence on behaviour changes once it is transferred across the socio-cultural boundaries which forge the meaning of core constitutional norms. That is, facticity and validity of norms produce conflicting interpretations across national boundaries within the territory to which a European Constitution would apply. Historical institutional analyses have pointed out the significance of identifying institutional impact over long time periods<sup>87</sup> with reference to changed resource constellations (i.e. power constellations, market resources, interests). This problem of so-called “snap-shot” as opposed to “moving picture” analyses extends towards the impact of socio-cultural resources which also produce unintended consequences under the conditions of time and contexts change. As I have argued elsewhere, “associative resources” (i.e. expectations, interpretations, meanings) are subject to change and contestation as well.<sup>88</sup> The example of Union citizenship substantiates this particular effect.

The argument elaborates on the evolving meaning of soft institutions based on the discussion about norms which offers new ways of assessing the establishment of democratic and legitimate process of governance beyond the State.<sup>89</sup> It begins from an institutionally established safe-guard mechanism for

<sup>86</sup> See eg JHH Weiler, *The Constitution of Europe* (1999). Weiler is in particular referring to constitutional principles such as eg the principle of tolerance which is already encapsulated in the preamble to the EC Treaty: see *id.*, ‘Europe’s Constitutional *Sonderweg*’ in *id.* and Wind, above n 5, 19.

<sup>87</sup> See on path-dependency in general North, above n 24; and with particular reference to European integration Pierson, above n 10; as well as A Wiener, ‘Zur Verfassungspolitik jenseits des Staates: Die Vermittlung von Bedeutung am Beispiel der Unionsbürgerschaft’ (2001) 8 *Zeitschrift für internationale Beziehungen* 73.

<sup>88</sup> See Wiener, above n 80.

<sup>89</sup> See H Müller, ‘Internationale Beziehungen als kommunikatives Handeln: Zur Kritik der utilitaristischen Handlungstheorien’ [1994] *Zeitschrift für Internationale Beziehungen* 371; Risse, above n 11; Joerges and Neyer, above n 56; C Joerges, ‘Deliberative Supranationalism Two Defenses’ (2002) 8 *ELJ* 133. But see also the more encompassing approach to ‘constitutional recognition’ in multicultural contexts developed by Tully, above n 1.



ongoing deliberation about the meaning of norms and rules. It hence establishes an institutional framework which allows for a flexible and equal assessment of the facticity-validity tension based on public participation, thus offering a constitutionally entrenched link between “[I]nstitutionalized deliberation and public debate” which “must, indeed, interact.”<sup>90</sup> It is here where the Europolity’s best and worst outcome may well be decided. Hence, the key problem of academic approaches to constitutional debate lies in the practice of analytically bracketing controversial associative connotations about the meaning of constitutional substance, i.e. in excluding the intangible factors that inform interpretation, and ultimately, resonance with contested socio-cultural norms from the analysis. For example, the debate focuses on the discussion of different constitutional models and their substantive aspects (vertical debate: Which model is considered legitimate?) Yet, shared constitutional norms inevitably acquire varying interpretations through associative connotations that are developed within different socio-cultural contexts (horizontal contestation: which meanings of a norm and which expectations?). It is ultimately the associative connotations within these contexts which are constitutive for unintended consequences of institution-building as the following will explicate further.

### 1. European Citizenship

The formal institutionalisation of European citizenship with the Maastricht Treaty in 1991 presents a classic example of institution building with unintended consequences. This is due to the fact that Union citizenship entails all but a scarce amount of prescriptive force which would allow for the identification of guiding capabilities and a behavioural performance expected by the logic of appropriateness expected by constructivist compliance research.<sup>91</sup> Yet, what must appear puzzling to the latter is that Union citizenship has caused political reaction, all the same and despite the absence of standardised rule for behaviour. Thus, political actors such as lobbying groups, associations and interest groups made explicit reference to Union citizenship following its stipulation in the Maastricht Treaty, indeed, even going so far as demanding its revision.<sup>92</sup> This case of mobilisation in reaction to a newly established institution was less puzzling for authors that analysed European citizenship as a *practice*, i.e. the politics and policymaking which institutionalise the terms and forge the meanings of citizenship than observers who analysed Union citizenship as a new legal norm. The practice oriented work was able to demonstrate that the institution of

<sup>90</sup> See Joerges, above n 68, 146.

<sup>91</sup> See Checkel, above n 33, 200.

<sup>92</sup> See Art 8a–e EC Treaty (Maastricht), now Arts 17–22 EC.

Union citizenship—as stipulated by the TEU—represents just *one* aspect of the multiple and fragmented meanings of European citizenship. The larger and more encompassing understanding of the meanings of citizenship have evolved in relation with European citizenship practice, involving socio-cultural spaces, i.e. transnational, national or international interactions that remain theoretically (and therefore also empirically) hidden by structure-oriented behaviourist approaches. Thus, more than twenty-five years of European citizenship practice have had an impact on the transformation of national citizenship. While modern nationally defined citizenship stipulates identity and regulates rights and access based on membership within a centrally organised constitutional State,<sup>93</sup> the European Union has forged a fragmented type of citizenship which is neither centrally defined nor centrally practised.<sup>94</sup> Indeed, Union citizenship is not thinkable without reference to national citizenship as the revision of the Amsterdam Treaty explicates.<sup>95</sup> This fragmentation of citizenship rights within the Europolity has created a new meaning of citizenship that challenges the meaning of modern concepts of citizenship. Based on the particular meaning that is specific to Union citizenship and has evolved through citizenship practice, it thus challenges modern conceptions of citizenship that are deduced from the universal norm of citizenship.<sup>96</sup> This transformation of meaning is however not readily visible as a prescriptive force which guides behaviour based on an exclusive investigation of the citizenship articles (Arts 17–22) in the EC Treaty. Instead, the meaning must be empirically explicated and *mediated* in order to facilitate understanding.<sup>97</sup> Absent a successful mediation of meaning and the understanding about where to locate them, the political reactions to Union citizenship must remain a puzzle for actor-oriented and

<sup>93</sup> R Grawert, *Staat und Staatsangehörigkeit* (1973); R Bendix, *Nation Building and Citizenship* (1964); WR Brubaker, *Citizenship and Nationhood in France and Germany* (1992); UK Preuss, 'Citizenship and Identity: Aspects of a Political Theory of Citizenship' in: R Bellamy, V Bufacchi and D Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (1995), 107; B Turner, 'Outline of a Theory of Citizenship' (1990) 24 *Sociology* 189; R Beiner (ed), *Theorizing Citizenship* (1995).

<sup>94</sup> See the current constitutional stipulation of citizens' rights in Arts 17–22 EC, as well as in a number of EU Treaty Articles, eg Arts 13, 119 EU etc.

<sup>95</sup> See Art 17(1) EC.

<sup>96</sup> On the particularity of citizenship see especially TH Marshall, who emphasises the importance of the emergence of a citizenship ideal within particular societal contexts: TH Marshall, *Citizenship and Social Class* (1950); on the EU see E Meehan, *Citizenship and the European Community* (1993); A Wiener, 'Assessing the Constructive Potential of Union Citizenship' (1997) 1 *European Integration online Papers* No 17 <<http://eiop.or.at/eiop/texte/1997-017a.htm>> (6 July 2004); A Wiener, 'European' *Citizenship Practice—Building Institutions of a Non-State* (1998); A Wiener, 'Citizenship' in M Cini (ed), *European Union Politics* (2003), 397. On the crucial importance of the difference between universal and particular aspects of citizenship and its contextual application, see also M Bös, 'Die Europäisierung nationaler Gesellschaften' [2000] *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, Special Issue, 429.

<sup>97</sup> See Wiener, above n 80; on the mediation of meaning see more generally Kieser, above n 27, ch 9.

structure-oriented approaches of institution-building. After all, in the absence of prescriptive force, behavioural change is not expected. (From the perspective of law the more controversial and hence interesting question is not about the “why” of political reaction to Union citizenship, but about the substance and possible reactions to institutionalisation with a view to legal practice, on the one hand, and the consequences of institutionalisation for the final political shape of the Union, on the other.)<sup>98</sup> Based on the premise of the dual quality of norms as structuring and constructed, it is however possible to shed light on the puzzle. Once the principle of contestedness is taken as the starting point, norm implementation is always interrelated with deliberation about the meaning of norms. It is this perspective which eventually allows for an analytical approach to the fragmented meaning of diverse norms of citizenship.

## 2. The Constitutional Debate

If the customary dimension of constitutional law matters, the principle of contestedness has two implications for the constitutional process. The first refers to considering the evolving norms of constitutionalism generated by social practices in the process of enlargement. While the constitutional debate which has been largely carried out in the old—western—Member States provides a framework for open and constructive thought, the enlargement process has for more than a decade been dictated by rule-following behaviour which allowed for all but “socialising into” the community. The former has been future oriented in style and dynamics, and it is evaluated according to democratic criteria with respect to procedure and substance alike. The yardstick for legitimacy refers to the principle of equal access to participation in the debate for all those potentially influenced by the outcome of the process. Here the logic of arguing and the principle of contestedness are central for actors’ behaviour. The latter, in turn, is guided by the rule following logic of compliance; the enlargement process thus entails the expectation of strict rule following and implementation of the compliance criteria. Accordingly the logic of action that influence behaviour most decisively in the enlargement process is that of consequentialism and the that of appropriateness.<sup>99</sup> The behaviour of the candidate countries is determined by the guiding impact of the accession criteria which had been identified in 1993 in Copenhagen. Their substance is not renegotiable.

<sup>98</sup> See S Kadelbach in this volume.

<sup>99</sup> For a focus on the logics of appropriateness and the logic of consequentialism in the enlargement process as separated from the process of EU polity formation and constitution making, see F Schimmelfennig and U Sedelmeier (eds), ‘European Union Enlargement—Theoretical and Comparative Approaches’ (2002) 9 *JEPP* Special Issue, in particular the contributions by Schimmelfennig, 598, and Schimmelfennig and Sedelmeier, 500.

Nonetheless, it is expected that the constitutional settlement agreed in 2004 be accepted by all signatories of the Constitutional Treaty—including both old and new Member States. Accommodating diversity based on day-to-day experience in *all* social contexts is therefore vital. Academic research on the European Constitution thus requires a critical understanding of the interrelation between both, the constitutional debate about political finality of the EU, on the one hand, and the political process of enlargement, on the other.<sup>100</sup> The link between both processes offers an understanding of both processes not only as potentially conflictive but as producing additional hurdles towards the acceptance of a revised common constitution in an enlarged EU.

The constitutional debate, preparing for massive enlargement in 2004 has demonstrated the dual challenge of accommodating diversity in a modern constitution beyond the State. Beyond analytically linking the two processes the challenge consists in establishing a constitutionally entrenched institutional body that offers the possibility for ongoing transnational deliberation as a basis for democratic decision-making, recognition and constitutional revision on the long run.<sup>101</sup> While doubtful, it is worthwhile assessing the potential future role of the *Convention model* and its democratic potential regarding fair and equal participatory conditions of current and future Member States. After all, the candidate countries are expected to act according to the compliance rationale and practice rule following with a view to the policy of conditionality that governs enlargement; yet at the same time, they are/were called to constructively participate in the Convention and in the wider public debate on the future of Europe.<sup>102</sup> The candidate countries are thus forced into a process of opposing identity formation which paves the way for a fragmentation among the future members of the constitutional community which raises four central questions. First, are restricted participation and opposing identity formation favourable factors for a successful outcome of the finality debate (i.e. agreement about the form and substance, and resonance of both within the respective Member State); second, what is the contribution of the Convention to solve the dilemma; third, how could the situation be improved; and fourth, what are the long-term consequences for establishment of democratic legitimation in the process of European integration?

<sup>100</sup> For a detailed argument on the two rationales, see A Wiener, 'Finality vs Enlargement: Constitutive Practices and Opposing Rationales in the Reconstruction of Europe' in Weiler and Wind, above n 5, 157.

<sup>101</sup> On the principle of constitutional recognition and the proposal to institutionalise access to ongoing deliberation about constitutional issues, see J Tully's excellent work, in particular Tully, above n 1, 59.

<sup>102</sup> Thus, eg, German Minister of Foreign Affairs Joschka Fischer 'encouraged Poland and the other east and central European countries which apply for membership in the European Union, to *participate in the debate over EU finality*': *Frankfurter Allgemeine Zeitung* (26 January 2002) 4 (emphasis added).

With reference to the different logics of action presented earlier in this chapter, it is possible to conclude that, in principle, the following conditions are necessary for democratic governance. First, according to Habermas's ideal speech situation all participants of a debate must be able to debate under equal conditions, including information, voice and vote in order to be able to generate, identify and accept shared norms (i.e. all participants must, in principle, be ready for persuasion by the better argument developed by the others, and to revise their previously held position accordingly). The starting point of the finality/compliance situation in the EU differs from this basic scenario. For example, the criteria set up for accession in Copenhagen have been neither sufficiently defined by the EU so as to allow for uncontested implementation (e.g. in the area of administration) nor have the EU Member States been subjected to scrutiny as to whether they have implemented the criteria themselves (e.g. in the area of minority rights).<sup>103</sup> In addition, the so-called transition rules, e.g. in the area of freedom of movement for workers, will create unequal conditions among the group of future Union citizens. While perfectly legitimate from a political and legal position, these are examples of areas in which the public perception of equality may not agree with the agreements on the governmental level and may therefore cause political mobilisation as an unintended consequence of institution building. Furthermore, the candidate countries work with a considerable information deficit in all areas of EU policy-making and politics, including the Convention, in which they have the right to voice, but not to veto. They thus enter the union with a structural disadvantage.<sup>104</sup> In conclusion, the establishment of spaces for transnational deliberation remains a core issue on the agenda for constitutional revision. Indeed, given past experiences of constitutional change, the *main issue* appears to be less one of agreeing on a new constitutional model than establishing transnational fora for deliberation in selected policy areas in which elected representatives from political levels of governance and public associations are entitled to participate in equal and ongoing debates as European citizens.<sup>105</sup>

<sup>103</sup> See Schweltnus and Wiener, above n 54, 455.

<sup>104</sup> See also C Landfried, 'Difference as a Potential for European Constitution Making' paper presented at the European Forum, Robert Schuman Centre, European University Institute, Florence (Ms, 18 March 2004).

<sup>105</sup> See proposals by Joerges and Neyer (supranational deliberation), above n 56; U Puetter, 'Informal Circles of Ministers—A Way Out of the EU's Institutional Dilemmas?' (2003) 9 *ELJ* 109; H Abromeit and T Schmidt, 'Grenzprobleme der Demokratie' [1998] *Politische Vierteljahresschrift*, Special issue 293; on Maduro (pluralistic citizenship), see MP Maduro, 'Where To Look For Legitimacy?', Arena Annual Conference, ARENA Oslo (2002) <<http://www.arena.uio.no/events/conference2002/papers.html>> (6 July 2004); and from a more theoretical perspective see Tully, above n 1, 59. See also recent proposals to include the 'Open Method of Coordination' in the revised constitutional treaty by G de Búrca and J Zeitlin, 'Constitutionalising the Open Method of Coordination' Paper 6 (2003) <[http://www.fd.unl.pt/je/edit\\_pap2003-06.htm](http://www.fd.unl.pt/je/edit_pap2003-06.htm)> (6 July 2004).

## IV. CONCLUSION

The process of enlargement with the respective challenges towards institutional adaptation requires precise understanding of the institutional framework of the EU. The calculation of necessary and expected institutional changes creates an increasing challenge for both academia and politics. While in earlier enlargement rounds that basic information was relatively easy to convey, the current enlargement process evolves within a context of increasing density of governance processes beyond State boundaries such as the influence of supranational institutions on domestic political processes (regime building, norm diffusion). Moral and ethical questions matter in world politics in addition to arithmetic and geopolitics that suggest the prevalence of allocation and distribution of resources. It is not only the focus on hard institutions such as e.g. the political organs of the EU (Commission, Council, Parliament, Court of Justice) and the formal core of the *acquis communautaire*, but also the role of soft institutions such as values, social norms, routinised practices and ideas which factor into analyses of European integration and enlargement. While neo-institutionalists have been able to explain the social push by way of spill-overs among particular policy areas, negative integration, the democratic deficit debate and now the constitutional debate have demonstrated that processes of institutionalisation have spread well beyond the market and its logic. In light of the dramatic increase in prescriptions for behaviour, lawyers have already suggested to clean up the *acquis*.<sup>106</sup> Furthermore, Brussels officials have expressed the wish to “use a hatchet to change the *acquis*, to cut it down, to revise it towards its necessity today.”<sup>107</sup> The point of these observations is that the *acquis* has acquired an institutional breadth and density that creates all sorts of unintended consequences which are in turn difficult to predict.<sup>108</sup>

Academic studies on hard institutions have been the standard for a long time. Different from theoretical work in International Relations theories, assessing the impact of soft institutions still has some way to go towards systematic and generalisable approaches in European integration studies, and particularly, in European legal studies despite a number of more recent contributions to the field.<sup>109</sup> This chapter sought to highlight the different

<sup>106</sup> See in more detail A von Bogdandy and J Bast, ‘The European Union’s Vertical Order of Competences’ (2002) 39 *CML Rev* 227. Bogdandy also stresses the importance of consequently implementing majority decisions into secondary law: see A von Bogdandy, ‘Europäische Prinzipienlehre’ in A von Bogdandy (ed), *Europäisches Verfassungsrecht* (2003), 149.

<sup>107</sup> Interview with a member of the European Parliament, Brussels, 28 August 2001; on file with author.

<sup>108</sup> See Wiener, above n 80.

<sup>109</sup> See Olsen’s critical perspective on the ‘Europeanisation’ literature: Olsen, above n 67; but see recent work by Börzel and Risse, above n 25; Cowles *et al*, above n 36; see the contributions in Christiansen *et al*, above n 55; as well as, eg, H Farrell and A Héritier, ‘Formal and Informal Institutions under Codecision’ (2002) 6 *European Integration online Papers* No 3 <<http://eiop.or.at/eiop/texte/2002-003a.htm>> (6 July 2004).

avenues of analytical access to an increasingly complex body of institutions from a political science perspective in order to offer guidelines for orientation on the success and risks of strategic institution building (hard institutions) in the process of integration based on the elaboration of a more distinct perspective on societally generated processes of institutionalisation (soft institutions). The chapter suggests that the latter play an important role in particular for interdisciplinary perspectives that are increasingly attractive to legal studies of European integration and offer a perspective that avoids the analytical shortcomings in inspiration and flexibility presented by dogmatic approaches in European constitutional law, arguing that the latter is likely to overlook possibilities for theoretical innovation that are necessary to include a sharper analytical perspective on changing institutional contexts and their respective impact. Including different approaches in international relations and studies of European integration allows for a dual perspective, e.g. from the nation-State up towards the EU and from world politics down towards the EU. This combination of theoretical standpoints based on the respectively different strategic rationales could eventually contribute to avoid the trap of methodological nationalism.<sup>110</sup> Different from the considerably more narrowly conceptualised boundaries in law, for which a link or even overlap between international law and national law is almost unthinkable and which therefore raises the issue of creating a new discipline of European constitutional law, the interdisciplinary link between sub-disciplines in political science, law and sociology offers reasonable and so far little used possibilities—in particular from the perspective of German law—for a more comprehensive study of the process of European integration, and of constitutionalism beyond the State.<sup>111</sup>

<sup>110</sup> M Zürn, 'Democratic Governance Beyond the Nation-State' (2000) 6 *European Journal of International Relations* 183.

<sup>111</sup> Note, however, the pronounced emphasis on interdisciplinarity in British legal approaches to European integration such as eg 'New Legal Dynamics of Integration' literature offered by Shaw, Moore, Armstrong, Scott, de Búrca, Benkowski, Chalmers, Walker, Eversen, among others.

