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Text, Cases, and Materials

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THE DEVELOPMENT OF EUROPEAN INTEGRATION

1 CENTRAL ISSUES

i. EU law is a complex and fascinating subject of study. This book aims to illuminate the EU legal and constitutional processes, and to depict the dynamic relationship between the substantive policies of the European Union, their institutions and procedures, and the Member States. It is important to situate legal doctrine in its historical and political context, and this book seeks to do so. It also seeks to illustrate the strongly dynamic nature of the EU polity, whose aims, policies, institutional structures, and membership have been in a continuous process of development for several decades.

ii. Reference will be made to the 'European Community' to describe the three Communities originally established in the 1950s, even though, until the amendments made by the Treaty on European Union (TEU) in 1993, the European Coal and Steel Community (ECSC, which expired in 2002), the Economic Community (EEC), and the European Atomic Energy Community (Euratom) were, properly speaking, the 'Communities'. After the Maastricht Treaty, the EEC was renamed the European Community, whereas the ECSC and the Euratom retained their original titles. The two constituent parts of the Lisbon Treaty, which came into force on 1 December 2009, are the Treaty on European Union, TEU and the Treaty on the Functioning of the European Union (TFEU).

iii. This chapter situates the emergence of the EEC in the tensions produced by nationalism in the first half of the twentieth century. While nationalism could often be a positive force for the good, it also had negative implications, more particularly when it led to use of force to subdue neighbouring states.

iv. The focus then shifts to analysis of the Treaties and the principal Treaty revisions. The ECSC Treaty is examined, followed by the EEC Treaty and the amendments in the Single European Act (SEA), the Maastricht, Amsterdam, and Nice Treaties. The chapter concludes with examination of the failed Constitutional Treaty and the successful conclusion of the Lisbon Treaty. Three themes should be borne in mind when surveying this development.

v. The first is the distinction between institutional and substantive Treaty amendments. Institutional change connotes the relative power within the EU exercised by the principal players, the Council, European Council, Commission, and European Parliament (EP). Institutional change can also impact on the EU's power in relation to the Member States. Substantive Treaty amendment connotes the subject matter over which the EU has competence.

vi. The second theme is the way in which successive Treaty amendments have made significant changes to the inter-institutional disposition of power within the EU, and to the substantive areas over which it has competence. The relative importance of the forces that shaped these changes continues to be debated by commentators.

vii. The third theme is the enlargement of the EU. The EEC began with six Member States, and there are now twenty-eight. This enlargement has been a factor in shaping institutional and substantive Treaty amendments.

viii. The chapter ends with an overview of theories of integration to explain its evolution. An awareness of these theories is important to understand why states chose to create the EEC and the reasons for subsequent Treaty changes.

2 NATIONALISM AND THE ORIGINS OF THE EU

There is no doubt that viewed from an historical perspective ideas of European unity can be traced to the late seventeenth century, when a prominent English Quaker, William Penn, called for a European Parliament.[1] There is however also little doubt that the more immediate push for European integration can be dated to the nineteenth century. It is worth recalling that, for example, Germany and Italy only became unified states in 1871. A powerful factor in the unification process was the surge in nationalist sentiment, which resonated in politics, philosophy and literature. It can be traced back to the beginnings of the nineteenth century, in reaction to French dominance of Europe.

There was much that was positive about this nationalist sentiment, which was initially directed towards attainment of unified states from disparate principalities, combined with the desire to be rid of foreign control. It was driven by the strong feeling that those who shared a common language and culture should naturally coexist in a single political entity, the corollary being that pre-existing boundaries between principalities were 'unnatural'.

The darker side of nationalism became apparent towards the end of the nineteenth and the beginning of the twentieth centuries. It was driven in part by economic imperatives, but in part also by the desire to assert the prominence of a particular national identity. The battles were initially fought on borrowed terrain, with the major nation states in Europe engaged in the carving up of Africa. The First and Second World Wars brought the clash of nation states to the very forefront of the European stage. While there is considerable debate about the causes of both conflicts, the aggressive effect of nationalism was a significant factor in this regard.

The culmination of the Second World War generated a widespread feeling that there had to be a way of organizing international affairs so as to reduce, if not eradicate, the possibility of such conflict recurring on this scale. This explains the founding of the United Nations in 1945, where the guiding rationale was to provide a forum in which disputes could be resolved through dialogue, rather than conflict, and to institutionalize a regime of international peacekeeping where force was required.

The founding of the EEC was another response to the horrors of two World Wars, although it was to be over a decade before it became a reality. During the war, the Resistance movement had strongly supported the idea of a united Europe, to replace the destructive forces of nationalism.[2] However, the integration movement faltered after the war, especially after the electoral defeat in the UK of

[1] D Urwin, *The Community of Europe: A History of European Integration* (Longman, 2nd edn, 1995); J Pinder and S Usherwood, *The European Union: A Very Short Introduction* (Oxford University Press, 3rd edn, 2013).

[2] W Lipgens (ed), *Documents of the History of European Integration* (European University Institute, 1985).

Churchill, who had been a strong proponent of European unity. There were nonetheless other moves towards European cooperation. The USA in 1947 introduced the Marshall Plan to provide financial aid for Europe, which was administered in 1948 by the Organisation for European Economic Co-operation (OEEC) and in 1960 the Organisation for Economic Co-operation and Development (OECD). Cooperation in defence was furthered by the creation of the North Atlantic Treaty Organization (NATO) in 1948 and the Western European Union (WEU) in 1954. The Statute on the Council of Europe was signed in 1949, providing for a Committee of Ministers and a Parliamentary Assembly. The international organization is best known for the European Convention on Human Rights (ECHR), which was signed in 1950 and came into force in 1953. We can now consider the more concrete moves towards the founding of the EEC.

3 FROM THE ECSC TO THE EEC

(A) ECSC: EUROPEAN COAL AND STEEL COMMUNITY

The UK was unwilling to participate in potentially far-reaching plans for European integration in 1948, and this led to more modest proposals advanced by the French Foreign Minister, Robert Schuman, that France and Germany should administer their coal and steel resources pursuant to an international agreement in which supervisory authority was given to a body termed the High Authority. The plan had been drafted by Jean Monnet, a committed federalist. The proposal was framed so that other states could also join the international agreement. The focus on coal and steel was in part economic, but also in part political. Coal and steel were still the principal materials for waging war. Placing production of such materials under an international body was therefore consciously designed to assuage fears that Germany might covertly rearm. It was hoped thereby to bring Germany back into the mainstream European fold, since the political architecture in Europe had changed after 1945, with Russian dominance of Eastern Europe and the emergence of the cold war.

The ECSC Treaty was signed in 1951 by France, Germany, Italy, Belgium, the Netherlands, and Luxembourg. It had a lifespan of fifty years to expire in 2002 and established a common market in coal and steel. There were four principal institutions. The High Authority, composed of nine independent appointees of the six Member State governments, was the main executive institution with decision-making powers. An Assembly made up of national parliaments' delegates had supervisory and advisory powers; a Council composed of a representative from each national government had limited decision-making powers and a broader consultative role; and the Court of Justice composed of nine judges. Its proponents saw the ECSC as a supranational authority, in which the High Authority could adopt decisions other than by unanimity, which could then serve as a step towards broader European integration.[3]

(B) EUROPEAN DEFENCE COMMUNITY AND EUROPEAN POLITICAL COMMUNITY: EDC AND EPC

The 1950s also witnessed setbacks in the moves towards European integration, which were nonetheless important in the overall story of the creation of the EEC. The proposals that failed were those for the European Defence Community (EDC) and the European Political Community (EPC).

[3] F Duchêne, *Jean Monnet: The First Statesman of Interdependence* (Norton, 1994) 239.

The proposal for the EDC had its origins in French opposition to German membership of NATO. The French alternative outlined in the Pleven Plan in 1950 was for the EDC, which would have a European army, a common budget, and joint institutions. The EDC Treaty was signed in 1952 by the six ECSC States, but Britain refused to participate. It was felt that a European army required some form of European foreign policy, and this was the catalyst for plans to establish the EPC.

The 1953 EPC draft statute was crafted by the ECSC Assembly as reinforced by certain additional members, with the principal work done by a Constitutional Committee. It produced far-reaching plans for a federal, parliamentary-style form of European integration, with a bicameral ('two-level') parliament, one chamber elected by direct universal suffrage, and the other senate-type body appointed by national parliaments. The parliament would have real legislative power. There was also to be an Executive Council, which would have been the government of the EPC, with responsibility to the Parliament. The draft statute contained provision for a Court of Justice and an Economic and Social Council. Although the draft received almost unanimous support in the ECSC Assembly, the reaction of the six foreign ministers of the ECSC was more circumspect, and there was significant opposition to the degree of parliamentary power that existed under the draft EPC statute.

The fate of the EPC was however inextricably linked with that of the EDC. The latter failed when the French National Assembly refused to ratify the EDC in 1954, opposition coming from both the French right and left wings.[4] This resulted in a major setback for the integration process and the shelving of plans for defence and political union.

(c) EUROPEAN ECONOMIC COMMUNITY: EEC

Movement towards European integration was not, however, halted by the failure of the EDC/EPC. The demise of these ambitious projects led proponents of European integration to focus more directly on the economic rather than the political, while drawing on ideas discussed when the EPC was drafted. Thus the Netherlands had sought to include in the EPC proposals the idea of a common market. This was felt to be too risky for several countries in the early 1950s, since they had protectionist traditions, but the idea resurfaced in discussions about the EEC. A conference of foreign ministers of the six Member States of the ECSC was held in Messina in Italy in 1955. A committee chaired by Paul-Henri Spaak, Belgian Prime Minister and a strong advocate of integration, published its report in 1956, which contained the basic plan for what became the Euratom and the EEC. The underlying long-term objective may well have been political, but the initial focus was nonetheless economic. There was no temporal limit to the EEC Treaty: the Treaty of Rome was signed in March 1957 and came into effect in January 1958. There were six Member States: France, Germany, the Netherlands, Belgium, Italy, and Luxembourg. The same Member States were signatories of the Euratom Treaty, which came into effect at the same time as the EEC Treaty.

In economic terms, the idea of a common market connotes the removal of barriers to trade, such as tariffs, which increase the cost of imports, or quotas, which limit the number of imports of a certain type of product. These barriers to trade were to be abolished and a common customs tariff was to be set up. The common market was to be established over a transitional period of several stages, but it connoted more than the removal of tariffs and quotas. It entailed also the free movement of the economic factors of production in order to ensure that they were being used most efficiently throughout the Community as a whole. This explains the centrality to the Community

[4] J Pinder, *The Building of the European Union* (Oxford University Press, 3rd edn, 1998).

of the 'four freedoms', which are often regarded as the core of its economic constitution: free movement of goods, workers, capital, and establishment and the provision of services. The idea was therefore that if, for example, a worker could not obtain a job in a particular country, because unemployment levels were high, he or she should be able to move freely within the EEC to search for employment within another country where there might be an excess of demand over supply of labour, with the consequence that the value of the labour resource within the Community as a whole was enhanced. The Treaty also contained key provisions to ensure that the idea of a level playing field was not undermined by the anti-competitive actions of private parties, or by national action that favoured domestic industry. The Rome Treaty was in addition designed to approximate the economic policies of the Member States, to promote harmonious development of economic activities throughout the Community, to increase stability and raise the standard of living, and to promote closer relations between the Member States. There were common policies in agriculture and transport. A European Social Fund was established to improve employment opportunities, and an Investment Bank to give loans and guarantees and to help less developed regions or sectors. A European Development Fund for overseas countries and territories of some of the Member States was also established.

In institutional terms, the Rome Treaty was a mixture of continuity with the past in terms of the institutional ordering under the ECSC, combined with novel arrangements devised for the EEC. The Parliamentary Assembly and the Court of Justice were shared with the ECSC. There was, however, a separate Council of Ministers consisting of a national representative from each Member State, which represented its interest in the Council, and a separate executive authority, the Commission, which was composed of members drawn from the Member States who had an obligation of independence and who were to represent the Community rather than the national interest. It was not until the Merger Treaty 1965 that these institutions were merged and shared by the three Communities. An Economic and Social Committee with advisory status was set up, to be shared with the Euratom Community.

The location of legislative and executive power was crucial to the Rome Treaty. It will be recalled that the draft statute for the EPC had been parliamentary in its orientation. It will be recalled also that this aroused considerable opposition from the Member States of the ECSC. The same unwillingness to accord power to parliamentary institutions was evident in the Rome Treaty. The reality was that legislative power was divided between the Commission, which proposed legislative initiatives, and the Council of Ministers, which voted on them. The Parliamentary Assembly, which changed its name to the European Parliament in 1962, although it was not officially so named until the SEA 1986, had a bare right to be consulted, and that was only where a particular Treaty Article mandated such consultation. Voting procedure varied according to the nature of the issue: in some limited instances voting was by simple majority, in many others it was by 'qualified majority', while in yet others unanimity was required. Where qualified-majority voting applied, voting in the Council was weighted to give greater weight to the larger Member States than the smaller, although the weighting was not perfectly proportional.

Executive power was also divided in the original Rome Treaty. The Commission was accorded the role of 'watchdog' to ensure that Member States complied with the Treaty; it had responsibility to ensure that regulations, directives, and decisions enacted pursuant to the Treaty were effectively implemented; and it was the principal negotiator of international agreements on behalf of the Community. The Council nonetheless exercised certain executive responsibilities in relation to, for example, the conclusion of international agreements, the planning of the overall policy agenda, and the Community budget. The Assembly was also given some power over the budget, and in addition possessed a strong but never-used power of censure, despite the tabling of many

motions of censure over the years, including one shortly before the dramatic resignation of the Commission in 1999.[5]

4 FROM EEC TO THE SINGLE EUROPEAN ACT

(A) TENSIONS WITHIN THE EEC

The Rome Treaty provided the legal framework for the EEC for almost thirty years, subject to the Merger Treaty 1965, which came into effect in 1967, and which merged the executive organs of the ECSC, Euratom, and the EEC. This is all the more remarkable given that the years after the SEA saw an almost continuous process of Treaty reform.[6] There were nonetheless important developments in the period between the EEC Treaty and the SEA.

The Community expanded through accession of new Member States. The UK had chosen to remain outside the EEC when it was initially established. It made its first application to join in 1961, but the French President, Charles de Gaulle, vetoed UK membership in 1963, and also a second UK application in 1967. It was not until de Gaulle's resignation that Britain's application for membership was accepted, together with those of Ireland and Denmark in 1973. Greece became a member of the EEC in 1981, followed by Spain and Portugal in 1986.

The almost thirty-year period between the EEC and the SEA revealed tensions between an *intergovernmental* view of the Community, championed initially by President de Gaulle of France, in which state interests were regarded as paramount, and a more *supranational* perspective espoused initially by Walter Hallstein, the Commission President, in which the overall Community good was perceived as the primary objective, even if this required sacrifices by particular Member States. The tension surfaced in 1965, at the time when the transitional provisions of the Treaty dictated a move from unanimous to qualified-majority voting in the Council, which would have affected many, although not all, areas of decision-making. De Gaulle objected to a Commission proposal that the Community should be able to raise its own resources from agricultural levies and external tariffs, rather than national contributions.[7] When compromise in the Council proved impossible, France refused to attend further Council meetings and adopted what became known as the 'empty-chair' policy. This lasted for seven months, from June 1965 until January 1966, after which a settlement was reached, which became known as the Luxembourg Compromise or the Luxembourg Accords. It was essentially an agreement to disagree over voting methods in the Council. The French asserted that even in cases where the Treaty provided for majority decision-making, discussion must continue until unanimity was reached whenever important national interests were at stake. The other five Member States declared instead that in such circumstances the Council would 'endeavour, within a reasonable time, to reach solutions which can be adopted by all'.[8] It seems nonetheless that the French view prevailed, such that if a state pleaded that its 'very important interests' were at stake, then this was akin to a veto, which the other Member States would respect.

The period between the EEC Treaty and the SEA also saw other developments that enhanced Member State power over decision-making and intergovernmentalism. In 1970 the Davignon Report

5 K Bradley, 'The Institutional Law of the EU in 1999' (1999/2000) 19 YBEL 547, 584.

6 B de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in P Beaumont, C Lyons, and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart, 2002) ch 3.

7 The EEC achieved its own resources through the Treaty of Luxembourg 1970 (known as 'the first budgetary treaty'), which entered into force in 1971.

8 Bull EC 3–1966, 9.

recommended the holding of quarterly meetings of the foreign ministers of the Member States, which became an intergovernmental forum for co-operation in foreign policy. In 1973 this became known as European Political Co-operation, which enabled the EEC to be represented as one voice in other international organizations in which all Member States participated, but also enhanced intergovernmentalism.

In 1974 the European Council was established to regularize the practice of holding summits. This body consists of the heads of government of the Member States, with the President of the Commission attending its bi-annual meetings. The European Council's 'summitry' provided the Community with much-needed direction, but represented to some a weakening in the supranational elements of the Community. The European Council was not within the framework created by the Treaties, and it was not until the SEA that it was recognized in a formal instrument. The EPC and the European Council enabled Member State interests at the highest level to impact on matters of political or economic concern, and their decisions, while not formally binding, would normally constitute the frame within which binding Community initiatives would be pursued. The Member States also assumed greater control over the detail of Community secondary legislation, through the creation of what became known as Comitology. This enabled Member States to influence secondary Community legislation in a way that had not been envisaged in the original EEC Treaty.

There were however also developments during the period between the EEC and the SEA that enhanced supranationalism. Thus 1976 saw agreement on direct elections to the Assembly, and the first such elections took place in 1979. It provided the EEC with a direct electoral mandate that it had lacked hitherto, but the downside was that voter turnout was low, and elections were often fought on national rather than Community issues. The supranational dimension to the Community was more unequivocally enhanced by developments relating to resources and the budget. In 1969 agreement was reached on funding from the Community's own resources rather than from national contributions, and on the expansion of the Parliament's role in the budgetary process. This thereby gave the Community greater financial independence and strengthened Parliament's role as a decision-maker. These developments were furthered in 1975 when a second budgetary treaty was adopted. The European Court of Justice (ECJ) also made important contributions to the supranational dynamic of the Community during this period.[9] It used the doctrine of direct effect in the 1960s and 1970s to make Community policies more effective. It interpreted Treaty provisions broadly in order to foster the overall aims of the Community, such as the free movement of goods. It created the supremacy of Community law over national law to reinforce these judicial strategies.

While there were positive developments relating to the Community from a supranational perspective, it was nonetheless the case that the decade from the mid-1970s to the mid-1980s was perceived as a period of relative political stagnation in the EEC. This was epitomized by the Commission's difficulty in securing the passage of legislation through the Council, with the consequence that Community objectives were left unfulfilled.[10] The malaise was recognized in high-level reports from the mid-1970s onwards, such as the Tindemans Report 1974–5 and that of the 'Three Wise Men' in 1978,[11] both of which recommended strengthening the supranational elements of the Community, but neither was acted on. This theme is evident in the following extract.

[9] J Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403.

[10] P Dankert, 'The EC—Past, Present and Future' in L Tsoukalis (ed), *The EC: Past, Present and Future* (Basil Blackwell, 1983) 7.

[11] Bull EC 11–1979, 1.5.2.

P Dankert, The EC—Past, Present and Future[12]

> The dialectics of co-operation or integration have also continued to dominate the process of European unification—to an increasing extent—ever since 25th March 1957. It has been a continuous 'to and fro' for years, as can be seen from the course of development of the Community institutions. The Council of Ministers, which was originally intended to be a Community body, has now become largely an intergovernmental institution thanks to the famous Luxembourg Agreement, which, under French pressure, put an end to the majority decisions which the Council was supposed to take according to the Treaty on proposals submitted by the European Commission. This rule that decisions could only be taken unanimously had the effect of gradually transforming the Commission into a kind of secretariat for the Council which carefully checked its proposals with national officials before deciding whether or not to submit them. This in turn has a negative effect on the European Parliament which can only reach for power, under the Treaty, via the Commission. The move towards intergovernmental solutions for Community problems reached its peak—after frustrated attempts such as the Fouchet plan at the beginning of the 60s—in the creation of the European Council, the EPC and the EMS.

The European Parliament proposed radical reform in 1984 in a 'Draft Treaty on European Union', but it too was largely ignored. The catalyst for change finally came from a meeting of the heads of state in the Fontainebleau European Council in 1984. This led to the 1985 European Council in Milan to establish an intergovernmental conference (IGC) to discuss Treaty amendment, and this generated the SEA. The impetus for reform was furthered by an extensive Commission 'White Paper' that set a timetable for completion of the internal market before 1992.[13]

(B) SINGLE EUROPEAN ACT: SEA

(i) *Institutional and Substantive Change*

The SEA 1986 was a disappointment to those who advocated sweeping reform. It nonetheless had a far-reaching significance, and still ranks as one of the most significant Treaty revisions in the EU's history because of the institutional and substantive changes that it introduced.

The most significant *institutional change* was that the SEA began the transformation in the role of the European Parliament. The Rome Treaty gave it scant powers, and its role in the legislative process was minimal, being limited to a right to be consulted where a particular Treaty Article so mandated. The change made by the SEA might at the time have appeared relatively minimal. A new legislative procedure was created, the 'cooperation' procedure, which applied to a defined list of Treaty Articles. It transformed the Community decision-making process. Prior to the SEA, the approach to the passage of legislation was captured by the aphorism that the 'Commission proposes, and the Council disposes', revealing the Commission's role as initiator of legislation and the Council's role in voting on such measures. The change in the SEA meant that the Commission would have to take seriously the views of the European Parliament where the cooperation procedure applied. The enactment of legislation required input from three players, not two, since the cooperation procedure meant that the European Parliament could in effect block legislative proposals provided that it had some limited support in the Council.

12 L Tsoukalis (ed), *The EC: Past, Present and Future* (Basil Blackwell, 1983) 7.
13 COM(85) 310.

There were also other institutional changes. The SEA gave a legal basis to EPC and formal recognition to the European Council, although not within the Community Treaties. A Court of First Instance (CFI) was created to assist the Court of Justice. The so-called 'Comitology' procedure, under which the Council delegates powers to the Commission on certain conditions, was formally included within what was Article 202 EC.[14]

The impact of the cooperation procedure was enhanced because of the *substantive changes* made by the SEA, in particular the creation of what was initially Article 100a EEC, which confers broad power on the EU to adopt legislation concerning the internal market. The completion of a common market requires not merely that trade barriers are prohibited, what is termed negative integration, but also that there should be European regulation of certain issues *in place of* national regulation, what is termed positive integration or harmonization. The latter is required because each country will have rules on, for example, banking that express important public interests, such as the prevention of fraud. These national rules cannot be eradicated, but their very multiplicity can hamper the creation of a common market, because traders will have to satisfy a different set of such rules in each Member State, thereby adding significantly to the costs of business. A way to meet this difficulty is to have Community rules on such issues. This was recognized in the original Rome Treaty, but Article 100 EEC required unanimity in the Council, which was difficult to secure. This was the rationale for Article 100a EEC, now Article 114 TFEU, which provided for the enactment of measures to approximate the laws of the Member States for this purpose. The cooperation procedure was applicable to this Article, thereby enhancing the EP's power, and voting within the Council was by qualified majority, rather than unanimity. The SEA amended the Rome Treaty to provide that the Community should adopt measures with the aim of 'progressively establishing the internal market over a period expiring on 31 December 1992', and defined the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.[15] What is now Article 114 TFEU became the principal vehicle for the enactment of measures to complete the internal market through legislation approximating Member State laws.

The SEA also added new substantive areas of Community competence, some of which had already been asserted by the institutions and supported by the Court, without any express Treaty basis. The additions covered cooperation in economic and monetary union, social policy, economic and social cohesion, research and technological development, and environmental policy.

(ii) *Reaction and Assessment*

The SEA represented the most important revision of the Treaties since they were first adopted, and heralded a revival of the Community momentum towards integration. The initial response to the SEA was nonetheless mixed. Some saw it as a positive step forward for the Community after a period of malaise. Others, such as Pescatore, formerly a judge on the ECJ, regarded it as a setback for the integration process.[16] Yet others stressed what was achieved under the SEA in combination with the Commission's White Paper.[17]

[14] The legal regime for dealing with these measures was altered by the Lisbon Treaty, Arts 290–291 TFEU.
[15] Art 8a EEC.
[16] P Pescatore, 'Some Critical Remarks on the Single European Act' (1987) 24 CMLRev 9.
[17] White Paper on the Completion of the Internal Market, COM(85) 310.

J Weiler, The Transformation of Europe[18]

Clearly, the new European Parliament and the Commission were far from thrilled with the new act.

And yet, with the hindsight of just three years, it has become clear that 1992 and the SEA do constitute an eruption of significant proportions. Some of the evidence is very transparent. First, for the first time since the very early years of the Community, if ever, the Commission plays the political role clearly intended for it by the Treaty of Rome. In stark contrast to its nature during the foundational period in the 1970s and early 1980s, the Commission in large measure both sets the Community agenda and acts as a power broker in the legislative process.

Second, the decisionmaking process takes much less time. Dossiers that would have languished and in some cases did languish in impotence for years in the Brussels corridors now emerge as legislation often in a matter of months.

For the first time, the interdependence of the policy areas at the new-found focal point of power in Brussels creates a dynamic resembling the almost forgotten predictions of neo-functionalist spillover. The ever-widening scope of the legislative and policy agenda of the Community manifests this dynamic.

The SEA thus helped to 'kick-start' fulfilment of the Community's economic objectives, more especially through the new Article 100a EC. Moreover, while the SEA was characterized primarily by its 'single market' aims, and while the new provisions on regional policy, the environment, and research might be regarded as secondary, the reality was that these changes created Community competence in these fields. This reinforced the views of those who conceived of the single market project in terms of 'a true common marketplace, which, because of the inevitable connection between the social and the economic in modern political economies, would ultimately yield the much vaunted "ever closer union of the peoples of Europe"'.[19] The debate between those on different sides of the political spectrum, between a neo-liberal conception of the EU and the 'European social model', continues to this day.

5 FROM THE SEA TO THE NICE TREATY

(A) MAASTRICHT TREATY: THE TREATY ON EUROPEAN UNION

The SEA reinvigorated the Community and many measures to complete the internal market were enacted between 1986 and 1992. It would nonetheless be mistaken to think that the internal market could be 'completed' by 1992, or any particular date thereafter. This is because factors such as technological change, industrial innovation, and changing patterns of consumer behaviour can generate the need for new EU measures to reduce obstacles to inter-state trade. The momentum generated by the SEA continued after its adoption. A committee chaired by the President of the Commission, Jacques Delors, on Economic and Monetary Union (EMU) reported in 1989 and set out a three-stage plan for reaching EMU. The European Council held an IGC on the subject, and a second IGC on political union. This led to a draft Treaty in 1991 and the Treaty on European Union (TEU) was signed by the Member States in Maastricht in February 1992.[20] It entered into force in November 1993 having survived constitutional challenge before the German Federal Constitutional Court.[21]

[18] Weiler (n 9) 2454.
[19] Ibid 2458.
[20] R Corbett, *The Treaty of Maastricht* (Longman, 1993).
[21] Cases 2 BvR 2134/92 and 2159/92 *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

(i) *The Three-Pillar System*

The TEU made important changes to the Rome Treaty, in both institutional and substantive terms. It was also significant in terms of the overall legal architecture, because it introduced the 'three-pillar' structure for the European Union, with the Communities as the first of these pillars, and the EEC Treaty was officially renamed the European Community (EC) Treaty.[22] The Second Pillar dealt with Common Foreign and Security Policy (CFSP) and built on earlier mechanisms for European Political Cooperation. The Third Pillar dealt with Justice and Home Affairs (JHA) and built on earlier initiatives in this area. The pillar structure was preserved in subsequent Treaty amendments, but was then removed by the Lisbon Treaty, although distinct rules still apply to the CFSP. Title I of the TEU contained common provisions, which laid down basic principles for the 'Union', and set out its objectives.[23]

The European Union was therefore given new responsibilities in relation to CFSP and JHA. The key issue is therefore why these new competences were not added to those already existing, as had been done in earlier Treaty amendments. The principal rationale for creating separate Pillars for the CFSP and JHA was as follows. The Member States wished for some mechanism through which they could cooperate in relation to CFSP and JHA, since in its absence such meetings would have to be set up to discuss each new problem. This was time-consuming and cumbersome. The Member States were not, however, willing to subject these areas to the normal supranational methods of decision-making that characterized the Community Pillar. They did not wish the Commission and the ECJ to have the powers they had under the Community Pillar, because the Second and Third Pillars concerned sensitive areas of policy considered to be at the core of national sovereignty. Thus decision-making under the Second and Third Pillars was more intergovernmental, with the Member States in the Council and European Council retaining the primary reins of power. The other Community institutions, the Commission, European Parliament, and ECJ, either had no role or one that was much reduced by way of comparison with the Community Pillar.

(ii) *Institutional and Substantive Change: The Community Treaties*

The Maastricht Treaty made a number of *institutional* changes to the Rome Treaty, the most significant being further increase in the Parliament's legislative involvement, by introducing the co-decision procedure, which was amended and strengthened by the Treaty of Amsterdam. This allowed the EP to block legislation, if it was subject to this procedure. The Parliament was also given the right to request the Commission to initiate legislation and the power to block the appointment of the new Commission. There were other significant institutional changes: provision was made for a European System of Central Banks (ESCB) and a European Central Bank (ECB) to oversee economic and monetary union; for a Parliamentary Ombudsman; and for a 'Committee of the Regions'.

The Maastricht Treaty also made significant *substantive changes*. It established the principle of subsidiarity. It was introduced to alleviate fears that the EC was becoming too 'federal' by distinguishing areas where action was best taken at Community level and national level.[24] A new concept of European citizenship was introduced, which was to become a fertile source for ECJ case law.[25] There were new provisions on economic and monetary union,[26] which laid the foundations for the

[22] D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 CMLRev 17.

[23] There were originally seven titles in the TEU: Title I included the 'common provisions', which set out the basic objectives of the TEU. Titles II, III, and IV covered the First Pillar amendments to the EEC, ECSC, and Euratom Treaties respectively. Title V created the Second Pillar of the CFSP, Title VI the Third Pillar of JHA, and Title VII contained the final provisions.

[24] Art 5 EC.

[25] Arts 17–21 EC.

[26] Arts 98–124 EC.

introduction of the single currency.[27] The Maastricht Treaty also, like the SEA, added new areas of competence to the EC, with new titles added in areas such as culture, public health, consumer protection, trans-European networks, and development cooperation, and significant modifications made in relation to the titles on, for example, the environment.

(iii) *Common Foreign and Security Policy*

The CFSP Pillar created by the Maastricht Treaty was distinct from the Community institutional and legal structure, such that decision-making was more intergovernmental and less supranational than under the Community Pillar. The CFSP Pillar established the objectives of EU action in this area, which included preservation of peace and international security, respect for human rights, and development of democracy. The Member States had an obligation to inform and consult each other on any matter of common foreign and security policy that was of general interest, in order to ensure that their combined influence could be exercised as effectively as possible, through concerted action.

Provision was made for the Council to define a 'common position' for the Member States on such issues. It was, however, the European Council, consisting of the heads of state and government of the Member States, which was to define the principles and general guidelines for the common foreign and security policy, with the Council having responsibility for decisions to implement it. The CFSP included all questions related to the security of the Union, including the eventual framing of a common defence policy. While decision-making was concentrated in the hands of institutions in which Member State interests predominated, the Council and the European Council, there was nonetheless provision for the European Parliament to be kept informed about foreign and security policy, and the Commission was to be fully associated with work in this area.

(iv) *Justice and Home Affairs*

The JHA Pillar originally governed policies such as asylum, immigration, and 'third country' (non-EU) nationals, which were integrated into the EC Treaty by the Treaty of Amsterdam. However, prior to the Lisbon Treaty the Third Pillar also included cooperation on a range of international crime issues and various forms of judicial, customs, and police cooperation, including the establishment of a European Police Office (Europol) for exchanging information. National sensitivity about such issues meant that the Member States were not willing for them to be included within the ordinary Community Pillar and be subject to the supranational rules on decision-making. Decision-making was dominated by the Council, and the ECJ's powers were limited. The Lisbon Treaty has now brought the entirety of what was the Third Pillar into the general fabric of the Treaty.[28]

(v) *Reaction and Assessment*

The TEU, like the SEA before it, was extensively analysed and criticized. The obscurity and secrecy of the negotiation processes, the complexity of the new 'Union' structure, the mixed bag of institutional reforms, the borrowing of Community institutions for the intergovernmental pillar policy-making, and the many opt-outs and exceptions (the 'variable geometry') attracted much critical comment. The perceived loss of unity and coherence of the Community legal order and the likely effect on the *acquis*

[27] J Pipkorn, 'Legal Arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union' (1994) 31 CMLRev 263.

[28] Arts 67–89 TFEU.

communautaire, which had bound all Member States to the same body of legal rules and principles, is addressed in the following extract.

D Curtin, The Constitutional Structure of the Union: A Europe of Bits and Pieces[29]

> The result of the Maastricht summit is an umbrella Union threatening to lead to constitutional chaos; the potential victims are the cohesiveness and the unity and the concomitant power of a legal system painstakingly constructed over the course of some 30 odd years. . . . And, of course, it does contain some elements of real *progress* (co-decision and powers of control for the European Parliament, increased Community competences, sanctions against recalcitrant Member States, Community 'citizenship', EMU etc.) but a *process* of integration, if it has any meaning at all, implies that you can't take one step forward and two steps backwards at the same time. Built into the principle of an 'ever closer union among the peoples of Europe' is the notion that integration should only be one way.
>
> It must be said, at the heart of all this chaos and fragmentation, the unique *sui generis* nature of the European Community, its true world-historical significance, is being destroyed. The whole future and credibility of the Communities as a cohesive legal unit which confers rights on individuals and which enters into their national legal systems as an integral part of those systems, is at stake.

It was evident with hindsight that the 'variable geometry', differentiation, or flexibility, which appeared in several forms in the Maastricht TEU[30] and which was perceived as undermining the cohesiveness and unity of the Community order, was not a temporary feature of European integration. The attraction of flexible or differentiated integration grew, and both the Amsterdam and Nice Treaties consolidated this trend in provisions on 'closer cooperation' and 'enhanced cooperation'.[31] The variety of labels describes a range of related ideas, including the possibility that some states may participate in certain policies while other do not, or that some will participate only partially, or possibly at a later date than others.[32] While the disadvantages of variable geometry may be a perceived lack of unity and increasing fragmentation (the dangers of '*à la carte*' integration), the advantages of providing a means for accommodating difference and reaching consensus in the face of strong divergence, for permitting progress in crucial areas such as EMU or foreign policy which might otherwise be deadlocked, are evidently considered sufficient to outweigh the former.[33]

[29] Curtin (n 22) 67.

[30] Examples of differentiated integration introduced by the Maastricht Treaty were the UK's opt-out from what was then the Social Policy Chapter, the exemption from defence policy provisions of Member States which are neutral or were not full WEU members, and the option for the UK and Denmark to decide later whether to join the arrangements for Economic and Monetary Union. See, for earlier discussion, C-D Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"' (1984) 82 Mich LR 1274.

[31] C-D Ehlermann, 'Differentiation, Flexibility, Closer Cooperation: The New Provisions of the Amsterdam Treaty' (1998) 4 ELJ 246; J Shaw, 'The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy' (1998) 4 ELJ 63; E Philippart and G Edwards, 'The Provisions on Closer Co-operation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union' (1998) 37 JCMS 87; H Bribosia, 'Les coopérations renforcées au lendemain du traité de Nice' [2001] Revue du droit de l'Union européenne 111.

[32] J Usher, 'Variable Geometry or Concentric Circles: Patterns for the EU' (1997) 46 ICLQ 243; A Stubb, 'Differentiated Integration' (1996) 34 JCMS 283; G de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart, 2000); B de Witte, D Hanf, and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001).

[33] A Kolliker, 'Bringing Together or Driving Apart the Union?: Towards a Theory of Differentiated Integration' (2001) 24 WEP 125.

(B) THE TREATY OF AMSTERDAM

(i) *Institutional and Substantive Change*

The process of Treaty amendment did not halt other important developments. Membership of the EU expanded shortly after the Maastricht Treaty, with Austria, Sweden, and Finland joining in 1995. An accession agreement was also negotiated with Norway, but a national referendum opposed membership of the EU, as it had done in 1973. An Agreement on the European Economic Area (EEA) was also made between the EC and the states that were party to the European Free Trade Association (EFTA), and came into force in 1994.[34]

The ink was nonetheless scarcely dry on the Maastricht Treaty before plans were made for an IGC between the Member States that would pave the way for the next round of Treaty reform, which was the Treaty of Amsterdam. It was signed in 1997 and came into effect on 1 May 1999. It was intended to prepare the Union for enlargement through accession of East European countries, but this issue was postponed until the Nice Treaty. The result was that the Treaty of Amsterdam was a modest exercise in Treaty reform, but it did delete obsolete provisions from the EC Treaty, and renumber all the Articles, titles, and sections of the TEU and the EC Treaty.

The 1990s saw a surge of debate, political and academic, concerning the *legitimacy of the EU*. This is the rationale for amendments introduced by the Amsterdam Treaty designed to enhance the EU's legitimacy. The principle of openness was added, such that decisions were to be taken 'as openly as possible' and as closely as possible to the citizen.[35] Promotion of a high level of employment and the establishment of the area of 'freedom, security and justice' were added to the EU's objectives.[36] There were amendments the effect of which was that the Union was said to be founded on respect for human rights, democracy, and the rule of law.[37] Respect for these principles was a condition for EU membership.[38] On a related note, the Amsterdam Treaty declared that the EU should respect the fundamental rights protected in the European Convention on Human Rights (ECHR) and in national constitutions,[39] and there was provision that if the Council found a 'serious and persistent breach' by a Member State of principles concerning the rule of law, human rights, and democracy, it could suspend some of that state's rights under the Treaty.[40]

The *institutional changes* made by the Amsterdam Treaty were largely an extension of a reform process begun with the SEA. The co-decision procedure was amended to increase the European Parliament's power and the number of Treaty Articles to which it was applicable was expanded. The cooperation procedure introduced by the SEA was virtually eliminated, apart from provisions on EMU. The increase in the EP's power was also evident in the amendment whereby its assent was required for appointment of the Commission President.[41] There were moreover changes designed to enhance the Community's legitimacy in relation to its citizens.

[34] It provided for free-movement provisions similar to those in the EC Treaty, analogous rules on competition policy, and 'close co-operation' in other policy areas, having been declared compatible with the EC Treaty by the ECJ, *Opinion 1/91* [1991] ECR 6079; *Opinion 1/92* [1992] ECR I-2821; J Forman, 'The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and its Implementation by the Two EEA Courts' (1999) 36 CMLRev 751. Since 1995, the non-EU parties to the EEA have been Iceland, Norway, and Liechtenstein. One country (Switzerland) remains a member of EFTA, but decided not to join the EEA; it has however entered into a number of separate bilateral treaties with the EU.

[35] Art 1 EU.

[36] Art 2 EU.

[37] Art 6 EU.

[38] Art 49 EU.

[39] Art 6(2) EU. This was subject to judicial oversight through Art 46 EU.

[40] Art 7 EU.

[41] Art 214(2) EC.

The same continuity with the past was evident in the trajectory of *substantive changes* concerning the scope of Community power. This was, as with the SEA and the Maastricht Treaty, further enhanced through the addition of new heads of competence, or the modification of existing heads.[42] There was also a new provision that conferred legislative competence on the Community to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.[43]

The Treaty of Amsterdam also *amended the Second and Third Pillars*. The changes made to the Second Pillar were modest, including the fact that the Secretary-General of the Council was nominated as 'High Representative' for the CFSP to assist the Council Presidency, and the Council was given power to 'conclude' international agreements,[44] whenever this was necessary in implementing the CFSP.

The changes made to the Third Pillar were more significant. The decision-making structure had been criticized on the ground that many JHA policies were unsuited to the intergovernmental processes established. The consequence was that those parts of JHA dealing with visas, asylum, immigration, and other aspects of free movement of persons were incorporated into Title IV EC, although the relevant legal provisions meant that decision-making was still more intergovernmental than in other areas for a certain period of time. The remaining Third Pillar provisions were subjected to institutional controls closer to those under the Community Pillar, and the Third Pillar was renamed 'Police and Judicial Cooperation in Criminal Matters'. The amended Third Pillar was to provide citizens with a high level of safety in an area of freedom, security, and justice, by developing 'common action' in three areas: police cooperation in criminal matters, judicial cooperation in criminal matters, and the prevention and combating of racism and xenophobia.[45] These objectives were pursued through legal instruments specific to the Third Pillar:[46] common positions, framework decisions, decisions, and conventions. The ECJ had some jurisdiction over certain measures adopted under this Pillar,[47] although it was not equivalent to its jurisdiction under the Community Pillar.

(ii) *Reaction and Assessment*

Assessment requires a benchmark, some criterion against which to measure what was achieved against prior aspirations. The two most salient benchmarks were institutional reform to cope with enlargement, and concerns about the EU's legitimacy. Viewed against these benchmarks, the Treaty of Amsterdam does not fare well. Institutional reform to cope with enlargement was not addressed, and there was relatively little to address broader concerns about the EU's legitimacy, although the extension of co-decision, the creation of the new Title IV EC, and provisions concerning access to documents, data protection, non-discrimination, and the like were beneficial in this respect.

The Treaty of Amsterdam nonetheless had a more general impact in two respects. It eroded the distinction between the Pillars, especially in relation to the Third Pillar. It also legitimated mechanisms for different degrees of integration and cooperation between groups of states. Article 40 EU, Article 11

[42] There was a new title on employment, the provisions on social policy were modified, the title on public health was replaced and enhanced, and that on consumer protection was amended.

[43] Art 13 EC.

[44] Art 24 EU; JW de Zwaan, 'Legal Personality of the European Communities and the European Union' (1999) 30 Netherlands Yearbook of International Law 75; K Lenaerts and E de Smijter, 'The European Union as an Actor under International Law' (1999/2000) 19 YBEL 95.

[45] Art 29 EU.

[46] Art 34 EU.

[47] Art 35 EU.

EC, and Title VII on closer cooperation demonstrated that differentiated integration should no longer be thought of as an aberration within the legal order.

(c) NICE TREATY

(i) *Institutional and Substantive Change*

The very fact that the Treaty of Amsterdam failed to address the institutional structure pending enlargement meant that a further IGC was inevitable. It was convened in 1999 to consider composition of the Commission, the weighting of votes in the Council, and the extension of qualified-majority voting. The Nice Treaty was concluded in December 2000 after a notoriously fractious summit, and entered into force on 1 February 2003.[48]

The Nice Treaty made a number of *institutional changes* to the EC Treaty, in particular relating to the Community's institutional structure. This had been devised for a Community of six Member States, which had expanded to fifteen. There was consensus on the need for reform of institutional arrangements pending enlargement. This was achieved and the Treaty provisions concerning the weighting of votes in the Council, the distribution of seats in the European Parliament, and the composition of the Commission were amended. These topics might sound dry, but the debates concerning reform were often fierce, precisely because these issues raised broader considerations concerning the relative power of large, medium, and small states in the Community, and also raised contentious issues as to the balance of power between the EU institutions. The detailed provisions have been superseded by those in the Lisbon Treaty, but the discourse concerning these changes was similarly contentious as those in the Nice Treaty.

The principal *substantive development* concerned the EU Charter of Rights. The initial catalyst for this came from the European Council in 1999. It established a 'body' which included national parliamentarians, European parliamentarians, and national government representatives to draft a Charter of fundamental rights for the EU.[49] This body, which renamed itself a 'Convention', began work early in 2000 and drew up a Charter by the end of 2000. The Charter received political approval at the Nice European Council in December 2000.[50] It was drafted so as to be legally binding. The Charter's legal status was not however resolved in Nice, and this issue was placed on the 'post-Nice agenda' for the 2004 IGC. The Charter was largely welcomed as a step forward for the legitimacy and human rights commitment of the EU. The mode by which it was drafted also attracted positive comment as an improvement on the method by which treaties had traditionally been negotiated.

(ii) *Reaction and Assessment*

The aspirations underlying the Nice IGC were limited, the primary aim being institutional reform in the light of enlargement, a task left unresolved in the Treaty of Amsterdam. Viewed from this limited perspective, the Treaty of Nice did the job. There was nonetheless dissatisfaction with the outcome.

This was in part procedural. There was much adverse media reaction to the ill-tempered exchanges and the late-night wrangling that accompanied the IGC and the European Council meeting in Nice. This formed part of the impetus for the European Council's decision in 2001 to establish a more open and representative Convention to prepare for the next IGC.

[48] [2001] OJ C80/1; K Bradley, 'Institutional Design in the Treaty of Nice' (2001) 38 CMLRev 1095; R Barents, 'Some Observations on the Treaty of Nice' (2001) 8 MJ 121.

[49] G de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2001) 26 ELRev 126.

[50] [2000] OJ C364/1.

The lingering dissatisfaction was also in part substantive. The Nice Treaty may well have addressed the primary institutional issues, but it was readily apparent that there were equally important issues that were not touched. This was reflected in Declaration 23 on the Future of the Union appended to the Nice Treaty, which called for a 'deeper and wider debate about the future of the European Union', involving a broad range of opinion. The Declaration identified four issues for the 2004 IGC: the 'delimitation of powers' between the EU and the Member States, the status of the Charter of Fundamental Rights, simplification of the Treaties, and the role of the national parliaments.

6 FROM NICE TO THE LISBON TREATY

(A) THE LAEKEN DECLARATION

The initial expectation following the Nice Treaty was that there would be another round of piecemeal Treaty reform four years later in 2004, the intent being that it would consider issues addressed but not resolved in the Nice Treaty, as set out in Declaration 23. These issues were to be considered further at the Laeken European Council scheduled for December 2001. The nature of the reform process was however transformed during 2000, which was reflected in the conclusions of the Laeken European Council.[51]

It came to be accepted that the topics left over from the Nice Treaty were not discrete, but were connected to other issues concerning the EU institutional balance of power, and with the distribution of authority between the EU and the Member States. This led to a growing feeling that there should be a more profound re-thinking of the fundamentals of the EU. It was also accepted that if a broad range of issues was to be discussed, then the result should be legitimated by input from a broader 'constituency' than hitherto. This emerging consensus was reflected in the Laeken European Council,[52] which gave formal approval, through the Laeken Declaration, to the broadening of the issues left open post-Nice. These issues became the 'headings' within which a plethora of other questions were posed, concerning virtually every issue of importance for the EU. The Laeken Declaration also formally embraced the Convention model which had been used to draw up the Charter of Rights, and established a Convention on the Future of Europe.

(B) CONSTITUTIONAL TREATY

(i) *Proposed Institutional and Substantive Change*

The Convention[53] was composed of representatives from national governments, national parliaments, the EP, and the Commission. The accession countries were also represented. The Convention was chaired by former French President Giscard d'Estaing, with two vice-chairmen, Giuliano Amato and Jean-Luc Dehaene. The executive role in the Convention was undertaken by the Praesidium.[54] It began work in 2002, making extensive use of Working Groups for particular topics.[55]

[51] P Craig, 'Constitutional Process and Reform in the EU: Nice, Laeken, the Convention and the IGC' (2004) 10 EPL 653.

[52] Laeken European Council, 14–15 Dec 2001.

[53] http://european-convention.europa.eu/.

[54] It was composed of the Convention Chairman and Vice-Chairmen, and nine other members.

[55] Working groups were established on: subsidiarity, Charter of Rights, legal personality, national parliaments, competence, economic governance, external action, defence, Treaty simplification, freedom, security, and justice, and social Europe. The decision to create the first six groups was taken in May 2002; the remaining five groups were created later in autumn 2002.

The end result in 2003 was a proposal for a Constitutional Treaty, but this was not preordained. The possibility of a constitutional text was mentioned only at the end of the Laeken Declaration, in the context of Treaty simplification, and the language was cautious. Many Member States felt that the Convention might just be a talking shop, which produced recommendations.[56] It was therefore a surprise when Giscard d'Estaing, in the Convention opening ceremony, announced that he sought consensus on a Constitutional Treaty for Europe. The Convention, once established, developed its own institutional vision. The idea took hold that the Convention should produce a Constitutional Treaty.[57] The Draft Treaty Establishing a Constitution for Europe[58] was duly agreed by the Convention in June 2003 and submitted to the European Council in July.[59]

The Member States in the European Council were however divided on certain issues and agreement on the Constitutional Treaty was only secured at the European Council meeting in June 2004.[60] It was still necessary for the Constitutional Treaty[61] to be ratified in accord with the constitutional requirements of each Member State. Fifteen Member States ratified the Treaty, but progress came to an abrupt halt when France and the Netherlands rejected the Constitutional Treaty in their referenda.[62] A number of Member States therefore postponed their ratification process. The European Council in 2005 decided it was best for there to be a time for 'reflection'. The Constitutional Treaty never 'recovered' from the negative votes in France and the Netherlands, and did not become law. However, the Lisbon Treaty, which was ratified in 2009, drew heavily on the Constitutional Treaty.

(ii) *Reaction and Assessment*

There was considerable diversity of views on just about every facet of the Constitutional Treaty. The principal areas of debate were as follows.[63]

There was discourse as to *whether it was wise for the EU ever to have embarked on this ambitious project*. This was reflected in the jibe 'if it ain't broke, why fix it?' On this view, grand constitutional schemes of the kind embodied in the Constitutional Treaty were unnecessary, because the EU could function on the basis of the Nice Treaty, and dangerous, because the very construction of such a constitutional document brought to the fore contentious issues, which were best resolved through less formal mechanisms. There is force in this view. It should nonetheless be recognized that the four issues left over from the Nice Treaty were not discrete. They raised broader issues concerning the nature of the EU, its powers, mode of decision-making, and relationship with the Member States. The dissatisfaction with piecemeal IGC Treaty reform, monopolized by the Member States, should not, moreover, be forgotten. If this traditional process had been adhered to in relation to the broadened

56 P Norman, 'From the Convention to the IGC (Institutions)' (Federal Trust, Sept 2003) 2.

57 CONV 250/02, Simplification of the Treaties and Drawing up of a Constitutional Treaty, Brussels, 10 Sept 2002; CONV 284/02, Summary Report on the Plenary Session—Brussels 12 and 13 September 2002, Brussels, 17 Sept 2002.

58 The Constitutional Treaty was divided into four parts: Part I dealt with the basic objectives and values of the EU, fundamental rights, competences, forms of lawmaking, institutional division of power, and the like; Part II contained the Charter of Rights, which had been made binding by Part I; Part III concerned the policies and functions of the EU; and Part IV contained the final provisions.

59 CONV 850/03, Draft Treaty establishing a Constitution for Europe, Brussels, 18 July 2003.

60 Brussels European Council, 17–18 June 2004, [4]–[5].

61 Treaty Establishing a Constitution for Europe [2004] OJ C316/1.

62 R Dehousse, 'The Unmaking of a Constitution: Lessons from the European Referenda' (2006) 13 Constellations 151.

63 G de Búrca, 'The European Constitution Project after the Referenda' (2006) 13 Constellations 205; A Moravcsik, 'Europe without Illusions: A Category Error' (2005) 112 Prospect, available at www.prospectmagazine.co.uk/features/europeanwithoutillusions; A Duff, 'Plan B: How to Rescue the European Constitution', Notre Europe, Studies and Research No 52, 2006; J Ziller, 'Une constitution courte et obscure ou claire et détaillée? Perspectives pour la simplification des traités et la rationalisation de l'ordre juridique de l'union européenne', EUI Working Papers, Law 2006/31.

reform agenda there would have been criticism about the 'legitimacy and representativeness deficit' inherent in the classic IGC model.

A related, but distinct, set of issues concerned *the way in which the Convention operated*. Thus some cast doubt on the participatory credentials of the Convention, pointing to the increasing centralization of initiative in the Praesidium. This was problematic and did not conform to some 'ideal-type' vision of drafting a Constitution. The Convention did not however exist within an ideal-type world. It conducted its task against the real-world conditions laid down by the European Council. Once the European Council reaffirmed the deadline the Praesidium had little choice but to take a more proactive role, since otherwise the Constitutional Treaty would not have been presented to the European Council in June 2003.

A third area of debate concerned the *content of the Constitutional Treaty*. Some were critical about the further federalization they believed to result from the Treaty, focusing on, for example, the shift from unanimity to qualified-majority voting in the Council. Others were equally critical about what they saw as the increased intergovernmentalism in the Treaty, through for example, enhanced Member State influence in the inter-institutional distribution of power, the creation of the long-term Presidency of the European Council, and the like. There were also significant differences of view concerning particular provisions of the Constitutional Treaty. Thus, for example, some applauded the distribution of competences, while others were critical, arguing that the provisions were unclear and uncertain.

(c) THE LISBON TREATY

(i) *From the Constitutional Treaty to the Lisbon Treaty*

The failure of the Constitutional Treaty meant that the legal ordering of the EU continued to be based on the Rome Treaty as amended by later treaties, including the Nice Treaty. This Treaty architecture had to regulate an EU of twenty-five Member States, the result of the 2004 enlargement that brought ten further states into the EU: the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia. Bulgaria and Romania joined the EU in 2007, and Croatia acceded in 2013 making twenty-eight states. The policy of conditionality meant that candidate states were required to adapt their laws and institutions in significant ways before any date for accession was set, at a time when they had little or no influence on European laws and policies.[64]

The decision that there should be a 'period of reflection' after the negative results in the French and Dutch referenda was sensible, given the justified concern that more states might vote against the Constitutional Treaty. The calm phrase 'period of reflection' nonetheless concealed a far more troubled perspective in the EU institutions, which were at the time unsure whether any of the content of the Constitutional Treaty could be salvaged. The Member States were not, however, willing to allow the work that had been put into the Constitutional Treaty to be lost. To this end, the European Council in 2006 commissioned Germany, which held the Presidency of the European Council in the first half of 2007, to report on the prospects for Treaty reform. The European Council meeting in 2007[65] then considered a detailed mandate of changes to the Constitutional Treaty, in order that a revised Treaty could be successfully concluded.

[64] H Grabbe, 'A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants', EUI Robert Schuman Centre Working Paper 12/99, and 'How does Europeanization affect CEE Governance? Conditionality, Diffusion and Diversity' (2001) 8 JEPP 1013; A Williams, 'Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?' (2000) 25 ELRev 601.

[65] Brussels European Council, 21–22 June 2007.

This led to the birth of the Reform Treaty. It was agreed to convene an IGC,[66] which was to finish its deliberations by the end of 2007.[67] The Reform Treaty was to contain two principal clauses, which amended respectively the TEU and the EC Treaty, the latter of which would be renamed the Treaty on the Functioning of the European Union. The Union should have a single legal personality and the word 'Community' throughout would be replaced by the word 'Union'.[68] There was a conscious decision to excise mention of the word 'constitution' from the Reform Treaty. The principal objective was to conclude this Treaty reform, and given that the constitutional terminology of the Constitutional Treaty was problematic for some Member States it was dropped. This was also the rationale for other terminological changes where the wording in the Constitutional Treaty was felt, whether correctly or not,[69] to connote the idea of the EU as a state entity. Thus the title 'Union Minister for Foreign Affairs' was replaced by High Representative of the Union for Foreign Affairs and Security Policy; the terms 'law' and 'framework law' were abandoned; there was no flag, anthem, or motto; and the clause in the Constitutional Treaty concerning the primacy of EU law was replaced by a declaration.

Portugal held the Presidency of the European Council in the second half of 2007 and was keen that Treaty reform should be concluded during its Presidency so that the new Treaty could bear its name. Developments in the second half of 2007 were rapid. There was scant time for any detailed discussion of the draft Treaty that emerged from the IGC. What became the Lisbon Treaty was forged hurriedly by the Member States and EU institutions, since they were keen to conclude a process that had started shortly after the beginning of the new millennium. The desire to conclude the Lisbon Treaty expeditiously was moreover explicable, since it was the same in most important respects as the Constitutional Treaty. The issues had been debated in detail in the Convention on the Future of Europe after a relatively open discourse, and were considered once again in the IGC in 2004. There was therefore little appetite for those engaged in the 2007 IGC to re-open Pandora's Box,[70] even if this could not be admitted too explicitly since they would be open to the criticism that they were largely re-packaging provisions that had been rejected by voters in two prominent Member States, although it should also be noted that the negative votes in the French and Dutch referenda had relatively little to do with anything new in the Constitutional Treaty.[71]

The 2007 IGC produced a document that was signed by the Member States on 13 December 2007,[72] and the title was changed from the Reform Treaty to the Lisbon Treaty in recognition of the place of signature. The finishing post was in sight, but the Treaty required ratification by each Member State, and Ireland rejected it in a referendum. This obstacle was overcome by a second Irish referendum in October 2009, after concessions were made to Ireland. The final hurdle was the unwillingness of the Czech President to ratify the Lisbon Treaty, but he did so reluctantly after a constitutional challenge to the Treaty had been rejected by the Czech Constitutional Court, and after other Member States agreed to add at a later date a Protocol to the Treaties relating to the Czech Republic and the Charter of Rights. The Lisbon Treaty entered into force on 1 December 2009.

66 Ibid [10].

67 Ibid [11].

68 Ibid Annex I, [2].

69 S Griller, 'Is this a Constitution? Remarks on a Contested Concept' in S Griller and J Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008) 21–56.

70 G Tsebelis, 'Thinking about the Recent Past and Future of the EU' (2008) 46 JCMS 265.

71 See in general, R Dehousse, 'The Unmaking of a Constitution: Lessons from the European Referenda' (2006) 13 Constellations 151.

72 Conference of the Representatives of the Governments of the Member States, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, CIG 14/07, Brussels, 3 Dec 2007 [2007] OJ C306/1.

(ii) *Form*

The Lisbon Treaty amended the Treaty on European Union and the Treaty Establishing the European Community.[73] The Lisbon Treaty has seven Articles, of which Articles 1 and 2 are the most important, plus numerous Protocols and Declarations. Article 1 amended the TEU and contained some principles that govern the EU, as well as revised provisions concerning the CFSP and enhanced cooperation. Article 2 amended the EC Treaty, which was renamed the Treaty on the Functioning of the European Union. The EU is henceforth to be founded on the TEU and the TFEU, and the two Treaties have the same legal value.[74] The Union replaces and succeeds the EC.[75] A consolidated version of the Lisbon Treaty contains the new numbering and references to the old provisions where appropriate.[76]

(iii) *Substance*

Part I of the Constitutional Treaty contained the principles of a constitutional nature that governed the EU. The Lisbon Treaty is less clear in this respect, although the revised TEU has some constitutional principles for the EU. This is especially true in relation to Title I–Common Provisions, Title II–Democratic Principles, and Title III–Provisions on the Institutions. There are nonetheless matters not included within the revised TEU, which had properly been in Part I of the Constitutional Treaty. Thus, for example, the main rules concerning competence are in the TFEU,[77] as are the provisions concerning the hierarchy of norms,[78] and those relating to budgetary planning.[79]

The Lisbon Treaty did, however, improve the architecture of the TFEU. The latter Treaty is divided into Seven Parts. Part One, entitled Principles, contains two Titles, the first of which deals with Categories of Competence, the second of which covers Provisions having General Application. Part Two deals with Discrimination and Citizenship of the Union. Part Three, which covers Policies and Internal Actions of the Union, is the largest Part of the TFEU with twenty-four Titles.[80] The provisions on Police and Judicial Cooperation in Criminal Matters, the Third Pillar of the old TEU, have been moved into the new TFEU.[81] Part Four of the TFEU covers Association of Overseas Countries and Territories. Part Five deals with EU External Action, bringing together subject matter with an external dimension. Part Six is concerned with Institutional and Budgetary Provisions, while Part Seven covers General and Final Provisions.

The Lisbon Treaty is not built on the Pillar system, and in this sense the Treaty architecture that had prevailed since the Maastricht Treaty has now gone. There are nonetheless distinctive rules relating to the CFSP which means that in reality there is still something akin to a separate 'Pillar' for such

[73] J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, 2010); P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, 2010).

[74] Art 1 para 3 TEU.

[75] Art 1 para 3 TEU.

[76] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/1, [2010] OJ C83/1, [2012] OJ C326/1.

[77] Arts 2–6 TFEU.

[78] Arts 288–292 TFEU.

[79] Art 312 TFEU.

[80] I–Internal Market; II–Free Movement of Goods; III–Agriculture and Fisheries; IV–Free Movement of Persons, Services and Capital; V–Area of Freedom, Security and Justice; VI–Transport; VII–Common Rules on Competition, Taxation, and Approximation of Laws; VIII–Economic and Monetary Policy; IX–Employment; X–Social Policy; XI–The European Social Fund; XII–Education, Vocational Training, Youth and Sport; XIII–Culture; XIV–Public Health; XV–Consumer Protection; XVI–Trans-European Networks; XVII–Industry; XVIII–Economic, Social and Territorial Cohesion; XIX–Research and Technological Development and Space; XX–Environment; XXI–Energy; XXII–Tourism; XXIII–Civil Protection; XXIV–Administrative Cooperation.

[81] Part Three, Title V TFEU.

matters. The approach to the CFSP in the Lisbon Treaty largely replicates that in the Constitutional Treaty, subject to the change of nomenclature, from 'Union Minister for Foreign Affairs' to 'High Representative of the Union for Foreign Affairs and Security Policy'. Executive authority continues to reside principally with the European Council and the Council.[82] The ECJ continues to be largely excluded from the CFSP.[83]

(iv) *Reaction and Assessment*

It is important to keep separate the 'official' and the 'non-official' reaction to the ratification of the Lisbon Treaty, since different considerations were relevant in the two instances.

The most prominent 'official' reaction in the EU was one of relief that the Treaty reform had been concluded. It had been on the agenda for almost a decade, since the conclusion of the Nice Treaty, Declaration 23 of which had been the catalyst for the next stage of Treaty revision, which led to Laeken, the Convention on the Future of Europe, the Constitutional Treaty, and the Lisbon Treaty. The failure of the Constitutional Treaty, more especially its rejection by two founding states, had taken its toll on the EU, sapping energy and morale. The prospect of failing twice was not therefore appealing. The prospect of re-opening the debates on the key issues was equally unappealing, more especially because many official players believed that the solutions in the Lisbon Treaty really were better than what had existed previously and/or that they were the best that could be attained in the real world of politics.

The 'non-official' reaction by academics, onlookers, EU observers, and the like was mixed, as one might have expected. Indeed, the very diversity of opinion that marked reaction to the Constitutional Treaty continued in relation to the Lisbon Treaty, primarily because the latter drew so heavily on the former. Thus debates as to whether it was wise to embark on 'general' Treaty reform, and discourse as to whether the content of the resulting Treaty was too 'federal' or too 'intergovernmental' continued in relation to the Lisbon Treaty, as did discussion of the desirability and impact of major changes, such as the creation of the long-term Presidency of the European Council. These issues will be assessed in more detail in later chapters of the book when the changes made by the Lisbon Treaty are analysed in detail. It is only then that informed conclusions can be reached about the impact of the new Treaty.

(D) POST-LISBON: THE FINANCIAL CRISIS

The Member States and EU institutional players that had finally secured the passage and ratification of the Lisbon Treaty hoped for a period of relative calm in which the new Treaty arrangements could bed down. This was not to be. The successful conclusion of the Lisbon Treaty overlapped with the onset of the financial crisis that has had a profound political, economic, and social impact on the EU.[84]

The reasons for the crisis are complex and cannot be examined in detail here, but some idea of the causes is nonetheless important.[85] The Maastricht Treaty introduced the legal framework

[82] Arts 22, 24 TEU.

[83] Art 24 TEU, Art 275 TFEU. It does however have jurisdiction in relation to Art 40 TEU, which is designed to ensure that exercise of CFSP powers do not impinge on the general competences of the EU, and vice versa; the ECJ also has jurisdiction under Art 275 TFEU to review the legality of decisions imposing restrictive measures on natural or legal persons adopted by the Council under Chapter 2 of Title V TEU.

[84] M Adams, F Fabbrini, and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart, 2014).

[85] http://ec.europa.eu/economy_finance/focuson/crisis/2010-04_en.htm; H James, H-W Micklitz, and H Schweitzer, 'The Impact of the Financial Crisis on the European Economic Constitution', EUI Law Working Paper, 2010/05; Ch 20 below.

for economic and monetary union. The latter connotes the idea of a single currency overseen by a European Central Bank. The former captures the idea of control over national fiscal and budgetary policy, with the basic aim of ensuring that a Member State does not spend more than it earns. The rationale for these controls was that the stability of the Euro could be undermined if the economies of the Member States that subscribed to the currency were perceived to be weak, and the financial markets might reach this conclusion if some Member States persistently spent more than they earned. The problem was that the two parts of the Maastricht settlement were out of sync.[86] EU control over national budgetary policy was relatively weak, and thus it was unable to exert the requisite control over national economic policy.

The specific problem for the EU began in earnest with the fact that Greece's credit rating to repay its debt was downgraded. This then led to problems for the Euro, and to concerns about the budgetary health of some other countries that used the currency. The impact of these developments was downward pressure on the Euro, which was only alleviated when Euro countries provided a support package for Greece that satisfied the financial markets. The sovereign debt crisis was overlaid by, and interacted with, the banking crisis that affected some lending institutions that were heavily committed to economic sectors, such as housing, which were hit badly by the downturn in the economic markets.[87] The net effect was that a number of countries, in particular Greece, Ireland, and Portugal, required very large financial assistance from funds financed by other Member States. Italy and Spain have also been on the 'danger list'. The assistance has been subject to 'strict conditionality', which means that the funding to the recipient states is contingent on their introducing far-reaching economic and social reforms, thereby increasing unemployment at a time when the general economic outlook has been bleak.

The economic and financial crisis has had profound effects on the EU, including its constitutional architecture.[88] Nor is the problem likely to go away in the short term. It has generated a complex array of political responses, some of which have been designed to provide assistance to ailing states, others of which have increased oversight of national economic policy. The measures have assumed varying legal forms, ranging from the enactment of ordinary EU legislation, albeit in an accelerated manner as warranted by the nature of the crisis, to intergovernmental agreements made outside the formal confines of the constituent Treaties. The constitutional implications of these developments continue to unfold, with profound consequences for the legal, economic, and political dimensions of the EU, and indeed for the balance between the 'economic' and the 'social', a theme that has run through the development of the EEC from its very inception. The social dimension of EU policy has been markedly affected by austerity policies at both EU and national level. The EU may weather this particular storm, but the nature of the polity that emerges thereafter remains to be seen.

7 THEORIES OF INTEGRATION

The discussion in this chapter has shown the way in which the EEC has changed since its inception. There is, however, a related but distinct issue, which is the rationale for this integration. The original EEC Treaty has been amended on many occasions and the subject matter over which the EU has

86 J-V Louis, 'Guest Editorial: The No-Bailout Clause and Rescue Packages' (2010) 47 CMLRev 971.

87 M Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice', European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.484, 2012.

88 P Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in Adams, Fabbrini, and Larouche (n 84) Ch 2.

competence has expanded very considerably. It is therefore important to consider the rationale for this. There is a wealth of literature, principally from political science, and there is not surprisingly debate as to the causes of integration.

(A) NEOFUNCTIONALISM

Neofunctionalism was the early ideology of Community integration.[89] The central tenet of neofunctionalism was the concept of 'spillover'. Functional spillover was based on the interconnectedness of the economy. Integration in one sphere created pressure for integration in other areas. Thus, for example, removal of formal tariff barriers would generate a need to deal with non-tariff barriers, which could equally inhibit realization of a single market. The desire for a level playing field between the states would then lead to other matters being decided at Community level, in order to prevent states from giving advantages to their own industries. Political spillover was equally important and involved the build-up of political pressure in favour of further integration. In integrated areas interest groups would be expected to concentrate their attention on the Community, and apply pressure on those with regulatory power. Such groups would also become mindful of remaining barriers to interstate trade, which prevented them from reaping the rewards of existing integration, thereby adding to the pressure for further integration. The Commission was to be a major player in this political spillover, since it would encourage the beliefs of the state players. Neofunctionalism was to be the vehicle through which Community integration, conceived of as technocratic, elite-led gradualism, was to be realized. Legitimacy was conceived of in terms of outcomes—increased prosperity, which was to be secured through technocracy, even if this meant a marginalized role for elected bodies.[90]

Neofunctionalism was however challenged empirically and theoretically. The empirical challenge was based on its failure to explain the reality of the Community's development. The 1965 Luxembourg crisis had a profound impact, since Member State interests re-emerged with a vengeance. The resulting *de facto* unanimity principle signalled that Member States were not willing to allow Community development inconsistent with their vital interests. Decision-making for many years thereafter was conducted in the shadow of the veto. The Commission's role changed from emerging government for the Community to a more cautious bureaucracy.[91] Moreover, evidence of interest group pressure for greater integration was found to be equivocal.[92]

The theoretical challenge to neofunctionalism was based on the fact that its failure to accord with political reality led to theoretical modification that rendered it increasingly indeterminate,[93] and on neofunctionalism's failure to relate to general themes within international relations, which sought to explain why states engaged in international cooperation. It would nonetheless be wrong to conclude that neofunctionalism has no explanatory value for EU integration, and it is arguable that functional spillover created impetus for further integration.[94]

[89] E Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950–1957* (Stanford University Press, 1958); L Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press, 1963); L Lindberg and S Scheingold, *Europe's Would-Be Polity: Patterns of Change in the European Community* (Prentice-Hall, 1970); L Lindberg and S Scheingold, *Regional Integration* (Harvard University Press, 1970).

[90] Lindberg and Scheingold (n 89) 268–269.

[91] K Neunreither, 'Transformation of a Political Role: The Case of the Commission of the European Communities' (1971–72) 10 JCMS 233.

[92] S George, *Politics and Policy in the European Union* (Oxford University Press, 3rd edn, 1996) 41–43.

[93] A Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 473, 476.

[94] George (n 92) 40–41.

(B) LIBERAL INTERGOVERNMENTALISM

An alternative theory of integration is known as liberal intergovernmentalism, championed by Moravcsik.[95] His thesis is rooted in a branch of international relations theory. The central thesis is that states are the driving forces behind integration, that supranational actors are there largely at their behest and that these actors as such have little independent impact on the pace of integration.

The demand for integration is said to depend on national preferences, which are aggregated through their political institutions.[96] The increase in cross-border flows of goods and services creates what are termed 'international policy externalities' among nations, which can have negative side effects on other states, thereby creating an incentive for policy coordination.

The supply of integration is said to be a function of inter-state bargaining and strategic interaction. Domestic preferences define 'a "bargaining space" of potentially viable agreements, each of which generates gains for one or more participants'.[97] Governments choose one such agreement, normally through negotiation. Integration is pursued through a supranational institution because it is felt to be more efficient. Constructing individual *ad hoc* bargains between states can be costly.[98] This problem is obviated by a supranational structure such as the EU. The same basic driving force of efficiency is said to explain the decision-making procedures in the EU. Thus Member States carry out a cost–benefit calculation, with the decision to delegate or pool sovereignty signalling the willingness of national governments to accept an increased risk of being outvoted on any individual issue in exchange for more efficient collective decision-making.[99]

(C) MULTI-LEVEL GOVERNANCE

Liberal intergovernmentalism was predicated on the assumption that supranational institutions enabled national governments to attain policy goals that could not be obtained by independent action.[100] This state-centric view was challenged by those who saw the EU in terms of multi-level governance.[101]

Thus Marks, Hooghe, and Blank argued that integration was a process in which authority and policy-making were shared across multiple levels of government: subnational, national, and supranational.[102] National governments were major players, but did not have a monopoly of control.

95 A Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 473; A Moravcsik, *National Preference Formation and Interstate Bargaining in the European Community, 1955–86* (Harvard University Press, 1992); A Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 International Organization 19.

96 Moravcsik, 'Preferences and Power' (n 95) 481.

97 Ibid 497.

98 J Buchanan and G Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1962).

99 Moravcsik, 'Preferences and Power' (n 95) 509–510.

100 A Milward, *The European Rescue of the Nation State* (University of California Press, 1992); A Milward and V Sorensen, 'Independence or Integration? A National Choice' in A Milward, R Ranieri, F Romero, and V Sorensen (eds), *The Frontier of National Sovereignty: History and Theory, 1945–1992* (Routledge, 1993); P Taylor, 'The European Community and the State: Assumptions, Theories and Propositions' (1991) 17 Review of International Studies 109.

101 See, eg, M Jachtenfuchs, 'Theoretical Perspectives on European Governance' (1995) 1 ELJ 115 and 'The Governance Approach to European Integration' (2001) 39 JCMS 245; G Marks, L Hooghe, and K Blank, 'European Integration since the 1980s: State-Centric Versus Multi-Level Governance' (1996) 34 JCMS 341; B Kohler Koch, 'The Evolution and Transformation of European Governance' (Institute for Advanced Studies, Vienna: Political Science Series No 58, 1998); K Armstrong and S Bulmer, *The Governance of the Single European Market* (Manchester, 1998); S Hix, 'The Study of the European Union II. The "New Governance" Agenda and its Rival' (1998) 5 JEPP 38; I Bache and M Flinders (eds), *Multi-Level Governance* (Oxford University Press, 2004).

102 Marks, Hooghe, and Blank (n 101) 341, 342.

Supranational institutions, including the Commission, the EP, and the ECJ, had influence in policy-making and could not merely be regarded as agents of national governments.[103] When competence over a certain subject matter has been transferred to the EU, proponents of multi-level governance contend that there are real limits to the degree of individual and collective state control over EU decisions.[104] Thus while Member States may play the decisive role in the treaty-making process, they do not exert a monopoly of influence, and the day-to-day control exercised by the states collectively is less than that postulated by state-centric theorists. The ability of the 'principals', the Member States, to control the 'agents', the Commission and the ECJ, is limited by a range of factors, including the 'multiplicity of principals, the mistrust that exists among them, impediments to coherent principal action, informational asymmetries between principals and agents and by the unintended consequences of institutional change'.[105]

(D) RATIONAL CHOICE INSTITUTIONALISM

Rational choice institutionalism is a derivative of rational choice theory. The latter is premised on methodological individualism, whereby individuals have preferences, and choose the course of action that is the optimal method of securing them.[106] Rational choice institutionalists were critical of liberal intergovernmentalism because of the minimal role that the latter accorded to EU institutions,[107] although the gap between the two theories became narrower in the late 1990s.[108]

Proponents of rational choice institutionalism acknowledged that institutions were important. Institutions constituted the rules of the game thereby enhancing equilibrium, and they exemplified principal/agent analysis. Member State 'principals' delegated to supranational 'agents' to enhance the credibility of their commitments, and to deal with incomplete contracting, since Treaty provisions are often open to a spectrum of possible interpretations. Principal/agent literature focused on the controls that the principal might use to ensure that the agent did not deviate from the desired goals of the principal.[109]

(E) CONSTRUCTIVISM

Constructivists agree with rational choice institutionalists that institutions matter. They nonetheless dispute the foundations of much rational choice literature, more especially methodological individualism and the idea that individual or state preferences are 'given'. Constructivists contend that the relevant environment in which preferences are formed is inescapably social.[110] This inevitably impacts

[103] Ibid 346.

[104] Ibid 350–351.

[105] Ibid 353–354.

[106] J Jupille, J Caporaso, and J Checkel, 'Integrating Institutions: Rationalism, Constructivism, and the Study of the European Union' (2003) 36 Comparative Political Studies 7.

[107] M Pollack, 'International Relations Theory and European Integration', EUI Working Papers, RSC 2000/55.

[108] This was primarily because Moravcsik modified his theory to acknowledge that supranational institutions might have greater powers over agenda setting and the making of EU law outside major Treaty negotiations than he had posited in his earlier work, A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998) 8.

[109] M Pollack, *The Engines of European Integration: Delegation, Agency and Agenda Setting in the EU* (Oxford University Press, 2003); Pollack (n 107).

[110] T Risse, 'Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union' (1996) 34 JCMS 53; J Checkel, 'The Constructivist Turn in International Relations Theory' (1998) 50 World Politics 324; T Christiansen, K Jorgensen, and A Wiener, 'The Social Construction of Europe' (1999) 6 JEPP 528.

on, and thus constitutes, a person's understandings of their own interests. Institutions will embody social norms and will affect a person's interests and identity.

Thus whereas rational choice institutionalism regards institutions as rules of the game that provide incentives within which players pursue their given preferences, constructivists regard institutions more broadly to include 'informal rules and intersubjective understandings as well as formal rules, and posit a more important and fundamental role for institutions, which constitute actors and shape not simply their incentives but their preferences and identities as well'.[111]

There have been attempts to soften the divide between rational choice institutionalism and constructivism.[112] Thus, for example, many rational choice theorists accept that preferences may well be altruistic as opposed to egoistic, and that preferences may be constrained by social structure. There have moreover been moves to test the relative cogency of the two approaches through carefully crafted case studies.[113]

8 CONCLUSIONS

i. Formal Treaty amendment has not been spread evenly over the EU's history. The period between the founding of the EEC and the SEA was relatively stable in this respect. The period since the SEA has been one of almost continuous Treaty revision, with the Maastricht, Amsterdam, and Nice Treaties coming in quick succession.

ii. Treaty reform is a continuation of politics by other means. The Lisbon Treaty represents the culmination of a decade of attempts at Treaty reform.

iii. The period since the inception of the EEC has seen very significant institutional and substantive changes to its powers.

iv. In institutional terms, the European Parliament has moved from a player very much on the fringes of decision-making to become an institutional force in its own right, with a major role in the legislative process. The European Council has gone from strength to strength, beginning as an institution that existed outside the strict letter of the Treaties, to become a major institutional player, a position further reinforced by the Lisbon Treaty. Treaty amendments have also impacted on the powers and institutional dynamics of the Commission and Council.

v. In substantive terms, the many complex Treaty changes should not mask the basic fact that each successive Treaty amendment has seen an increase in the areas over which the EU has competence. The time when the EU could be regarded as solely 'economic' in its focus, if it ever truly existed, has long gone. The rationale for this will be explored in subsequent chapters. Suffice it to say the following. There is debate as to the relative importance of Member States and other players, such as the Commission, during the process of Treaty amendment. There is however no doubt that the Member States are central to the pace and direction of Treaty amendment, and that they have been willing to accord the EU competence over an increased range of areas.

[111] Pollack (n 107) 14–15.

[112] J Checkel, 'Bridging the Rational-Choice/Constructivist Gap? Theorizing Social Interaction in European Institutions', University of Oslo, ARENA Working Papers 00/11.

[113] See, eg, the essays in (2003) 36 Comparative Political Studies.

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