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Chapter 1

Introduction: The Constitutionalization of Europe

For the European Union (EU) the early twenty-first century was dominated by the debate about a ‘European Constitution’ – first concerning its negotiation, later followed by its demise, and finally focusing on its ‘rebirth’ as the Lisbon Treaty (LT). In the face of the Union’s biggest ever enlargement to 27 member states a fundamental debate about, and a systematic overhaul of, Europe’s institutional architecture and normative foundation was deemed essential. Yet, while the prospect of a ‘big bang’ enlargement had been with the EU since the 1990s, previous reform attempts – the Amsterdam Treaty and the Nice reforms – fell short of expectations and became the subject of criticism both for their substantive content and for the process through which they came about. Thus, just as the ink on the Nice Treaty was drying, the so-called ‘Post-Nice Process’ was launched in order to engender a large-scale debate about Europe’s future. By now the outcome of this endeavour is all too familiar: Post-Nice set the scene for the Convention on the Future of Europe (CFE) and for the negotiation of the Treaty Establishing a Constitution for Europe (CT). Widely referred to as the ‘European Constitution’, this document was to be the foundation of an EU of 27 or more member states – a project unexpectedly derailed when the French and Dutch people rejected the Constitutional Treaty in two referenda in 2005. Following a ‘period of reflection’, top political negotiations as well as yet another Intergovernmental Conference (IGC), on 13 December 2007 Europe’s Heads of State or Government (HSG) eventually signed the Lisbon Treaty – and thus a legal text shunning any explicit constitutional reference.

This book discusses the Constitutional Treaty, but it is not only a book about the Convention process or about the short –

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if significant – phase of formal and explicit constitutionalization which the EU underwent between 2001 and 2005. Rather, it is a book about Europe’s continuous constitutionalization over the last five decades. Founded in the 1950s on the basis of an international treaty among six countries, over time the EU has become a polity based on a codified set of rules, a unique institutional architecture, a set of common policies and values, an exceptional record of compliance with supranational law, and an integrated political, economic and administrative elite. This polity is not a state. But it is more than an association of states or an international organization. Furthermore, in the broadest sense of the word ‘constitution’ – as ‘the set of the most important rules and common understandings in any given country that regulate the relations among that country’s governing institutions and also the relations between the country’s governing institutions and the people’ (King, 2007, p. 3) – Europe has undoubtedly become constitutionalized. The Union’s Treaties are constitutional in both a legal and political sense – containing rights subject to judicial review, and establishing a structure for democratic participation (Bellamy, 2007, p. 3). Yet, due to the EU’s contested nature – famously defined as ‘less than a federation, more than a regime’ (Wallace, 1983) – even the above ‘uncontroversial, perhaps platitudinous’ constitutional definition (King, 2007, p. 3) must be disputed. And in contrast to most nation states the European Union has been constitutionalized by way of informal incrementalism and semi-permanent reform, rather than explicit public endorsement and a ‘constitutional moment’ (Ackerman, 1991).

Our book charts this process of constitutionalizing Europe – of which the Constitutional Treaty might have been a preliminary peak, but certainly not the final step. More specifically, this book

- maps the legal, political and academic discourse about a ‘European Constitution’, and assesses the constitutional quality of the EU’s Treaties;
- discusses the formal and informal mechanisms behind constitutionalization, with a particular emphasis on the impact of everyday policy-making and jurisprudence;

- looks at the actors that took – or contributed to taking – reform decisions, as well as at the structural opportunities and constraints behind their choices;
- not only depicts constitutionalization *en grand*, but analyses individual IGCs themselves as ‘constitutional policy processes’ from agenda-setting to ratification;
- discusses the rise and fall of the Constitutional Treaty as embedded in the context of Europe’s long-term constitutionalization.

In doing so, we pursue two aims. First, we strive to offer the reader a *tour d’horizon* of both the substance and procedure of constitutional change from the EU’s foundation till the present day. As such, our approach is both substantively and theoretically broader than related recent scholarship, focusing on the Convention process (Milton and Keller-Noëllet, 2005; Norman, 2003b); on individual rounds of treaty reform (Beach, 2005; Moravcsik, 1998; Piris, 2000); on institutional change between IGCs (Héritier, 2007; Jupille, 2004); or on substantive dimensions of constitutionalization such as human rights or parliamentary empowerment (Rittberger and Schimmelfennig, 2007). Second, we aim to equip the reader with multiple theoretical perspectives so as to encourage and facilitate future research in the field. While drawing on political and legal theory, public policy analysis and institutionalist approaches to European integration, we do not develop – or test – as rigorous an explanation as do some of the above-mentioned scholars. Nevertheless, as elaborated in more detail below, we adopt a distinct conceptual take on constitutionalization as a continuous, non-teleological process, and pay attention to a number of analytical factors that are bracketed by rationalist explanations of constitutional change. As will become evident in the course of this book, the choice for such an approach has direct repercussions for our analytical focus and empirical investigation.

Constitutionalization, treaty reform and constitutional politics in Europe

This book is built on one driving argument: we can only fully understand constitutional change in Europe if we treat consti-

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tutionalization as a continuous process rather than limit our analysis to formal reform as a ‘series of celebrated intergovernmental bargains’ (Moravcsik, 1998, p. 473). Although we consider formal treaty change to be a key force behind constitutionalization – in fact, we devote a major part of this book to the study of IGCs – our analysis is based on three broader propositions:

- First, *constitutionalization* is best understood as the continuous, non-teleological process through which Europe’s normative basis has been – and is being – transformed. This process is driven by formal and informal, explicit and implicit mechanisms, with each instance of constitutional change connected to the previous and subsequent ones.
- Second, formal *treaty reform* through IGCs is an important – yet by no means the only – mechanism behind constitutionalization. Intergovernmental Conferences as the arenas for formal reform are themselves best studied as heavily prestructured, historically embedded and longitudinal processes, rather than as discrete, punctuating events.
- Third, *constitutional politics* as the struggle between a wide range of actors over constitutional choice takes place in a legally, institutionally and discursively prestructured context. As such, constitutional politics overlaps with, is influenced by and partially plays out as everyday – or ‘normal’ – Community politics.

Throughout this book, we understand Europe’s constitutional order as evolutionary rather than as the product of an explicit and deliberate constitutional moment – it is ‘specifically non-teleological and accepts contestation and non-fixity as a way of life’ (Shaw, 2003, p. 48). Against this backdrop, the concept of constitutionalization denotes the process that has conferred – and is conferring – ‘a constitutional status on the basic legal framework of the European Union’ (Snyder, 2003, pp. 62–63). A similar ‘constitutional status’ has two main dimensions: first, the genesis and juridification of public authority beyond the nation state (Scholl, 2006, p. 51); second, the transformation of Europe’s legal order from a ‘relationship binding upon the states *qua* states, to an integrated legal order that confers rights and obligations on pri-

vate parties, and one in which the controls and exercise of public power are similar in nature to those found in the member states' (Craig, 2001, p. 128).

A similar definition of constitutionalization fully accommodates the specificities of supranational constitutionalism, which will be discussed at some length in the next two chapters. Suffice it here to mention three features that distinguish constitutionalism at the European level from its national variant (although constitutionalism is a contested concept at the national level too). First, the *sui generis* nature of the European polity, located somewhere between a state and an international organization, raises the – as yet unanswered – normative question of whether a constitution is at all possible without statehood; it also requires a legal and political settlement that can reconcile the breadth of national constitutional ideas and traditions (Jachtenfuchs, 2002; Scholl, 2006). Second, the semi-permanent and incremental process of constitutionalizing the EU contrasts starkly with the national experience of intentional constitutional design (Menéndez, 2004, p. 110) – with the UK a notable exception. If constitutionalization at the supranational level thus refers to the step-by-step *generation* of a constitutional system, at the national level it mainly denotes the *interpretation* and *development* of a constitution once created. Third, a non-teleological understanding of constitutionalization builds on continuity rather than a *finalité politique* as the definition of a final destination for the integration process. Put differently, the constitutionalization of Europe need not necessarily result in a formal, 'capital-C-Constitution' (Andenas, 2002, p. 103) – for some scholars such an outcome would even be normatively undesirable (Weiler, 2003). Nor need the failure of such an attempt mark the end of constitutionalization, as demonstrated post-2005 when Europe took a step back from formal-explicit constitution building, but continued the process itself.

In this continuous, non-teleological process of constitutionalizing the European Union, treaty reform through Intergovernmental Conferences has been an important – arguably the most important – mechanism. Treaty reform is here defined as the creation and/or modification of the EU's foundational rules and institutions (Closa, 2003); IGCs are negotiations between governments outside the framework

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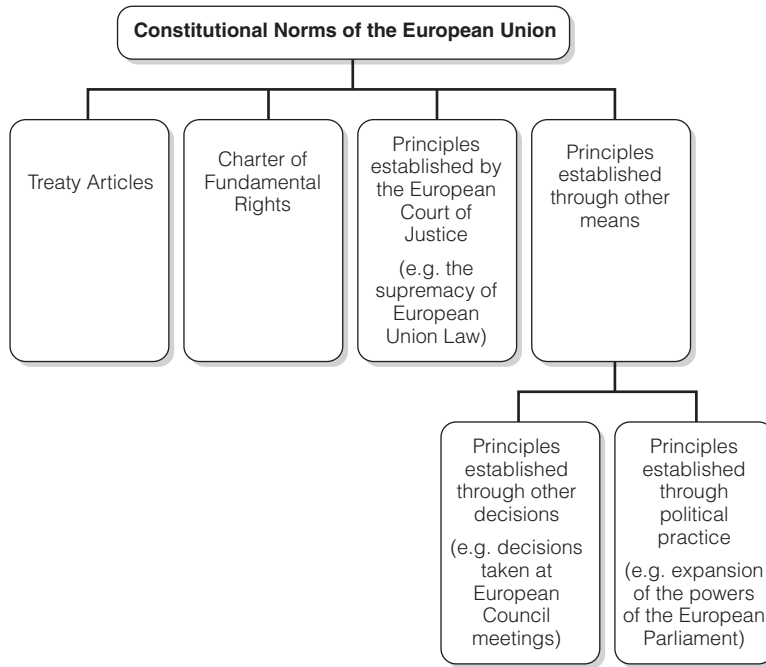


Figure 1.1 *Elements of Europe's constitutional order*

of the Union's procedures and institutions (European Commission, 1997b). As discussed below, formal treaty change has been of prime interest to those scholars who strive to explain why and how European integration has come about. At the same time, similar change approximates the domestic experience, with the reform steps taken through IGCs coming closest to the constitutional moments of nation states.

Our take on treaty reform and Intergovernmental Conferences is somewhat different. First, we argue that even though formal treaty reform punctuates Europe's legal basis, each constitutional decision will be constrained by previous constitutional choice, by the current political and democratic praxis, and by the informal politics taking place between formal reform rounds. Second, Intergovernmental Conferences themselves are conceptualized as long-term processes rather than isolated historical events, in view of both the ideational,

institutional and personal continuities between IGCs, and the longitudinal negotiation process during a conference itself. In short, formal treaty reform is crucial in constitutionalizing the European Union, but can only be understood as embedded in the broader context of constitutionalization.

While constitutionalization refers to the gradual transformation of the EU's legal order, and treaty reform denotes the creation and/or modification of the Union's foundational rules and institutions, constitutional politics is here defined as the conflict about and struggle over constitutional choice. This struggle is carried out among a variety of national, supranational, subnational and non-governmental actors in different arenas: in domestic politics, in Intergovernmental Conferences and their preparatory bodies such as the Convention, in public discourse and the media, in Community policy-making, as well as before the European Court of Justice (ECJ). Based on the above-mentioned momentous rather than evolutionary creation of national constitutions, scholars have traditionally treated constitutional politics as strictly distinct from 'normal' or everyday politics – the former occurring in exceptional times, either to create a political system or to place it under discussion; the latter conducted in the framework of a settled constitutional system (Ackerman, 1991, pp. 6–7). 'Normal' politics is characterized by the strife between ideological factions and competing interests; constitutional politics, by contrast, 'only takes place when some national crisis manages to unite the people and leads them to transcend their own particular interest and consider the common good' (Bellamy, 2007, p. 130) – it is 'mobilized deliberation made in the name of We the People' (Ackerman, 1991, p. 7).

In contrast, we contend that a similar dichotomy cannot be upheld when studying the EU's constitutionalization. This is, first, because despite the transformation of its legal order, the European Union does not (yet) dispose of a settled constitutional system – and, in fact, may never do so. Thus, the distinction between a consensual, common good-oriented constitutional moment and a conflict-ridden 'normal' policy process cannot be made. Instead, far from unifying its member states, constitutional debates about the EU's final function and form have triggered the sharpest conflicts between them. Arguing against the politicization of Europe, scholars have

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made a similar point: in contrast to the domestic level, where ideological divisions play out along a left-right dimension, politicized debates about the EU would necessarily challenge the polity's *raison d'être* and constitutional foundations (Bartolini, 2006). Second, where constitutionalization is understood as a process, constitutional politics and everyday politics will necessarily take place side by side, and overlap in substance and style, participants and procedure.

Constitutionalization as process: aspects and implications

The following zooms in on our conceptual take on constitutionalization as process. First, we look at the specific forms that this process has taken at the supranational level; second, we identify the diverse substantive sources on which the transformation of Europe's legal order has been built; and, third, we discuss the repercussions of a conceptual turn towards process for the empirical analysis of constitutional politics.

In a nutshell, Europe's constitutional process has been driven by three key mechanisms: (1) formal and explicit constitutionalization; (2) formal and implicit constitutionalization; and (3) informal and incremental constitutionalization. While distinct in form and underlying logic, these mechanisms have not succeeded each other in a linear fashion, but have played out in parallel, building on and partially reinforcing each other.

First, *formal and explicit constitutionalization* is here defined as the attempt to create a capital-C Constitution for Europe, and thus comes closest to the ideal-typical domestic experience. This first (and, in fact, rarest) mechanism implies a constitutional moment, a public constitutional debate, as well as democratic participation in constitutional drafting and at the ratification stage. Formal and explicit constitutionalization results in a codified document, not only setting the rules of the game but recognized as the legitimate basis of the European polity. Albeit open to interpretation and development, such a document generates stability. In short, formal and explicit constitutionalization would give Europe a *finalité* and a 'positivized constitution' (Menéndez, 2004, p. 110). In the EU's constitutional history only two such attempts can be identified,

both of which failed at the ratification stage: the plan to set up a European Defence Community (EDC) and a European Political Community (EPC) in the 1950s (Rittberger, 2006), and the Convention process between the 2001 Laeken Declaration and the popular rejection of the Constitutional Treaty in 2005.

Second, *formal and implicit constitutionalization* is here understood as a particular modification of the Union's fundamental rules and institutions, namely a modification that moves the EU's legal order a step away from international law and towards a constitutional settlement, but that avoids any explicit constitutional language or reference to a *finalité politique*. While setting the rules of the game, the legal order resulting from formal and implicit constitutionalization has little symbolic power or potential to generate stability. Similar incremental legal transformation is equal to treaty reform and has been the most prominent mechanism in Europe's constitutional history, effected principally – but not only – through Intergovernmental Conferences such as the ones in Messina, Maastricht or Nice. Examples of formal, implicit constitutional change occurring before the major treaty reforms of the 1980s and 1990s include the earlier decisions to create a single European Commission for the three Communities in 1965, and to introduce direct elections to the European Parliament (EP) in 1979.

Third, *informal and incremental constitutionalization* denotes those legal and political developments that have *de facto* moved Europe's legal system towards a constitutional order, but have not relied on treaty reform to do so. Originating in the Community policy process, similar informal and incremental change is often (but by no means always) formalized in subsequent IGCs. Informal constitutionalization can have a variety of origins: ECJ judgments, inter-institutional agreements, disputes over the application and interpretation of formal rules, political and democratic practices, as well as changed perceptions or linguistic references. Examples from these 'valleys' of Europe's constitutional history are legion, reaching from the Court's famous rulings on the direct effect and supremacy of Community law in the 1960s, to the European Parliament's impact on the selection procedure of the Commission President in the 1990s (see Figure 1.2).

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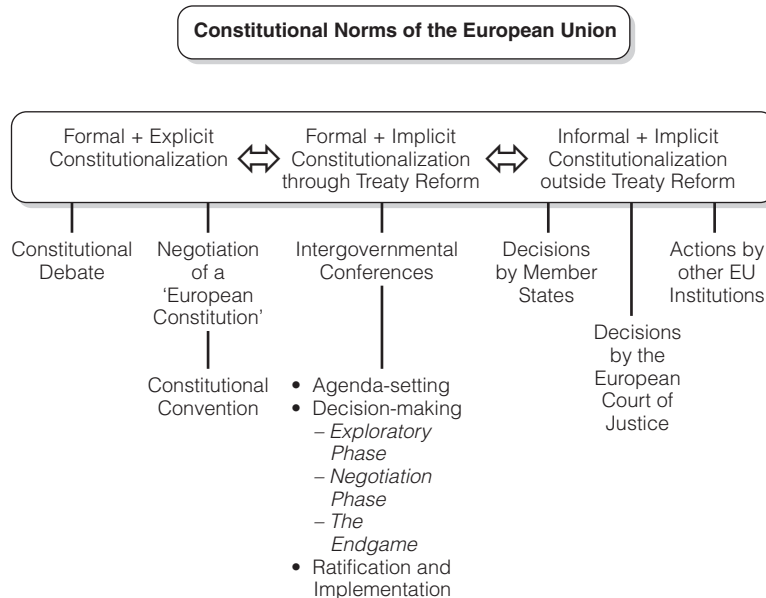


Figure 1.2 Conceptualizing the constitutionalization of the European Union

As mentioned above, these three mechanisms do not progress in a linear fashion, nor need the failure of formal and explicit constitutionalization put an end to Europe's constitutional process as such. The most recent reform round – taking up almost a decade in EU history – is a case in point. While the constitutionalization of Europe had been driven by a combination of formal-implicit and informal-incremental mechanisms from the 1960s to the late 1990s, the new millennium began with a formal-explicit 'constitutional turn' (Diez and Wiener, 2004). As discussed in detail later in the book, the Convention process was firmly embedded in and prestructured by previous constitutional choice, but it broke with the established practice in a number of ways: by using explicit constitutional language, by launching the European Convention as a new method of constitutional creation, and by raising the democratic participation in negotiating and ratifying a 'European Constitution'. When ratification failed in 2005, the EU did not halt but

simply redirected the process: with the 2007 IGC and the Lisbon Treaty it fell back on the mechanism of formal but implicit constitutionalization that had been tried and tested over the past fifty years.

This particular *procedure* of constitution building in Europe has impacted directly on the *substance* of its constitutional settlement. Rather than being targeted at the creation of one codified document – akin to most national constitutions – the mix between formal and informal, as well as explicit and implicit constitutionalization has, over time, produced a ‘Constitution of bits and pieces’ (Curtin, 1993) – based on sources as diverse as Treaty texts, binding protocols and declarations; ECJ case law and advocate generals’ opinions; general principles of law and national constitutional traditions; extra-Treaty agreements and international conventions, such as the European Convention on Human Rights (ECHR); European Council conclusions; inter-institutional agreements; and established political and democratic practices. In that sense, Europe’s constitutional order resembles the UK’s: as the product of evolution rather than deliberate creation, the latter does not come as one codified document but is based on a large number of constitutional arrangements and conventions – such as the 1707 Act of Union, the 1911 Parliament Act, and the practice of holding regular elections (King, 2007).

Finally, a turn towards constitutionalization as process has a number of repercussions for the analytical focus and empirical investigation of the following chapters.

First, an understanding of constitutionalization as continuous and non-teleological requires a specific take on the substance of Europe’s constitutional order. Thus, we will not ask whether the EU has been given a capital-C Constitution, or is likely to acquire one in the near future. Instead, we will be interested in the constitutional quality of the Union’s legal system, as well as in the different steps that have added to – or taken away from – its constitutionalization. In so doing, we develop a set of functional and normative criteria as a yardstick, and introduce the legal and political discourse as well as the praxis that has accompanied, and driven, Europe’s constitutional evolution.

Second, recognizing the longitudinal nature of EU treaty reform and constitutional politics calls for a particular

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approach to agency and structure, and, in particular, to the role assigned to ideas and institutions in shaping actors' constitutional preferences (Christiansen *et al.*, 2002). In a nutshell, a conceptual turn towards process requires us to look beyond those governmental actors that negotiate formal treaty change and have a veto over an IGC's final outcome. In contrast to both intergovernmentalists and supranationalists we therefore study agency in the broadest possible perspective – on the one hand, moving beyond member states as unitary actors either at the stage of domestic preference formation or during the actual constitutional negotiation; on the other hand, accounting for the whole variety of national, supranational, subnational and non-governmental actors that have contributed to constitutionalizing Europe. True to our longitudinal perspective, we also argue that these actors operate in a prestructured environment, providing the opportunities and constraints for their reform decisions. Defined broadly as those factors that influence constitutional change in Europe but that cannot be reduced to individual or collective agency, structure is here divided into three sub-sets: (1) legal-institutional structures, comprising the formal rules and informal institutions behind constitutionalization; (2) ideational-discursive context, prestructuring through prior constitutional choice and the prevalent public-political debate; and (3) temporal-political conditions, exerting constraints through reform-immanent deadlines, as well as international and domestic schedules.

Third, where constitutionalization is approached as a continuous process we need to look at how different forms of agency and structure have interplayed over time so as to effect constitutional change. As argued above, constitutional change in Europe has predominantly been driven by a combination of formal-implicit constitutionalization through Intergovernmental Conferences, and informal-incremental constitutionalization through Community law and politics. When attempting to explain the interplay between structure and agency, we therefore look at how these two mechanisms have played out in Europe's constitutional history. Against the backdrop of our conceptual take on Intergovernmental Conferences as themselves embedded and longitudinal, we pay particular attention to the interlinkages between IGCs, and to

how treaty reform has become increasingly akin to and influenced by the Community policy process.

In sum, the suggested conceptual turn towards process has three implications for the analysis of constitutional change in Europe. First, it calls for a focus on the evolution and idiosyncrasies of the Union's constitutional system rather than on its *finalité*. Second, it necessitates an inclusive take on actors and an interest in structural opportunities and constraints, as well as an analysis of how their interplay over time has shaped constitutional change in Europe. Third, it triggers an interest in those developments that occur in the 'valleys' between the better-known events taking place at the 'summits' of Intergovernmental Conferences, as well as in the substantive and procedural overlaps between treaty reform and Community policy-making.

Last but not least, a turn towards process directly affects our interpretation of the 2001–2005 interlude of formal-explicit constitutionalization, and of the Convention process in particular. While we readily admit that the CT's ratification failure plunged the EU into momentary crisis, we argue that neither was the CFE as novel an institutional experiment as conventional wisdom would have it, nor did the CT's rejection put an end to constitutionalization. In short, both the Convention and the Constitutional Treaty are best understood as embedded in Europe's long-term process of implicit and incremental constitutionalization, and not as the futile, historical attempt at fixing the Union's *finalité politique* (see Figure 1.3).

Constitutionalizing Europe: the academic background

When conceptualizing EU constitutional politics, we have identified two key elements: first, the nature of constitutionalization as continuous and non-teleological, and, second, three different mechanisms that have driven this process. In order to explain constitutionalization in greater depth, we need to analyse the formal and informal decisions, discourses and practices that have shaped the European polity over time, and assess the constitutional quality of Europe's legal and political order. This will be the task of the next chapters. As noted

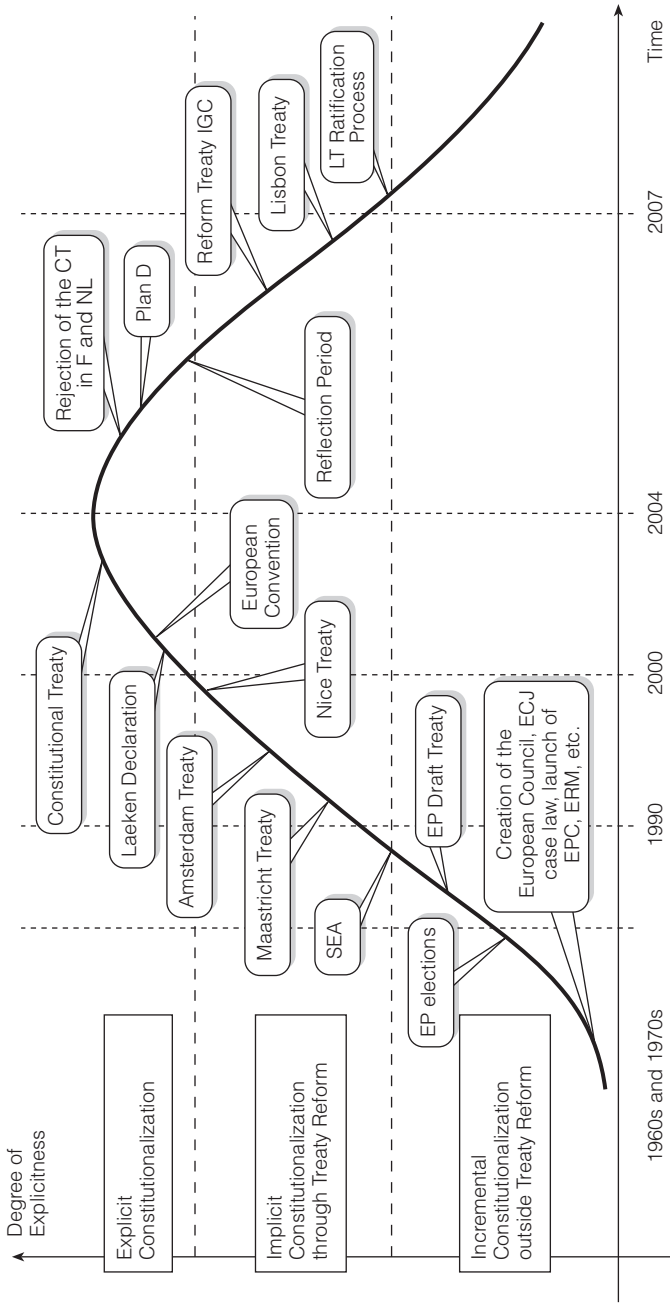


Figure 1.3 The process of constitutionalization in Europe

briefly at the outset, while these chapters are theory-guided and grounded in our distinct conceptual take on constitutionalization, they are not used to test a fully fledged theory. Nevertheless, our project is embedded in – and contributes to – previous research on constitutionalization, treaty reform and the European Union as a polity. It is to these contributions that we now turn.

In line with its predominantly formal-implicit as well as informal-incremental constitutionalization since the 1950s, until recently the European Union lacked an explicit and public constitutional debate. Similarly, non-legal academic contributions dealing explicitly and exclusively with the ‘European Constitution’ were rare – or emanated from federalists working at the interface of academia and politics such as Andrew Duff, Pier Virgilio Dastoli or John Pinder. Nonetheless, the absence of an explicit constitutional debate did not mean that before the brief phase of formal-explicit constitutionalization political scientists failed to deal with constitutional issues. In fact, it is possible to distinguish three well-established categories of ‘constitutional scholarship’ in European studies: first, theoretical explanations of why particular constitutional decisions were taken, and why European integration has developed in a particular way; second, descriptive-analytical studies, discussing the outcome and impact of individual IGCs; and, third, theory-guided empirical research on continuous constitution building in Europe. While the first and second strands are mainly interested in formal-implicit constitutionalization, the third body of literature focuses on informal-incremental mechanisms.

Explaining the substantive changes of European integration, as well as the underlying dynamics has been at the core of ‘grand’ integration theory – from Neofunctionalism (NF) in the 1950s, through ‘classic’ Intergovernmentalism in the 1960s, to Liberal Intergovernmentalism (LI) in the 1990s. The driving questions behind these theories – Why do nation states cooperate? Who drives integration? Where will integration lead to? – do not tackle constitutionalization explicitly, although the reform of Europe’s legal and political system is of prime relevance. And even if none of the contributions discussed below are explicitly about the ‘European Constitution’, they all touch upon core constitutional issues: the nature of

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sovereignty and the state in Europe, the role of norms and institutions, and the distribution of political power.

The early phase of integration theory was dominated by two competing views: the first, neofunctionalist school considered European integration as a process which generated a new, supranational base of sovereignty, and resulted in a shift of national political loyalties to the new centre in Brussels (Haas, 2004/1958; Lindberg and Scheingold, 1970). According to this view, the European Communities were not a state but they were certainly more than a classic international organization. While member states were assigned an important role, the key dynamics were argued to be non-governmental: on the one hand, decisions to integrate further were the automatic ‘spill-overs’ from previous choices for European integration; on the other, supranational institutions and interest groups were the powerful entrepreneurs of further change. The opposing school considered the EU as just another instance of intergovernmental cooperation – strengthening rather than weakening state sovereignty, driven by national interests and economic preferences, and fully controlled by member states as ‘Masters of the Treaties’ (Hoffmann, 1966; Milward, 1992).

The core of both strands was carried on into subsequent theoretical controversies about the origins and the nature of the EU – controversies which gained new impetus in the early 1990s when the Maastricht Treaty fundamentally transformed Europe’s legal and political order, and when its ratification crisis alerted the wider political and academic public to the potential democratic repercussions of integration. The theoretical debate – still centring on integration rather than constitutionalization – was dominated by three main arguments. First, and standing in line with Neofunctionalism, scholars assigned supranational actors the main role in driving integration – be that the European Commission (Beach, 2005), or the Court of Justice (Stone Sweet, 2004). Second, and inspired by the rise to prominence of social constructivism in International Relations (IR), Europeanists argued that actors’ constitutional preferences are best explained by their beliefs about legitimate political order (Jachtenfuchs *et al.*, 1998; Jachtenfuchs, 2002), and that the EU’s unique institutional architecture reflects the ideology of an elite minority post-Second World War (Parsons, 2003).

Third, and built on intergovernmental thinking, delegation theorists argued that the transfer of sovereignty followed a functional logic: national governments created and strengthened supranational institutions so as to guarantee effective agenda-setting, to provide expertise, to monitor compliance, and to fill incomplete contracts (Pollack, 2003). However, all three arguments can only be fully understood against the backdrop of Liberal Intergovernmentalism – the predominant and most systematic integration theory of the 1990s. LI explains the course and shape of Europe ‘from Messina to Maastricht’ (Moravcsik, 1998) and beyond as the result of a three-step process:

(a) national preferences develop in response to exogenous changes in the nature of issue-specific functional interdependence; (b) interstate negotiation proceeds on the basis of relative bargaining power; and (c) delegation to supranational institutions is designed to facilitate credible commitments. (Moravcsik, 2005, p. 358)

In short, according to LI demand for European integration stems from governments’ economic preferences, based in turn on domestic pressure for supranational solutions; negotiation outcomes are determined by member states’ size, economic weight and, first and foremost, by their different preference intensities and exit options; and Europe’s institutional set-up is a function of the member states’ desire to keep their commitment to economic integration.

Most recently – and embedded in Europe’s explicit ‘constitutional turn’ – political scientists have developed a comprehensive explanation of deepening integration in two core areas of Western constitutionalism: parliamentary empowerment and human rights (Rittberger and Schimmelfennig, 2006). Complementing both rationalist and constructivist integration theory, they identify two factors behind constitutional change: (1) a reform’s democratic salience and resonance with existing European and international norms, and (2) the publicity of the constitutional negotiation (Schimmelfennig *et al.*, 2006, pp. 1170–1). Case studies corroborate the theoretical argument, looking at the early roots of parliamentarisation, as well as at the origins of the Union’s human rights provisions either in

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debates about enlargement or in the interaction between the ECJ and national courts (Rittberger, 2006; Schimmelfennig, 2006; Thomas, 2006).

In sum, the first group of scholars is mainly interested in the trajectory of European integration, with individual reform decisions and Intergovernmental Conferences used to support, or disprove, a particular causal argument. As such, the accounts offer competing explanations of *why* particular constitutional decisions were taken, but tell us little about *how* formal decisions evolved and *who* took them.

This shortcoming is mirrored by a second body of scholarship that looks at formal-implicit constitutionalization as an ever more salient aspect of European integration. Indeed, conducting six Intergovernmental Conferences since 1990 alone, the EU has found itself in a state of self-perpetuating and semi-permanent revision (de Witte, 2002, p. 39), with public, political and academic attention peaking in the Convention process from February 2002 to June 2003. Yet, the plethora of studies on the ‘Convention method’ (Milton and Keller-Noëllet, 2005; Norman, 2003b; Shaw *et al.*, 2003) has not been matched by a similar academic interest in the conduct of constitutional politics through IGCs. Indeed, with noteworthy exceptions (Beach, 2005; Beach and Christiansen, 2007; Christiansen *et al.*, 2002; Falkner, 2002; Forster, 1998; Mazey and Richardson, 1997), research on EU reform has mainly focused on the substantive issues, results and impacts of individual IGCs, as well as on member states’ positions (Best *et al.*, 2000; Edwards and Pijpers, 1997; Laursen, 2002; 2006; Laursen and Vanhoonacker, 1992; Monar and Wessels, 2001; Neunreither and Wiener, 2000; Smith, 2002). In addition, former negotiators have given us first-hand accounts of how the Single European Act (SEA) as well as the Maastricht, Amsterdam and Nice Treaties were negotiated (Cloos *et al.*, 1993; de Ruyt, 1987; McDonagh, 1998; Stubb, 2002). Beyond these, however, little attention has been paid to the process and procedure of conducting IGCs – despite their key function in Europe’s constitutional process.

In sum, we can draw on sophisticated explanations of the grand integration trajectory, as well as on comprehensive accounts of the Union’s substantive reforms. Yet, we still know little about constitutionalization as continuous beyond

single reform events, and about the underlying formal and informal mechanisms – such as the ongoing negotiations within and between IGCs, the substantive and procedural context of constitutional choice, or the interlinkages between constitutional and everyday politics.

A third set of process-oriented contributions has, however, begun to explore informal-incremental constitutionalization. Filling the ‘holes’ left by established accounts, they redirect analytical attention from the ‘history-making’ reform summits to the in-between ‘valleys’. These contributions include, on the one hand, a structurationist approach to EU treaty reform as a long-term process, based on the recognition that the ‘crucial object of analysis cannot be Member State interests alone, but the process in which these are constructed’ (Christiansen and Jørgensen, 1999, p. 1). Similar to our approach, this process is conceptualized as the interplay between structural properties such as routines and practices, the path-dependency of the EU’s institutional development, IGC discourses, and both national and supranational agency. On the other hand, rational choice institutionalists have inquired how treaty change has been influenced by the institutional politics and informal norms of Community policy-making, and investigated the conditions under which informal institutions become formalized (Stacey and Rittberger, 2003). They have looked at ‘continuous constitution-building’ in Europe through interstitial institutional change and ‘conflicts over competences’ (Farrell and Héritier, 2003; 2007); at constitutional agenda-setting through rule interpretation by the European Parliament (Hix, 2002); and at the constitutional impact of ‘procedural politics’ or ‘rule-fights’ about a legislative act’s legal basis (Jupille, 2004; 2007). Examples offered in these studies will be used throughout the book to illustrate our discussion of informal-incremental constitutionalization.

This cursory overview shows that the constitutionalization of Europe has been amply researched, but that a number of lacunae remain. First, we can draw on competing explanations of why integration has followed its specific trajectory, and why particular constitutional choices were taken at particular moments in time. Yet, we still know little about how previous substantive decisions and institutional practices – formal and informal – have prestructured these choices and linked them

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across IGCs. Second, there are ample accounts that describe and analyse the substance of individual reform rounds, as well as actors' underlying preferences. However, we still lack a comprehensive discussion of the ideational, institutional and social context behind constitutional politics, and of its impact on actors' choices. Third, rational institutionalists have demonstrated how informal norms developed between IGCs were constitutionalized in subsequent reform rounds. Nevertheless, we are still unfamiliar with the role of informal politics within Intergovernmental Conferences, and with the procedural overlaps between the Community policy process and constitutional politics.

Our book contributes to filling these lacunae. This exercise seems to be particularly relevant at the current constitutional stage, with the brief interlude of formal-explicit constitutionalization running its course, and with the European Union falling back on tried and tested formal-implicit and informal-incremental mechanisms. What drives the analysis in this book is our desire to provide a full account of these mechanisms across time, to give an overview of the actors involved as well as the grown structures enabling and constraining their choices, and to show that neither before nor after the Convention has constitutionalization been exclusively dominated by Heads of State or Government, summit encounters and hard-nosed bargaining over exogenous preferences.

Plan of the book

The subsequent chapters follow from our three main propositions: constitutionalization is continuous and non-teleological; formal treaty reform as the predominant constitutional mechanism is best understood as a historically embedded process rather than as a series of discrete events; and, finally, constitutional politics overlaps substantively and procedurally with everyday policy-making.

The next two chapters discuss the constitutional substance of Europe's legal and political order and give an overview of the developments behind constitutionalization. Chapter 2 derives a set of formal, material and normative criteria against which the Treaties, but also Europe's constitutional process, are sys-

tematically assessed. Chapter 3 discusses the praxis of incremental constitutionalization, and charts the historical roots, the rise to prominence, and the demise of the new millennium's brief interlude of an explicit constitutional debate.

Chapters 4 and 5 provide an overview of the actors involved in the constitutionalization of Europe and of the opportunities and constraints that have structured their choices. At an abstract level, Chapter 4 discusses the conditions for effective agency and entrepreneurship in constitutional politics; empirically the reader is introduced to the plethora of national, supranational, subnational and non-governmental actors that took or shaped constitutional decisions. Chapter 5 then depicts the context within which these actors operate and decide, looking at the legal-institutional, ideational-discursive, as well as temporal-political context of IGCs.

Where constitutionalization is approached as a continuous process we then need to analyse how agency and structure have interplayed over time so as to effect constitutional change. This analysis is provided in the three following chapters, each treating a different stage of the 'IGC policy process' – agenda-setting and problem-definition (Chapter 6), negotiation and decision-making (Chapter 7), as well as ratification and implementation (Chapter 8). True to our conceptual take on IGCs as themselves embedded and longitudinal, particular attention is paid to how policy-stages and individual reform rounds have been interlinked, to how treaty reform has become increasingly akin to and influenced by the Community policy process, and to non-summit deliberation. Examples are drawn from across Europe's history, in particular from the post-SEA reform rounds.

Chapter 9 finally turns to the recent phase of formal-explicit constitutionalization, analysing the European Convention and the Constitutional Treaty, the subsequent IGCs, the CT's ratification failure, as well as the Lisbon reforms. Against the backdrop of the previous discussion, we argue that the Convention and the Constitutional Treaty too are best understood as embedded in Europe's long-term process of implicit and incremental constitutionalization, rather than as a historical attempt to fix the Union's *finalité*. The chapter also demonstrates that the developments following the suspension of the CT's ratification – the pause for reflection, the agree-

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ment on a mandate for a new IGC, the re-negotiation of the Treaty, the crisis over the ratification of Lisbon – show that the process of constitutionalization is likely to continue, yet unlikely to become explicit in the near future again.

Chapter 10 sums up the key arguments presented in the book in the light of these recent developments. We demonstrate that the defining characteristics of EU constitutionalization – openness, implicitness, incrementalism and continuity – will remain central features in this process. The constitutionalization of Europe in the absence of a capital-C Constitution is likely to continue.

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