THE POLICY-MAKING PROCESS OF AN EMERGING POLITY:

A STUDY OF THE MAKING OF A CONSTITUTIONAL

ARCHITECTURE FOR EUROPE

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THE POLICY-MAKING PROCESS OF AN EMERGING POLITY: A STUDY OF THE MAKING OF A CONSTITUTIONAL ARCHITECTURE FOR EUROPE

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ABSTRACT

The European Union's constitution-making process has been characterized by a piecemeal approach to integration, which has given rise to a treaties-, rather than a constitution-based compound polity. In 1989–91, the end of the Cold War and subsequent dissolution of the Soviet Union prompted the EC leaders to expand the Community's remit into policy areas beyond economic and monetary union. Eventually, the post-Maastricht era was characterized by an unprecedented string of EC/EU accession applications from across the continent; hence the maturation of what seemed to be a **quasi-constitutional moment** for Europe, during which European leaders seemed willing to tie the Union's constitutional 'loose ends' that had accumulated over the previous fifty years of piecemeal constitution-making and disjointed incrementalism, into one simplified constitutional treaty text, possibly modelled along federal lines.

This study posits that the Union's confederative process has experienced a slowdown, especially after the rejection of the Constitutional Treaty by the French and Dutch electorates in 2005, due to the resurgence of a sovereignist rationale among Europeans and certain Eurosceptic national governments, which seems to have dampened the integrationists' vision of a Union run on a federalist basis. Furthermore, it is argued that the practice of adding extra-Treaty accords piecemeal to the basic Treaties continues to characterize the Union's constitution-making process. Finally, this study illustrates that the various treaty mechanisms and safeguard clauses crafted by the Masters of the Treaties continue to be vital 'holding together' arrangements because they provide enough flexibility for the Union's edifice to persist.

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ABBREVIATIONS AND ACRONYMS

ALDE	Alliance of Liberals and Democrats for Europe
AWGI	Ad Hoc Working Group on Immigration
Benelux	Belgium, the Netherlands, and Luxembourg
BEPG	Broad Economic Policy Guidelines
BIS	Bank for International Settlements
CDU	Christian Democratic Union (Germany)
CEECs	central and eastern European countries
CFSP	Common Foreign and Security Policy
CoR	Committee of the Regions
COREPER	Committee of Permanent Representatives
COREU	*Correspondance Européenne*
COSAC	Conference of European Affairs Committees
CSDP	Common Security and Defence Policy
DNA	deoxyribonucleic acid
EC	European Community
ECAS	European Citizen Action Service
ECB	European Central Bank
ECI	European citizens' initiative
ECJ	European Court of Justice
Ecofin	Economic and Financial Affairs Council
ECSC	European Coal and Steel Community
ECHR	European Court of Human Rights
ECU	European Currency Unit
EDP	Excessive Deficit Procedure
EEC	European Economic Community
EFSF	European Financial Stability Fund
EFSM	European Financial Stabilization Mechanism
EFTA	European Free Trade Association
EMS	European Monetary System
EMU	Economic and Monetary Union
EP	European Parliament
EPC	European political cooperation
EPP	European People's Party
EPP–ED	European People's Party and European Democrats
EPSU	European Public Service Union
ERM	Exchange Rate Mechanism
ESC	Economic and Social Committee
ESCB	European System of Central Banks
ESDP	European Security and Defence Policy
ESM	European Stability Mechanism
ESP	European Social Partners

EU	European Union
EUL/NGL	European United Left/Nordic Green Left
EURATOM	European Atomic Energy Community
EUSD	European Union of Security and Defence
FSJ	(area of) freedom, security and justice
G/EFA	Greens/European Free Alliance
GDP	gross domestic product
HQs	headquarters
IGC	intergovernmental conference
IMF	International Monetary Fund
IRI Europe	Initiative & Referendum Institute Europe
JHA	Justice and Home Affairs
MEP	Member of the European Parliament
MP	Member of Parliament
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OECD	Organization for Economic Cooperation and Development
OMC	Open Method of Coordination
PASOK	Pan-Hellenic Socialist Movement
PES	Party of European Socialists
PSC	Political and Security Committee
QMV	qualified majority voting
R&D	research and development
SACEUR	Supreme Allied Commander Europe
SEA	Single European Act
SGP	Stability and Growth Pact
SRM	Single Resolution Mechanism
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (or fiscal compact)
UEN	Union for a Europe of Nations
USSR	Union of Soviet Socialist Republics
UK	United Kingdom
UMFA	Union Minister for Foreign Affairs
UN	United Nations
UPM	Union for a Popular Movement (France)
US	United States (of America)
WEU	Western European Union
WG	Working group
WTO	World Trade Organization

CHAPTER 1

THE POLICY-MAKING PROCESS OF AN EMERGING POLITY: A STUDY OF THE MAKING OF A CONSTITUTIONAL ARCHITECTURE FOR EUROPE

1.1 Introduction

In the liberal democratic tradition, a written constitution is meant to formalize state institutions and governance rules, which are expected to secure a polity's stability; promote its government's accountability and legitimacy; and uphold its citizens' fundamental rights. Such charters are usually designed and agreed in such a way as to garner the consensus of the contracting parties, namely the political elite and the citizens that they represent. And once constitutional settlements are clinched, they are usually endorsed by a popular vote.[1] Once ratified, such charters are expected to withstand the test of time, although they tend to be revised in response to historical upheavals or outstanding social and economic changes which carry political consequences.

If one were to look for these characteristics in Europe's constitution-making process, one might be disappointed to find out that the European Union (EU) is still a treaty-, rather than a constitution-based polity. Therefore international relations scholars are correct in saying that the Union is not a state; for example EU treaty amendment still depends on unanimous decisions reached at intergovernmental conferences (IGCs). However, the Union has some unmistakable attributes of a federal polity, having

[1] See J. Wheatley & F. Mendez (eds), *Patterns of Constitutional Design: The Role of Citizens and Elites in Constitution-Making* (Farnham & Burlington, VT, 2013), 7–66.

institutions like the Commission, the European Parliament (EP), the European Court of Justice (ECJ), and the European Central Bank (ECB), clearly vested with supranational competences. Furthermore, no other transnational organization has developed a competitive party system with direct elections to a co-legislative house; or exerts substantial influence on its member states' domestic policies, especially economic. Besides, the Union is the only polity in the world which grants a common citizenship alongside the constituent states' national citizenships; and by virtue of this common citizenship, *circa* 508 million Europeans are entitled to a wide range of rights that feature in its Treaties and in the EU Charter of Fundamental Rights. The Union is also an economic bloc that the US and other economic powers like China and Japan must reckon with, while the euro has become one of the world's reserve currencies.

The EU is also unique, in that sovereign states freely choose to become members thereof. Furthermore, the Lisbon Treaty (2009) renders it possible for a member state to exit the Union, if that state deems the European project no longer viable or compatible with the national interest. Again, the recognition of the voluntary nature of EU membership sets the Euro-polity apart from sovereign federal states. Arguably, this safeguard is inevitable in a polity that comprises twenty-eight countries, especially when proposals for the transfer of sensitive competences from the national to the supranational level pitch Euro-federalists against sovereignists. Actually, the cautious handling of the tension along the supranational–intergovernmental–sovereignist continuum is reflected in the working of the Union's institutions. For example, in most bicameral legislatures, a one-vote majority in both chambers secures the passage of ordinary national legislation, whereas the passage of EU legislation is subject to complex double-majority formulae in

the Council, as well as a majority of votes in the EP. Indeed, such an institutional design has been crafted to reassure sovereignists and Eurosceptics that EU laws and common policies enjoy the support of the vast majority of the member states, since the Union's exclusive and shared competences currently cover no less than thirty policy areas.[2] In other words, the politics of EU constitution-making have come to resemble an ongoing balancing act in which the key players among the High Contracting Parties persevere in their resolve to deepen the Union's remit, while crafting remedial mechanisms aimed at addressing the sovereignists' objections to the polity's further deepening.

1.2 The research objective

In the light of the foregoing, this study explores whether, and by how much, the EU member states' political actors are ready to shift their loyalty and political activities from the national capitals to a supranational centre in a post-Yalta geopolitical environment. In other words, it explores, *inter alia*, whether the member states are ready and able to reach a federal-like constitutional settlement for Europe.

This inquiry is prompted by the commonly shared fact that the Maastricht summit (1991) was a watershed in EU constitution-making, as the heads of state and government of the member states:

- agreed to the timetable for the realization of the single currency by 1999 at the latest;
- were set to expand the Union's remit in policies beyond the internal market, namely a Common Foreign and Security Policy (CFSP), and cooperation on Justice and Home Affairs (JHA).

[2] J. McCormick, *European Union Politics* (Houndmills & New York, 2011), 150.

Concurrently, the end of the Cold War ushered the transformation of a formerly Western European bloc, into a pan-continental political, and economic union as sixteen countries applied for EC/EU membership between 1989 and 1995. Hence the expediency of treaty reform as the twentieth century drew to a close.

This quest for a constitutional settlement is also reviewed from the sovereignists' and Eurosceptics' perspective, as they joined forces to countervail Maastricht's federalist euphoria. In fact, the Amsterdam (1997) and Nice (2000) stalemates signalled a slowdown in the Union's deepening process, which became more pronounced in May–June 2005, when the French and Dutch electorates rejected the Constitutional Treaty. Indeed, it will be argued that despite the establishment of a Union citizenship under the Maastricht Treaty (1992), Europeans find it hard to let go their nationalist moorings. Thus, it is posited that the 'deepening in order to widen' rationale has come to put up with the hardening of the sovereignist rationale, which continues to compromise vertical plans for the creation of a European superstate. On the other hand, the post-Maastricht tendency to craft:

- an increasing number of protocols and opt-outs that exempt certain member states from overly federalist objectives; and
- extra-Treaty accords, which enable certain member states that share common interests, to reach a higher degree of integration without obliging the rest to pursue the same goals,

prove vital 'holding together' arrangements, which allow enough flexibility for the Union to remain in place. Indeed, this ambivalence underscores the fact that most member states *do* realize the advantages of being part of the EU.

1.3 The Union's 'quasi-constitutional moment'

These issues will be reviewed within the ambit of the post-Maastricht constitution-making process; more specifically within the shorter timeframe that goes from the Nice (2000) and Laeken (2001) Councils' call for the convening of a Convention on the future of Europe, to the crafting in 2012 of the *Treaty establishing the European Stability Mechanism* (ESM), and the *Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union* (TSCG, or fiscal compact).

The choice of this timeframe is not fortuitous. To begin with, an analysis of the Union's constitution-making process would reveal that a US-like 'Philadelphia moment' – at which the EU member states might strike a constitutional bargain – continues to elude the European project, because the Union is not the product of a decisive revolutionary break or political development within a well-defined territory, but the result of a continuously evolving process characterized by piecemeal enlargement in every decade since the 1970s. Furthermore, the Union still lacks the characteristics of a purposeful *res publica* or 'composite polity able to navigate the normative orientations of European civic society, by means of harnessing its deliberative potential, and by elevating its members into a governing demos';[3] hence the EU leaders' wariness *vis-à-vis* the classical 'convention method', which might jeopardize the member states' sovereignty. But despite these structural shortcomings, it is commonly acknowledged that the Treaty on European Union (TEU) agreed to in Maastricht in December 1991 'made the process of European integration more politically salient than ever before.'[4] In fact, the

[3] D.N. Chryssochoou, 'The Constitutional Future of Europe', in *The Future of the European Union: Unity in Diversity*, ed. P.G. Xuereb (Malta, 2002), 121.
[4] See for example, C. Church, 'Treaty on European Union (TEU)', in *Encyclopedia of the European Union*, updated edn, ed. D. Dinan (Houndmills & London, 2000), 463.

inclusion of the CFSP Pillar was deemed psychologically necessary to render the Union and its eastern neighbourhood more secure from the geopolitical instability that could be provoked by the disintegration of the Soviet empire. Likewise, the inclusion of the JHA Pillar constituted another important step toward the communitarization of the Schengen accords (1985), as the freedom of movement of persons was set to complete the internal market.[5] Furthermore, at the close of the twentieth century,

- EU accession negotiations with twelve candidate countries gathered momentum;
- the EU leaders were engaged in transforming the JHA Pillar into a more communitarized area of Freedom, Security and Justice (FSJ).

Actually, these momentous developments prompted the former German Foreign Minister Joschka Fischer to call, in May 2000, for the establishment of a federation of nation states.[6] In other words, a **quasi-constitutional moment** seemed to have developed, at which many observers concur that treaty reform was necessary, *inter alia*, for the Union to face: the challenges of globalization; the eastern enlargement; and the feared resurgence of Russian influence in the affairs of neighbouring post-Socialist states and former Soviet republics. Indeed, one may mention four other factors that prompted constitutional reform.

First, under Amsterdam and Nice, there still were no clear-cut treaty provisions for the allocation of competences; hence the legal ambiguity and political uncertainty around the application of the principle of subsidiarity agreed at Maastricht.[7]

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[5] See pages 84 (Table 3.4), 132, 133 (Table 5.2).
[6] J. Fischer, 'From Confederacy to Federation – Thoughts on the finality of European integration' (Berlin, 12 May 2000)', 2–8, at: http://www.cvce.eu/en/obj/speech_by_joschka_fischer_on_the_ultimate_objective_of_european_integration_berlin_12_may_2000-en-4cd02fa7-d9d0-4cd2-91c9-2746a3297773.html (accessed on 29 February 2016).
[7] See Chapter 8, 225–249.

Second, Nice failed to incorporate substantive civic rights, thus failing to reflect the insistence of the more rights-conscious member states to codify such provisions. Besides, a more rights-based constitutionalism was deemed crucial, not only because of the sagacity of transposing a human-rights *acquis* alongside the internal market's neo-liberal regime, but also because such a provision could purportedly establish a social contract between the Union and its citizens.

Third, many constituent regions inside the Union's multi-national or federal polities complained that the integration process impinged on their constitutional autonomy, because treaty reform continued to fall under the exclusive remit of the national governments. Thus, the regions having legislative powers demanded a greater say in EU decision-making and treaty reform, since the encroachment of common policy areas on regional competences impacted on their regional autonomy.

Fourth, the al-Qaida-linked 9/11 terrorist attacks in the US, and the March 2004 and July 2005 bombings of the Madrid and London transport systems hypothetically favoured the drive for a deeper Europe as the EU leaders realized that international terrorism could be countered via an enhanced foreign and security policy, and cooperation on JHA.[8] Hence Laeken's call for the launching in 2002 of a Convention on the future of Europe, which gave the member-state governments the mandate to replace the Union's amending Treaties with one simplified constitutional text.

Actually, the Convention cum follow-up IGC was a *sui generis* episode *par excellence* in the Union's constitution-making process as the EU leaders came to

[8] See I.-J. Sand, 'Constitutionalism and the Multi-Coded Treaties of the EU: Changing the Concept of Constitutionality', in *The Many Constitutions of Europe*, eds K. Tuori & S. Sankari (Farnham & Burlington, VT, 2010), 63–64.

acknowledge the limitations of IGCs as the prevailing approach for treaty reform.[9] Consequently, the Laeken Council supported the idea that constitutional reform needed to move from the usual inter-state diplomacy under the direction of a single presiding member state, to a wider forum under the direction of what came to be a fifteen-member Convention Praesidium, whose appointees hailed from ten member states and one candidate country. Furthermore, the draft constitutional text was to be prepared by a forum in which the government representatives of twenty-eight participating countries were to negotiate with the representatives of the EP, the Commission the European Ombudsman, a wide spectrum of national MPs from the government and opposition sides of the twenty-eight participating countries, as well as the representatives of the Union's committees. Furthermore, the input of several scores of third-party experts, and other national- and Euro-MPs who were invited to air their views or report on their field of expertise; and the opening of a public forum, which enabled, *inter alia*, the members of civil society from across Europe to forward their proposals and contributions to the constitution-making process, rendered the views expressed during the Convention's debates more representative of the forces in play.[10]

1.4 European integration theory in context

There is general agreement among scholars that the Union is a *sui generis* polity. Consequently, it is argued that its making 'cannot be a theoretical testing site for the elaboration of broader generalizations', so much so that there is the tendency 'to treat the

[9] See P. Magnette & K. Nicolaïdis, 'The European Convention: Bargaining in the Shadow of Rhetoric', in *West European Politics*, April 2004, at: http://users.ox.ac.uk/~ssfc0041/magnettenicolaidis.pdf (accessed on 17 September 2015), 1, 2, 20.
[10] Magnette & Nicolaïdis, 18; and H. Church & D. Phinnemore, *Understanding the European Constitution: An introduction to the EU Constitutional Treaty* (London & New York, 2006), 25.

EU as an historically-rooted phenomenon, arising in utterly specific conditions [...] without meaningful historical precedent or contemporary parallel.'[11] Furthermore, it is argued that its disjointed incrementalism is too complex to be captured by a single theoretical prospectus, thus rendering the political ontology of the EC/EU order rather difficult to grasp. Nevertheless, the Union's current polity-like qualities beg comparisons with federal, or quasi-federal, orders. Indeed, the idea of replacing Western Europe's traditional system of relations among states with federal arrangements goes back to the experience of virulent nationalism during the interwar, and Second World War years. Subsequently, interest in European federalism peaked during the Congress of Europe in May 1948, when Altiero Spinelli's advocacy of a federalist solution to the conflictive tendencies inherent in the European state system were rejected by Britain's opposition to the establishment of a Euro-entity that purported to replicate the nation state, albeit in its supranational form.[12] Consequently, French political economist Jean Monnet and French Foreign Minister Robert Schuman's approach to an integrated Europe was characterized: (1) by the rejection of the idealism of Spinelli's federalist movement (which envisaged a constitutional design for Europe);[13] and (2) their sponsorship of a piecemeal path to European federation based on the tenets of functional economic integration, via which the creation and the deepening of integration in one economic sector (eventually, the establishment of a common market in coal and steel), would create a spillover effect

[11] B. Rosamond, *Theories of European Integration* (Houndmills & New York, 2000), 15–16.
[12] See pages 93–94.
[13] D. Dinan, *Ever Closer Union: An Introduction to European Integration*, 3rd edn. (Houndmills, 2005), 15.

within, and beyond that sector, and greater authoritative capacity to the supranational level.[14]

Ernst Haas and Leon Lindberg were among the first to posit that functional spillover would be a linear, progressive phenomenon that would eventually account for the Euro-polity's full economic integration.[15] However, the validity of this theory was questioned, *inter alia*, by Lindberg himself who realized at the onset of the so-called 'Empty Chair' crisis of 1965–66, that incursions of supranationality into the member states' sensitive domestic policy areas could actually slow down the deepening process of the EC.[16] Indeed, French President Charles de Gaulle's opposition to the Commission's supranationalist remit and ambitions underscored the nation state's obduracy *vis-à-vis* the European project, thus forcing the neofunctionalists to acknowledge the importance of nationalism as a prevailing sentiment in European politics. This led Bulmer to argue in 1983, that the national governments clearly remained the actors in the Community system. Indeed, he latched the bargaining that occurs at the European level to the national governments' resolve to attend to the domestic roots of member-state preferences, since the national polities remain the source of legitimacy for state actors.[17] Likewise, Moravcsik's liberal intergovernmentalist theory of the 1990s posits that the nation states remain central in international politics, and act in a context of anarchy with policy-making generally taking place at intergovernmental negotiations, during which governments pursue integration as 'a means to secure commercial advantages for

[14] See E.B. Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950–1957*, 2nd edn. (Stanford, CA, 1968), 283–317.
[15] Ibid.; and L.N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford, CA, 1963).
[16] L.N. Lindberg, 'Integration as a Source of Stress on the European Community System', *International Organization* (1966), 20(2), 233–265.
[17] S. Bulmer, 'Domestic Politics and European Community Policy-Making', *Journal of Common Market Studies* (1983), 21(4), 349–364.

producer groups, subject to regulatory and budgetary constraints.'[18] In other words, 'the primary source of integration lies in the interest of the [member] states themselves and the relative power each brings to Brussels.'[19] And on a more rationalist key, Milward argues that

> the process of European integration, was [...] a part of that post-war rescue of the European nation-state, because the new political consensus on which this rescue was built required the process of integration, the surrender of limited areas of national sovereignty to the supranation.[20]

Actually, the inclusion of the CFSP Pillar under Maastricht, and the concomitant commitment to proceed with monetary union by 1999 at the latest, may be construed as deliberate instances in which the member states surrendered control over issues of certain importance to national sovereignty in the spirit of Milward's 'rescue' theory. Indeed, his work may be construed as challenging the standard polarization of intergovernmentalism and supranationalism, thus rendering the EU system ever more complex to explain. In fact, as far back as 1972, Donald Puchala had already portrayed the EC as a 'concordance system' where the member states remained important primary actors, but where arenas of political action operated at several levels, levels of influence varied from one issue to another, and where bargaining was about the attainment of convergent goals.[21] Indeed, this alternative reading predated: (1) Gary Marks et al.'s 'multilevel government' analysis which claims that the EU has become a polity where authority is dispersed between various levels of governance and amongst actors, and where there are significant sectoral

[18] A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (London, 1999), 38.
[19] A. Moravcsik, ''Negotiating the Single European Act', in *The New European Community: Decisionmaking and Institutional Change*, eds R.O. Keohane & S. Hoffmann (Boulder, CO, 1991), 75.
[20] A.S. Milward, *The European Rescue of the Nation-State*, 2nd edn. (London, 2000), 4.
[21] D. Puchala, 'Of Blind Men, Elephants and International Integration', *Journal of Common Market Studies* (1972), 10(3), 276–283.

variations in governance patterns;[22] and (2) Dimitris Chryssochoou's notion of 'confederal consociation' as a way of steering between the alternative poles of intergovernmental and federal understandings of a post-Maastricht EU, which he defines as:

> a compound polity whose distinct culturally defined and politically organized units are bound together in a consensually pre-arranged form of 'Union' for specific purposes, without losing their national identity or resigning their individual sovereignty to a higher central authority.[23]

And in a subsequent study, Chryssochoou develops this idea, and posits the adaptation by the member states of co-sovereignty under a synarchical system, which 'does not point at the emergence of a new sovereignty as in the process of creating a federal state, nor does it sweep away the constituent demoi', but rests upon the development of a 'cooperative culture' among the constituent states within the Union's 'institutionalized framework of shared competences as well as of mutually reinforcing perspectives about the organization of collective life.'[24]

Chryssochoou's second proposition came at a time when Lisbon 'rescued' the Constitutional Treaty's intended reforms *after* being cleansed of all political symbolism; and once the Irish electorate 'rescued', *inter alia*, 'their' representative in every line-up of the College of the Commission *after* having previously rejected Lisbon in the June 2008 referendum.[25] However, the research question posits that during the European Convention proceedings; the 2003/04 and 2007 IGCs; and the post-Lisbon negotiations

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[22] G. Marks, et al., 'Competencies, Cracks, and Conflicts: Regional Mobilization in the European Union', in *Governance in the European Union*, eds G. Marks, et al. (London, 1996), 41.
[23] D. N. Chryssochoou, et al., *Theory and Reform in the European Union* (Manchester, 1999), 49.
[24] D.N. Chryssochoou, *Theorizing European Integration*, 2nd edn. (London & New York, 2009), 137. See also G. Marks, et al., 'European Integration from the 1980s: State-centric vs. Multi-level Governance', in *Debates on European Integration: A Reader*, ed. M. Eilstrup-Sangiovanni (Houndmills & New York, 2006).
[25] See pages 124, 150–153, 278, 294.

which led to the crafting of the ESM Treaty and the TSCG, the member states gradually assumed a harder sovereignist stance *vis-à-vis* the Convention Presidency's original design for a deeper Union complemented with synarchical mechanisms and provisions. Indeed, the numerous opt-outs included in the EU Treaties; and the asymmetries of the extra-Lisbon accords underscore the ongoing tension between the member states and the Union. Indeed, the pressures caused by:

- the Convention Presidency's preference for a more federalist constitutional settlement for the Union;
- the aftermath of the international financial crisis of 2008 on the Union's internal cohesion, especially within the euro area;
- the aftermath of the Arab Spring revolutions of 2011, especially the destabilizing effect of the influx of millions of refugees and economic immigrants from the Middle East, Africa and beyond on Europe's socio-economic fabric; and
- the increasing presence of far-right parties in many national parliaments of the European Union,

come together to underscore the heightening of a sovereignist, and at times anti-federalist, attitude among an increasing number of EU countries. These factors partly confirm Milward's, and Moravcsik's state-centric theses, namely that national governments go beyond traditional interdependence and surrender sovereignty in key policy areas in order to guarantee their own survival and enhance their authority within the Union. However, the crafting of extra-Lisbon accords like the ESM and fiscal compact Treaties suggests that the pursuit of 'confederal consociation' tends to constitute yet another tessera in the Union's post-Laeken constitution-making process.

1.5 Research design and methodology

In 1958, Haas defined Europe's political integration as 'the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new center, whose institutions possess or demand jurisdiction over the pre-existing national states.'[26] Forty-two years later, it seemed as though a deeper and wider EU had reached the point at which Europe's 'political actors' were compelled by events to address this issue, and decide by how much they were ready to shift their loyalties to a supranational order; hence the calling of the European Convention cum IGC which were supposed to transform Maastricht's three-pillar polity into a Union with a single personality.

Prima facie, European integration has been characterized by the integrationists' quest for a federal bargain, which could endow the EU with at least some of the attributes of a sovereign state. And since the founding fathers envisaged the reconstitution of (Western) Europe's pre-existing nation states into 'a European Federation',[27] it appeared useful to compare the making of Europe's constitutional architecture with the federal processes of four established federal states, namely the US, Canada, Switzerland, and Germany, in order to see whether their constitution-making processes would offer clues regarding the Union's quest for a constitutional settlement. Indeed, this comparative study – whose narrative is based on a thorough analysis of the secondary sources which feature in Section Two of the bibliography – helps to identify six main themes (or factors)

[26] Haas, *The Uniting of Europe*, 16.
[27] See, 'The Schuman Declaration', in *Documents on European Union*, eds A.G. Harryvan & J. van der Harst (Houndmills & London, 1997), 62.

which impel cohesive, autonomous political communities to federate, rather than maintain the Westphalian state order. These themes include:

1. the transfer of security and defence matters, from the constituent-state level to the supranational level;
2. purposive acts of human agency which impinge upon the waxing (or waning) of the 'we-feeling';
3. economic and monetary union;
4. the crafting of institutions and mechanisms which enhance the legitimacy of the constitutional settlement;
5. the political recognition of sub-national competences within the wider federal framework;
6. institutional provisions that guarantee a compound polity's stability and longevity via the inclusion of the largest possible number of member states in the decision-making process, as well as the crafting of opt-outs for those constituent states that are not interested in being party to certain common policies.

Then, this study embarks upon a combination of six contextual narratives followed by critical thematic studies which take their cues from each of the six themes just mentioned, and which characterize Europe's six-odd decades of constitution-making and treaty reform. For this purpose, each of Chapters 4 through 9 has been subdivided into two parts, wherein the first comprises a synchronic analysis of *how* each theme of federation mirrors the Union's constitution-making process from the establishment of the European Communities in the 1950s to the signing of the Nice Treaty. Each narrative overview is based on an analysis of secondary sources. Then each overview is followed by a thematic

study that deals: *either* with the revision of certain mechanisms or common policies which featured in the Treaties *before* the convening of the Convention; *or* with the introduction of new initiatives or provisions, which purported to transform the EU Treaties into a more permanent constitutional settlement. Indeed, the six thematic studies focus on the following aspects of constitution-making, namely:

- the proposed enhancement of the Union's security and defence policy (Chapter 4);
- the proposed downsizing of the College of the Commission in response to the anticipated EU enlargements of 2004 and 2007 (Chapter 5);
- the proposed communitarization of the Union's economic (including fiscal) arm (Chapter 6);
- the introduction of the European citizens' initiative (ECI) (Chapter 7);
- the enhancement of the Protocol on the application of the principles of subsidiarity and proportionality; and of the Protocol on the role of the national parliaments of the EU (Chapter 8);
- the proposed enhancement of Union citizenship; the introduction of the symbols of the Union; and the redefinition of qualified majority voting (QMV) in the Council under a straightforward double-majority formula (Chapter 9).

These aspects of constitution-making have been chosen as subjects of this thesis's thematic studies because they touch upon core issues of national sovereignty, such as:

- absolute sovereignty and jurisdiction over a defined territory;
- monopoly on the use of force (or power of coercion);
- the capacity to conduct an independent foreign, security and defence policy;
- the (national) community feeling; and

- general recognition by other sovereign states,

which the EU countries find hard to surrender to a supranational order or authority. Indeed, these thematic studies help to assess the member states' wariness *vis-à-vis* the adoption of a *sui generis* form of synarchy, as it is posited that the post-Maastricht resurgence of a sovereignist rationale contrasts the establishment of a federal order for the Union; and encourages the crafting of mechanisms and procedures which have a minimum impact on, or actually defend, the sovereignty of the member states in these core issues.

In order to explain this complex question, the proposed reforms and initiatives regarding these core issues are reviewed: (1) as scrutinized during the 2002/03 European Convention and eventually codified in the draft Constitutional Treaty; (2) as revised during the 2003/04 and 2007 IGCs; and (3) as enhanced by two post-Lisbon accords, namely the ESM and fiscal compact Treaties. Indeed, it is posited that the Convention and ensuing IGCs were defining episodes of a different sort – like the two sides of the same coin – which have determined the Union's current constitutional architecture. Furthermore, the Convention proved to be a unique think-tank, during which 269 representatives of the twenty-eight participating countries and six EU institutions were free to philosophize and deliberate upon the future of Europe, and influence the final outcome according to their personal or collegial convictions, or according to the agendas set by their respective national executive.[28] Besides, the Convention offered space for

[28] Initially, input to the constitution-making process was expected to come from 220 delegates, alternates included. But in turnover terms, this forum came to include 269 conventions because some of 220 delegates were replaced due to: domestic cabinet reshuffles; post-national election changes in some participating countries; the rotary nature of the European Council Presidency; other appointments away from the Constitutional Convention.

deliberation to various intersecting sets of agents who had been *either* sidelined in, *or* excluded from, previous IGCs. These included:

- 105 government and parliamentary representatives of the thirteen candidate countries, who could air their views on various aspects of the draft Constitution like any member-state counterpart, and back common position papers and suggestions for amendment;
- *circa* seventy national MPs from all participating countries, who were drawn from the opposition benches;
- fifty-four representatives of the EP, the Commission, the Committee of the Regions (CoR), the European Social Partners (ESP), the Economic and Social Committee (ESC), and the European Ombudsman, who had been excluded from previous IGC negotiation tables;
- *circa* twenty-four Eurosceptics;
- the five main transnational party delegations, namely the European People's Party (EPP), the Party of European Socialists (PES), the Alliance of Liberals and Democrats for Europe (ALDE), the Greens/European Free Alliance (G/EFA), and the European United Left/Nordic Green Left group (EUL/NGL), who had the unprecedented opportunity to table common, or similar, position papers and proposals for article amendment;
- the government representatives of twenty small-, and medium-sized, states who had good reason to believe that their participation in the Convention would strengthen their position *vis-à-vis* the big states;

- 162 organizations from across Europe;[29]
- 210 youths from all the participating countries, who had the opportunity to forward their views on the Constitution during the European Youth Convention of 9–12 July 2002.[30]

Testimony to this complex debate was the tabling, *inter alia*, of 854 Convention documents and contributions on practically every aspect of the draft Constitution; 460 working documents on fourteen major themes;[31] and *circa* 10,600 suggestions for amendment to the draft Constitution's 465 articles, five protocols, and three declarations. And although the candidate countries were precluded from preventing the formation of a consensus during the Convention, this proviso was not applicable at the 2003/04 IGC, during which ten accession countries were granted the right of veto, despite the fact that they were scheduled to become full EU members in May 2004. Indeed, this is another first in the Union's constitution-making process, thus singling out the 2003/04 IGC as another defining episode in the Union's constitution-making process. Actually, this, and the 2007 IGC were crucial moments during which the EU leaders had to seek consensus on each sticky point *before* endorsing the Constitution and its Lisbon sequel.

Regarding methodology, one of the limitations that the author faced when choosing the primary sources was the fact that the government documents covering the timeframe of the six thematic studies had not been declassified yet because of the

[29] European Convention, 'List of Contributions to the Forum', CONV 112/02, ADD 1, Brussels, 19 June 2002, 1–6. These organizations comprised: 104 NGOs and schools of thought; 27 academic think-tanks; 18 political and public authorities; and 13 socio-economic organizations.
[30] European Convention, 'List of nominations to the Youth Convention', Brussels, 24 June 2002, 1–9; and 'Final text adopted by the European Youth Convention', CONV 205/02, Brussels, 19 July 2002, 1–15.
[31] The fourteen themes were: Subsidiarity; the Charter of Fundamental Rights; Legal Personality; National Parliaments; Complementary Competencies; Economic Governance; External Action; Defence; Simplification; Security and Justice; Social Europe; the Court of Justice; Budgetary Procedure; and Own Resources. European Convention, 'Report from the Presidency of the Convention to the President of the European Council', CONV 851/03, Brussels, 18 July 2003, 20.

standard thirty-year rule. Furthermore, there was no access to the private papers of individual protagonists, key economic actors or interest groups involved in the constitution-making process, or oral feedback from interviews. On the other hand, all the Convention's official documents mentioned in the foregoing paragraphs, and many other documents related to the post-Convention IGCs are available on-line. Thus, these primary sources constitute the bedrock for our investigation.

Admittedly, these documents capture the views and preferences of the official elites entrenched in the governing institutions and leading political organizations of the EU and the twenty-eight countries involved in the constitution-making process. However, one must point out that the engaging nature of the conventioneers' contributions and working documents, and the exhaustive input regarding the proposals for amendment to the articles of the draft Constitution make up for the insights that one may expect from the impromptu answers to an interviewer's questions. Besides, interviewees may forget certain details, or refrain from disclosing certain reserved information.

Given the draft Constitution's prolix text, one could not possibly analyze its contents in their entirety within the timeframe set for the completion of this study. Therefore, it was decided to focus mainly on the (re)crafting of forty-one articles and three protocols which are relevant to the six thematic studies, and which shed light upon the evolution of the Union's post-Laeken constitution-making process. This investigation required, *inter alia*, an in-depth analysis of over 200 Convention documents and contributions, 266 working documents, and close to 1,000 amendment proposals to the forty-one articles and three protocols under review.

This part of the investigation proved to be quite challenging. First, the conventioneers were free to submit their contributions and amendment proposals in the language(s) of their choice. Second, the documents varied considerably in content, form, length, and depth of argument. Furthermore, the contributors' ideological and political heterogeneity enhanced the nature of the debate on practically every subject of the draft Constitution. In other words, the delegates' working documents, contributions, reports, and suggestions for amendment to the treaty articles had to be organized in such a way that meaningful patterns of thought and action could be established. This was done by classifying the archival material according to the delegates':

- country of origin;
- institutional affiliation, and their role therein;
- political weight;
- political allegiance or ideology;
- level of support for, or opposition to, the European project;
- readiness or otherwise to forming transnational alliances on a party-, cross-party, or ideological basis;
- support of pro-democracy NGOs.

On the basis of these variables, it was then possible to: (1) better trace the evolution of the constitution-making process as the draft articles were repeatedly revised during the second half of the Convention; (2) identify who was in favour of, or against, the various proposals and initiatives tabled; (3) gauge the divergences between what the various delegates wanted included in, or subtracted from, the draft Constitutional Treaty; (4) establish what changes were being proposed under the draft Constitutional Treaty *vis-à-*

vis the previous Treaties; and (5) better understand what the EU leaders would change when agreeing upon the final versions of the Constitutional Treaty and its Lisbon sequel. These findings were further corroborated by other on-line primary sources, namely:

- the 2003/04 and 2007 IGC position papers and conclusions of the government representatives of the member states;
- various European Council decisions, especially those that followed the French and Dutch rejection of the Constitutional Treaty, and the international financial crisis of 2008;
- various green and white papers, working documents, reports, communications, and contributions published by the European Commission;
- reports and resolutions of the EP published between October 2005 and July 2013;
- a selection of Council decisions/regulations;
- various Eurobarometer surveys;
- the input of civil society's pro-democracy NGOs that lobbied for the inclusion of the ECI in the EU Treaties;
- various position papers of certain national governments regarding treaty reform.

Furthermore, the analysis of the post-Convention constitution-making process was based on the national governments' preferences as presented in the working documents and position papers tabled during the IGCs of 2003/04 and 2007; and the conclusions to the various European Councils, rather than the input of a wider set of policy-makers, as was the case with the Convention proceedings. Finally, one must recall that nine months before the Convention started, the Irish people had rejected the Nice Treaty in the June 2001 referendum. Indeed, this was the first in a series of four negative votes on three EU

Treaties in the space of seven years. Thus, it was deemed necessary to analyze the reasons behind these negative votes as documented in the post-referenda Eurobarometer surveys, in order to gauge their impact on the post-Laeken reform process.

1.6 Structure of the study

This study examines the unfolding of political ideas, issues and forces behind the crafting of a constitutional architecture in post-Nice Europe. Given the federalist *telos* of the founding Treaties; and the development of some of the Union's key institutions along federal lines, it is argued that federalist theory is essential to the assessment of the member states' willingness or otherwise to reach a constitutional settlement along federal lines. Thus, Chapter 2 features a comparative study of the constitution-making processes of four federal states, namely, the US, Canada, Switzerland, and Germany, in order to understand why cohesive, autonomous political communities which are endowed with at least some of the attributes of statehood decide to federate; and to assess which mechanisms the federating states tend to devise in order to minimize tension between the central and sub-national government levels.

The choice of these four comparators offers various insights on these core issues. To begin with, the US Constitution is the oldest, and one of the shortest federal charters, besides being remarkable for having provided a pan-American polity with a symmetrical and territorial federal order, whereas the Canadian Constitution is an interesting case of asymmetrical federalism, which attempts to accommodate the French-Canadian and First Nation ethnic minorities within a polity dominated by an English-Canadian political culture. On the other hand, the Swiss Constitution accommodates the Helvetians'

idiosyncrasies which stem from their multi-ethnic differences and centuries-old multiculturalism, whereas the German Basic Law is particularly relevant to the research question because Germany is the Union's foremost federal state and keen promoter of European integration.

On the basis of this comparative study, Chapter 3 analyses the six common factors of confederation listed in page 15, which impelled the US, Canada, Switzerland, and Germany to strike their federal bargain. This is followed by a short introductory overview of the EC/EU's constitution-making process, whose first fifty years of integration laid the bases for ever closer cooperation in key policies such as economic and monetary union; common foreign, security and defence; and JHA. On the other hand, the Union's post-Wall transformation from a Western European bloc into a pan-continental polity seemed to determine the maturation of a **quasi-constitutional moment**, which prompted Europe's political elite to attempt crafting a more permanent constitutional settlement for the EU. Then, each of Chapters 4 through 9 includes an introductory contextual narrative which traces the Union's federal process from the 1950s until Nice from the perspective of each of the six factors of federation. Consequently, each contextual narrative is followed by a thematic study as outlined in page 16.

In the contextual narrative of Chapter 4, it is argued that the launching of the European project had the making of a transnational security and defence pact, in that the coal–steel pool was meant to deter another armed conflict between France and Germany, and stabilize transnational relations within the Western camp until the fall of the Berlin Wall, when the dissolution of the Soviet Union was perceived as a destabilizing event that could trigger insecurity along the Community's eastern border; hence the launching

of the CFSP at Maastricht. Likewise, the Gulf War and Balkan crises of the 1990s, and the 9/11 terrorist attacks on the US, triggered the debate on whether the Union should adopt a common security and defence policy (CSDP). These developments lead to the first thematic study, which focuses on the debate at the Convention on how to enhance the Union's security and defence policy: (1) without compromising the status of neutrality of certain member states; (2) without jeopardizing the Atlanticists' preference to cooperate within NATO's military structure; and (3) without excluding a priori any EU country from taking part in any external EU-led military operation.

In Chapter 5, it is argued that the Union's constitution-making process does not present itself as a linear progression. Rather, it is characterized by *ad hoc* readjustments and institutional reform triggered by opportune moments or unexpected events, like the push for the completion of the single market that was prompted by the onset of neo-liberal economics in the mid-1980s; or the Union's post-Wall widening that was spurred by the dissolution of the Soviet communist bloc. Indeed, until Nice, treaty reform was characterized by the crafting of additional accords within and outside the Treaties, which increased the Commission's competences; hence the increase in the number of Commissioners beyond the comparable executive line-ups of three comparators, namely the US, Switzerland, and Germany.[32] Thus, our thematic study focuses on the proposed downsizing of the College of the Commission, such that not every member state would have its appointee in every term of the Commission, once the Union was to take on board

[32] At the time of writing, the Canadian Federal Cabinet (prime minister included), comprised thirty members. Five of the ten provinces, i.e. New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, and Saskatchewan fielded one minister each; Alberta and Manitoba fielded two ministers each; British Columbia three; Québec seven; and Ontario eleven. The three territories (Northwest Territories, Nunavut, Yukon Territory), were not represented in the Federal Cabinet because they do not enjoy inherent sovereignty. Actually, the Canadian Federal Cabinet has more members than the current 28-strong College of the Commission.

its twenty-seventh member state. As it turned out, this was one of many instances where the nation-state rationale prevailed over that of the Euro-federalists.

The contextual narrative of Chapter 6 deals with the factors which determined the establishment of the Common Market. Other factors of economic integration are reviewed, namely the launching of the exchange rate mechanism (ERM) in 1979; and the industrial lobby's successful call for, and the Jacques Delors Commission Presidency's support of, the completion of the single market and adoption of the single currency. Then, the thematic study deals with: the federalists' call for the total communitarization of EMU; and the intergovernmentalists' defence of national sovereignty in fiscal and other economic matters. Then, the chapter turns to how the onset of the global financial crisis of 2008 and subsequent sovereign debt crises in several EU countries prompted the signing of two extra-Lisbon accords, namely: the ESM Treaty for euro area member states; and the fiscal compact. Indeed, the novelty of these accords was that unanimity was not required for them to take effect.

Chapter 7 deals with the Union's legitimacy crisis, which stems from the fact that the original institutions of the EC were styled on Monnet's preference of a top-down administrative system wherein, for example, the Commission wielded executive power like the cabinet in a parliamentary system, without its members being elected by the EC/EU citizens. Furthermore, the decisions taken at the supranational level after the launching of the single market programme, brought about a profound reshuffling for the worse of the social structure established during the early post-war years because of the single market's neo-liberal rationale and the diktats of a globalizing economy. On top of that, the stringent rules of the stability and growth pact (SGP) that underpin EMU; and

the Union's post-Wall quest for a deeper political union, heightened the legitimacy crisis in the eyes of Europeans. Therefore, this chapter's thematic study focuses on the inclusion of the ECI in the EU Treaties; and the (failed) proposal tabled by a minority group of Convention members, for a pan-European referendum on the ratification of the Constitutional Treaty.

In Chapter 8, it is posited that the EU finds it hard to exercise a unified political will because it is still in search of a finite territoriality, and lacks a unified sovereign. Consequently, the Union's federative process remains characterized by the growing divergence between Euro-federalist aspirations, and the member states' guarded, almost defensive attitude *vis-à-vis* the transfer of more competences from the national capitals to Brussels. Then, the thematic study focuses on the revision of: the Protocol on the application of the principles of subsidiarity and proportionality; and the Protocol on the role of the national parliaments in the EU, which were designed to improve the monitoring capabilities of the national capitals *vis-à-vis* the passing of EU legislation that could erode competences pertaining, *either* to the national governments, *or* to the member states' regions, especially those having legislative powers. These procedures were meant to enhance the legitimacy of the Union's institutional framework, and encourage greater indirect popular participation in the EU legislative process.

Chapter 9 questions the impact that: (1) the rights-based Union citizenship established under Maastricht; and (2) the adoption of the EU Charter of Fundamental Rights by the Union's institutions, had upon the formation or otherwise of a post-national citizenship. The motive behind this inquiry is that if Europeans were to espouse a common Union citizenship, then they would accept straightforward double-majority

voting in the Council because the Union would have become a well-defined territorial entity having a single sovereign. In other words, a link would have been established between the philosophical implications of post-national citizenship (or Habermas's 'constitutional patriotism'), and the consolidation of the 'we-feeling', which would facilitate the acceptance of decision-making based on the absolute parity of the constituent states that prevails, say, in the Senate Houses of Switzerland and the US. Thus, the thematic study explores whether the 'ever closer union' objective of the EEC Treaty's opening article could be replaced by a more federal-like statement on the establishment of the Union; and whether the stakeholders involved in the post-Nice reform process were ready: (1) to enhance the remit of Union citizenship; (2) include the EU Charter of Fundamental Rights in the constitutional text; (3) adopt state-like symbols of Union identity; and (4) replace the Nice triple-majority voting procedure in the Council with a straightforward double-majority rule.

As one can see, these thematic studies touch upon a series of polity-building provisions which, if embraced by the EU member states and their *demoi*, could lead to the transformation of the Union into a federal-like polity. Indeed, it is to the analysis of this tricky question that the discussion now turns.

CHAPTER 2

THE MAKING OF FEDERAL POLITIES

2.1 Introduction

According to Michael, the need for a constitution arises when a society breaks with its past as a consequence of war or evolution; because of political development from colonial appendage to full independence; or simply because the accumulation of social and economic changes makes a new system of government imperative.[33] And Wheare posits that most constitutions are devised because people wish 'to make a fresh start, so far as the statement of their system of government [is] concerned.'[34] Therefore, it is understood that a constitution seeks to establish a state's claim to sovereignty, thanks to which the state may assert its right to exercise power on behalf of the people and their territory. Thus, the state exists as an entity that is supreme in its own right, and able to make independent decisions that are contingent to no other power. Furthermore, the symbolic function of a constitution is to provide a set of values around which a collective identity may be forged.[35] This De Tocqueville 'civic culture' would facilitate the formation of consensus with regard to political sovereignty, thanks to which disputes would be resolved via politics, rather than litigation. Furthermore, it is commonly agreed that a constitution establishes the bases upon which all other laws may be passed. In this sense, the constitution is the prime law that makes law-making legitimate. Thus, 'the essence of constitutionalism remains the transfer of power from a governing order to a set

[33] E.J. Michael, *Public Policy: The Competitive Framework* (Oxford, 2006), 18–20.
[34] K.C. Wheare, *Modern Constitutions*, 2nd edn (Oxford, 1966), 6.
[35] X. Contiades & A. Fotiadou, 'How Constitutions Reacted to the Financial Crisis', in *Constitutions in the Global Financial Crisis: A Comparative Analysis*, ed. X. Contiades (Farnham & Burlington, VT, 2013), 42–43.

of rules' so that the rule of law may prevail.[36] Consequently, people count on the constitution to unify their society as a polity, and freely consent to state practices, especially when the authority of the state derives from the people via institutional mechanisms, such as free elections.

In this chapter, it is argued that the gravitas of a constitution as an instrument of governance is especially great in federal polities because the federal route entails agreement as to *how* to divide the functions of government between the central, and the sub-national order. And since the EU has acquired certain federal features, this chapter explores why sovereign states may choose to federate. This analysis of federalist theory is followed by a comparative study of the constitution-making processes of four federations, namely the US, Canada, Switzerland, and Germany. Finally, this chapter evaluates how the role of political elites; the role of bargaining, competition and conflict; political economics; institutional statecraft and conventions; and political and popular legitimacy, determine the nature of constitutional settlement. Indeed, this comparative study, together with the synoptic analysis of Chapter 3, will provide the reader with a roadmap which will explain the Union's own constitution-making process in the subsequent chapters.

2.2 Why federate?

Burgess describes federal constitution-making as 'deliberate, conscious and purposive acts of human agency [characterized by] a series of bargains, agreements and compromises emanating from the interaction of political elites.'[37] Actually, various factors account for such statecraft. First, the territory may be(come) too wide to be

[36] E. Schneier, *Crafting Constitutional Democracies: The Politics of Institutional Design* (Lanham, MD, 2006), 4.
[37] M. Burgess, *Comparative Federalism: Theory and Practice* (London & New York, 2006), 156.

governed effectively from the metropolis. For example, Elazar observes that 'every time an entity is made larger, a parallel need is generated for some aspect of it to be made smaller.'[38] Second, federalism may accommodate ethnic, linguistic, religious, socio-economic and cultural heterogeneity. In fact, when a polity's ethnic minorities are regionally concentrated, the boundaries of its subunits may be drawn in such a way that minorities form majorities in their ancestral territories. Thus, federalism empowers minorities to take certain policy decisions at the sub-national level *without* being outvoted by the larger society. Third, some autonomous or independent polities federate to find strength in numbers. Fourth, federalism was sometimes imposed from above by a colonial power. Indeed, the development of colonial autonomy was often likened to a federal relationship, under which, 'a division between central and local powers [were expected to] work in a federal sense and come to be thought of in this way'.[39]

Elazar concludes that '[f]ederalism addresses the need of people and polities to unite for common purposes yet remain separate to preserve their respective integrities.'[40] And Riker assumes that every long-standing federation is the result of a bargain whereby previously sovereign polities agree to give up part of their sovereignty in order to pool their resources to increase their collective security and to achieve other goals, including economic ones.[41]

In the liberal-democratic tradition, the subunits are not creatures of the federal government, but like the latter derive their authority directly from the people.

[38] D. Elazar, *Exploring Federalism* (Tuscaloosa, AL & London, 1987), 111.
[39] G. Martin, 'Empire Federalism and Imperial Parliamentary Union, 1820–1870', *The Historical Journal*, 16(1) (1973), 71–72.
[40] Elazar, 33
[41] W.H. Riker, 'Federalism', in *Handbook of Political Science*, ed. F. Greenstein & N.W. Polsby (Reading, Mass., 1975), vol. 5, 93–172, as quoted in A. Stepan, 'Federalism and Democracy: Beyond the U.S. Model', in *Theories of Federalism: A Reader*, ed. D. Karmis & W. Norman (New York & Houndmills, 2005), 256, 268.

Structurally, they are immune to federal interference, but functionally they share many activities with the central government without forfeiting their policy-making roles and decision-making powers at the sub-national level. Thus, the various levels of government – federal, state, or municipal – exercise only delegated power as prescribed by the constitution. Indeed, by creating an overarching government having exclusive powers over common national matters as well as international relations, federalists argue that

> it [is] possible to aspire to the same goals of political unification and integration as the Jacobin state, but by removing sovereignty from the state as such and lodging it with the people, it [is] possible to arrange for power sharing and to set limits on governmental authority.[42]

Furthermore, federalism protects individual rights against encroachments by the central government by establishing institutions such as a bicameral legislature wherein the members elected to the lower house represent the polity's total population, whereas the sub-national units are represented in the upper house *either* equally, *or* proportionally, according to demographics.

Riker identifies two main types of federal systems, namely peripheralized, and centralized federalism.[43]

1. In a peripheralized federation the central government is accorded minimal or limited authority, whereas the bulk of authority rests with the constituent subunits. This occurs when autonomous states bind themselves together in order to establish mutual defence pacts, raise and maintain joint military forces, or facilitate inter-state commerce. The US under the *Articles of Confederation*

[42] Elazar, 35, 41.
[43] W.H. Riker, *Federalism: Origin, Operation, Significance* (Boston, 1964), as quoted in *Federalism: Political Identity and Tragic Compromise*, M.M. Feeley & E. Rubin (Michigan, 2008), 87.

(1777–87), the German Confederation (1815–66), and the pre-1848 Swiss Confederation, are examples of peripheralized federations.

2. On the other hand, the evolution of the US since 1789 is an example of centralized federalism, characterized by a strong federal government and relatively weak subunits. Besides, each of the fifty constituent states is accorded the same constitutional competences at the sub-national level. Indeed, this constitutional framework facilitates what Resnick calls 'territorial federalism', as distinct from 'multinational federalism'.[44]

For Elazar, 'the viability of federal systems is directly related to the degree to which federalism has been internalized by a particular civil society'.[45] Closest to the model of a voluntary bargain are the relatively autonomous units that 'come together' to pool their sovereignty while retaining their individual identities. The US, post-war Germany, and Switzerland fall under this category. On the other hand, there is 'putting together' federalism as experienced in polities like the former Soviet Union (1922–91), Czechoslovakia (1968–92), and post-war Yugoslavia (1946–92). These federations were established by a coercive power, whose objective was to forcibly federate multinational polities composed of formerly independent states or territories of other sovereign states. On the other hand, the struggle to reconcile territorial integrity with internal ethno-cultural differences has led some polities to award 'group-specific' rights, such as those granted to Belgium's three autonomous regions and three linguistic communities, and Canada's French-speaking Québec. Indeed, the solutions arrived at by the Belgian, and

[44] P. Resnick, 'Toward a Multinational Federalism: Asymmetrical and Confederal Alternatives', in *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options*, ed. F. Leslie Seidle (Montreal, 1994), 71, as quoted in W. Kymlicka, 'Federalism, Nationalism, and Multiculturalism', in Karmis & Norman, 276.
[45] Elazar, 78.

Canadian constitution-makers are examples of 'holding together' federalism underpinned by asymmetrical constitutional arrangements. The general idea behind this brand of federalism is to avoid both secession and the US-style 'melting pot' nation-building strategy.

Ackermann observes that in the liberal-democratic tradition, the constitution-making process is characterized by three phases, beginning with a *signalling phase*, where a movement earns the authority to establish a reform agenda under public scrutiny. This is followed by a *proposal phase*, in which alternatives are hammered out in a draft constitution. Finally, proposals are presented for ratification and subjected to *mobilized popular deliberation*.[46] This process is particularly important for would-be federal polities, for whom '[c]onsensual legitimacy is utterly necessary for a constitution to have real meaning and to last',[47] as shall be seen in our comparative study on the constitution-making processes of the US, Canada, Switzerland, and Germany.

2.3 The United States of America

2.3.1 Origins of the US Constitution

The American nation knows its origin to the foundation of the British colony of Jamestown (Virginia) in 1607; eventually another twelve colonies were established by royal charter by 1732. Given the remoteness of the Thirteen Colonies from the metropolis, the Crown encouraged local self-government, wherein political power in every colony was vested in the governor who was appointed either by the King of

[46] B. Ackermann, *We the People: Foundations* (Cambridge, MA., 1991), 267.
[47] Elazar, 164.

England or the colonial proprietor.[48] Consequently each colony adopted a Westminster-style bicameral legislature.[49] Thus the relationship that developed between colony and metropolis was 'federal in operation, although not federal by design'.[50]

The English settlers soon developed a collective identity because they needed to protect themselves from hostile Native Americans and European powers on all their frontiers; and after the French and Indian War of 1754–63, this sense of unity was dramatically enhanced by the colonists' growing opposition to Britain.[51] In fact, after the victory of the British over the French-Canadians (1759–60), the Imperial power attempted to assert authority over North America by imposing a series of taxes. Furthermore, Britain controlled trade and manufacture in its overseas possessions by requiring that goods exported from its colonies be carried in British vessels.[52] In response to these restrictive measures, the colonial leaders asserted their right to 'no taxation without representation' at their First Continental Congress held in Philadelphia in September 1774, whereas British refusal to negotiate provoked the American Revolution, which ushered the end of Imperial rule in the Thirteen Colonies. Indeed, by mid-November 1777, the seceding colonies adopted the *Articles of Confederation and Perpetual Union*, which became binding on 1 March 1781 when ratified by the thirteenth founder state (Maryland),[53] and under which the constituent states did not forfeit their political autonomy and separate identity. In other words, the *Articles of Confederation*

[48] P. Jenkins, *A History of the United States*, 3rd edn. (Houndmills & New York, 2007), 28–29.
[49] See S.E. Finer, *The History of Government*, vol. III (Oxford, 1997), 1400–1405.
[50] D. Lutz, 'The Articles of Confederation as the Background to the Federal Republic', in *Publius: The Journal of Federalism* (1990), 20(1), 57.
[51] Feeley & Rubin, 97–99.
[52] Jenkins, 44.
[53] R.C. Schroeder, *An Outline of American Government*, rev. edn. (US Information Agency, 1990), 7, 10.

devised a loose association in which each sovereign state had the right of veto.[54] Consequently, it was difficult for the Continental Congress: to establish a unified financial system; regulate inter-state trade; enforce international treaties; resolve inter-state disputes; or exert military force against potential foreign aggressors.[55] Thus, Federalists like John Jay, Alexander Hamilton, and James Madison pressed for the reconstitution of the founder states in one body politic according to aggregate numbers, with the overall effect that, 'each vote, whether proceeding from a larger or a smaller state, or a state more or less wealthy or powerful, will have an equal weight and efficacy'.[56] And in the ensuing Constitutional Convention that began its deliberations on 29 May 1787, the fifty-five delegates that represented all the states except Rhode Island resolved the problem of the chief executive by settling on an elected president vested with administrative powers. As for the representation of the people and the thirteen constituent states, the Virginia Plan favoured demographic proportionality in a bicameral legislature. On the other hand, the New Jersey Plan floated by the smaller states demanded equal representation for each constituent subunit in a one-chamber legislature.[57] Eventually, the Connecticut (or Great) Compromise of July 1787 balanced demographic proportionality in the House of Representatives with equal representation for each constituent state in the Senate. Furthermore, the requirement that both houses wield equal legislative power satisfied both parties.[58] Nevertheless, antipathy toward a strong central government was a major concern among anti-Federalists.[59] Indeed, North

[54] Finer, vol. III, 1493–1494.
[55] Burgess, *Comparative Federalism*, 57–58.
[56] 'Madison, Federalist 54', in *The Federalist Papers*, ed. C. Rossiter (New York, 1961), 340.
[57] Finer, vol. III, 1497–1498.
[58] Jenkins, 59; and Burgess, *Comparative Federalism*, 196.
[59] Burgess, *Comparative Federalism*, 60.

Carolina and Rhode Island joined the Union *after* the First Congress submitted the Bill of Rights (or First Ten Amendments) for ratification by the founder states.[60]

2.3.2 The making of the American *demos*

Bryce argues that the success of the US Constitution was due to the 'mechanical contrivances' that were intentionally crafted to foster 'a legal habit in the mind of the nation'. These included, *inter alia*, the federal government's direct authority over all citizens, irrespective of the constituent state governments' particularities; and the Supreme Court's judicial review.[61] And Elazar relates the viability of federal polities to the degree to which federalism has been internalized by civil society. However, although the US Constitution had created a 'political nationality', the Founding Fathers failed to recognize the ethno-cultural diversity of their re-founded republic. For starters, Jay ignored the Native-, and African-Americans, as well as other settlers from continental Europe when stating that

> Providence has been pleased to give this one connected country, to one united people, a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs.[62]

Indeed, Jay's 'one united people' referred to the White Anglo-Saxon Protestant template, and when the Convention dealt with the question of who was entitled to vote for the members of the Lower House, the Native- and African-Americans were disenfranchised. Indeed, Article I, section 2, paragraph 3 of the Constitution stated that:

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[60] H. Cinotta (ed.), *An Outline of American History* (US Dept. of State, 1994), 94; G.W. Moon, *Story of Our Land and People* (New York, 1949), 145; and J.D. Hicks, et al., *A History of American Democracy*, 3rd edn. (Boston, 1966), 116; and Appendix x–xi.

[61] J. Bryce, *The American Commonwealth*, vol. I [1888], 317, in Online Library of Liberty, at: oll.libertyfund.org/titles/bryce-the-american-commonwealth-vol-1 (accessed on 28 September 2016).

[62] A. Hamilton, J. Jay & J. Madison, 'Federal Theory in *The Federalist*', in Karmis & Norman, 106.

> Representatives […] shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole Number of free Persons […] and excluding Indians not taxed, three-fifths of all other persons.

Furthermore, the Constitution did not abolish slavery from day one. Actually, Article I, section 9, stated that it was not to be prohibited by Congress prior to 1808, whereas the Tenth Amendment empowered the states to treat slavery as a matter outside the jurisdiction of the federal government. In other words, the Constitution failed to build a civil society based on universal equal rights. And since the Southern states depended on plantation agriculture, the anticipated end of slavery did not occur in 1808. Consequently, when in 1819 the Union comprised twenty-two subunits equally divided between slave states and slave-free states, the South demanded that new states be admitted in pairs, one slave, and one slave-free so that the Southern senators would still be able to block federal legislation that could have adverse effects on the economy of their home states. Actually, these requests were to provoke the Civil War of 1861–65, which ended with: the defeat of the secessionist Confederate States and their readmission to the Union; the abolition of slavery; the progressive centralization of the federal government's remit via the Supreme Court's judicial review; and the progressive extension of full civil rights to all US citizens.[63]

2.3.3 The 'melting pot' strategy

Meanwhile, the Northwest Ordinance of 1787 had devised an orderly and gradual procedure by which the new frontier lands would first receive the status of territories under appointed governors. Then, when the population reached 60,000 – a level deemed

[63] Jenkins, 135–152.

sufficient to support a state government – the territory would accede to the Union as a slave-free state.[64] But according to Kymlicka, a deliberate decision had been taken not to accommodate First Nation minorities, when it was decided that no territory would achieve statehood unless such minorities were outnumbered by Americans of Anglo-Saxon stock.[65] This was done, *either* by exterminating the American Indians, *or* confining them to reservations.[66] Alternatively, white supremacy was achieved by redrawing state boundaries so that the Indian tribes or Hispanic Americans would be outnumbered. For example, when Florida achieved statehood on 3 March 1845, its westernmost half was incorporated into the adjacent states of Louisiana, Mississippi, and Alabama.[67] Thanks to these various stratagems, none of the constituent states became the homeland of a national minority.

Other factors promoted the creation of a 'common national community'. For example, the more industrialized Northern states started attracting immigrants from continental Europe, who could aspire to become US citizens by virtue of the Fourteenth Amendment (section I) of 1868. Likewise, internal migration determined a similar development, since the continuation of racial discrimination in the South pushed many blacks to flee to the North where discrimination was less of a problem.[68] Eventually, the nationalizing process reached the South when the Committee on Civil Rights recommended new legislation against racial discrimination, with the turning point being the Supreme Court ruling of 1954 in *Brown v. Board of Education*, which condemned 'separate but equal' education as a violation of the 'equal protection' clause under the

[64] Ibid., 61.
[65] W. Kymlicka, 'Federalism, Nationalism, and Multiculturalism', in Karmis & Norman, 269–292.
[66] Jenkins, 155–161.
[67] Compare Maps 3, 4, and 5, in Jenkins, 45, 116, 128.
[68] Ibid., 96, 154, 175.

Fourteenth Amendment.[69] In the following decade, pressure for equal rights became so overwhelming that Congress passed the Civil Rights Acts of 1964 and 1968, which prohibited discrimination in public facilities and employment, whereas the Voting Rights Act (1965) enabled blacks to participate fully in America's political life.[70] Thus, the US Constitution achieved legitimacy via inter-ethnic conflict, civil war, the adoption of a civic culture, and the crafting of twenty-seven constitutional amendments over 201 years. Indeed, this federal experience was quite different from that of its northern neighbour, as shall be seen in the following section.

2.4 Canada

2.4.1 The dual nature of the Canadian polity

Canada's origins are prevalently bilingual. C*irca* 30 per cent of Canadians speak French; 34.4 per cent are of British origin; 1.5 per cent are First Nation Peoples; and recent immigrants tend to learn English, rather than French. Catholicism claims 46.5 per cent of Canadians and 41.2 per cent are Protestant.[71] This duality knows its origin to the landing of John Cabot on Newfoundland in 1497, who claimed North America for England, and Jacques Cartier's landing on the Gaspé Peninsula in 1534, who claimed it for France. In 1663 New France became a crown colony, and nine years later French explorer Sieur de la Salle claimed all the land between the Great Lakes and the Gulf of Mexico for France.[72] Meanwhile, about two million British colonists were concentrated along a contained stretch of land east of the Appalachian Mountains. Therefore the clash for

[69] G. Clark (ed.), *Outline of the U.S. Legal System* (Washington D.C., 2004), 16, 27.
[70] Feeley & Rubin, 114–115.
[71] E. Wright (ed.), *A Dictionary of World History*, 2nd edn. (Oxford, 2006), 110.
[72] Jenkins, 9; and Wright, 108.

hegemony over North America was only a question of time, which the *circa* 80,000 French settlers lost during the four French and Indian Wars that the two colonial powers fought between 1689 and 1760.[73]

2.4.2 The pre-federal era (1763–1867)

Consequently, settlement and conquest (or cession) established British legal authority and legal institutions in Canada,[74] whereas the Royal Proclamation of 1763 recognized aboriginal tribes and nations as representatives of their peoples and possessors of their lands.[75] However, the greatest dilemma for the Imperial government was how to appease the French-Canadians who had become British subjects against their will. And in order to win their support against the increasingly dissident American colonists, the Québec Act, 1774, recognized the Roman Catholic Church; recognized the Customs of Paris as Québec's legal and landholding system;[76] and allowed French culture and education to continue.[77] Furthermore, this Act also extended Québec's jurisdiction over the Ohio and Allegheny basins, thus subtracting this territory from the hypothetical jurisdiction of the Thirteen Colonies.

As it turned out, the American Revolution heightened the tension between French-, and English-Canadians when 80,000–100,000 Loyalists fled to Canada, thus weakening the political status of the French-Canadian majority.[78] This demographic shift

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[73] Jenkins, 10, 25, 42; and B.P. Lenman (ed.) *Chambers Dictionary of World History* (Edinburg, 2000), 136.
[74] P.C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford, 2005), 30.
[75] C. Cook & J.A. Lindau (eds), *Aboriginal Rights and Self-Government: the Canadian and Mexican Experience in North American Perspective* (Montreal & Kingston, 2000), 9.
[76] S. Luck (ex. ed.), *Philip's World History Encyclopedia* (London, 2000), 342.
[77] J. Palmowski, *Oxford Dictionary of Twentieth Century World History*, rev. edn. (Oxford, 1998), 504.
[78] Lenman, 488.

prompted two arrangements. First, New Brunswick was created a separate province from Nova Scotia in 1784 to resettle the Loyalists.[79] Second, the Loyalists made demands for political representation. But rather than adapting Dutch consociationalism to the specific needs of the Canadian *demoi*, the Imperial government partitioned the Province of Québec by virtue of the Canada Act, 1791, thus weakening the French-Canadian power base, since Upper Canada became home for many Britons, Loyalists and Iroquois, and a distinct province from French-speaking Lower Canada. Furthermore, land was allotted in each province to the Protestant clergy, a move that angered French-Canadians. Eventually, inter-ethnic tension increased with the influx of English-speaking immigrants into Québec,[80] whereas the proposed reunification of the two provinces continued to foment anti-British dissidence, which gave rise to the Papineau rebellions of 1837–38.[81] Eventually, the Act of Union (1840) reunited Upper and Lower Canada into a single province with one legislature, in which both parts had equal representation. Furthermore, English became the sole official language of the United Province of Canada.[82]

2.4.3 The federalist rationale and the British North America Act (1867)

However, a number of factors concurred to set the federal process in motion. First, by the late-1850s, the English-Canadian business community realized that in order to compete with an industrializing US, federalism was deemed essential for Canada.[83] Second, America's nineteenth-century westward expansion convinced the British of the transitory

[79] Luck, 292.
[80] Ibid., 120; and Lenman, 137.
[81] Luck, 315.
[82] A.-G. Gagnon, 'Canada: Unity and Diversity', in M. O'Neill & D. Austen (eds), *Democracy and Cultural Diversity* (Oxford, 2000), 13.
[83] See M. Zaslow, *The Opening of the Canadian North 1870–1914* (Toronto, 1971).

nature of empires.[84] Thus, between 1848 and 1910, London granted self-government to its colonies of settlement, namely Canada, Newfoundland, New Zealand, Australia, and South Africa, as '[i]t was vaguely hoped that one day the whole empire might be coordinated in some form of federation'.[85] Third, during the American Civil War, the Canadian provinces became aware that they were potentially vulnerable to retaliation from the Union states because of British anti-American policies.[86] Fourth, the British realized that their position required urgent reinforcement, especially after US Secretary of State William H. Seward declared in 1867 that the whole of North America 'shall be, sooner or later, within the magic circle of the American Union';[87] indeed, Russia ended its imperial ventures in North America when it sold Alaska to the US government that same year.

In the light of the foregoing, in 1864, the 'great coalition' of Canadian Reformers and Conservatives broached the idea of a federal settlement at the Charlottetown Conference for the following reasons. First, the Canadian subunits had achieved responsible government between 1848 and 1855. Second, it was hoped that the partial transfer of power from the sub-national to the federal level would render the provinces securer *vis-à-vis* foreign powers. Third, the US Constitution came out stronger at the end of the Civil War, thus becoming a model that could be copied wherever federalism was construed as preferable to a unitary state. Fourth, given Canada's ethno-cultural duality, French-Canadians hoped that federalism would offer them asymmetrical power-sharing arrangements. Fifth, the Imperial government favoured the federalization of the White

[84] M.E. Chamberlain, *Decolonization*, 2nd edn. (Oxford, 1999), 4.
[85] Ibid., 6.
[86] Lenman, 201.
[87] Jenkins, 163.

colonies of settlement. Therefore talks on a federal settlement among the political representatives of the provinces continued in Québec until the final resolutions were agreed at the London Conference of 1866, which were embodied in the British North America Act, 1867.[88] Incidentally, Canada's constitution-making process lacked any popular input unlike, say, the Australian Constitution, which was approved in the referendum of 1899 by 72 per cent of those who cast their vote.[89]

Thus, Canadian federalism was the product of a deliberate devolutionary process in British imperial politics, wherein the executive government and authority of, and over, Canada was vested in the British monarch represented by his or her appointed Governor General.[90] Indeed, section 11 empowered the Governor General to appoint members on the Monarch's Privy Council, who were commissioned 'to aid and advise in the Government of Canada'. This central executive served as a template for the provincial executives. In fact, section 58 authorized the Governor General to appoint a lieutenant governor for each province, and similarly each lieutenant governor had the authority to appoint a provincial executive council.

The Canadian Parliament comprised the Senate and the House of Commons, whereas the Constitution designated three power levels namely: exclusively federal;[91] exclusively provincial;[92] and concurrent,[93] with residual powers assigned to the federal government, which could override the provinces under particular circumstances.[94] O'Sullivan defines this division of sovereignty as 'separate and distinct sovereignties

[88] Lenman, 201.
[89] A.G.L. Shaw, *The Story of Australia* (London, 1983), 193.
[90] *Constitution Acts, 1867 to 1982*, at: http://lois.justice.gc.ca/en/const/index.html (accessed on 22 October 2009), section 132, and sections 9–10.
[91] Ibid., section 91.
[92] Ibid., sections 92, 92A, 93.
[93] Ibid., sections 94, 95, 129.
[94] Ibid., sections 92A(3), and 93(4).

acting separately and independently of each other within their respective spheres.'[95] Furthermore, section 129 provided that pre-1867 laws that were in force in the uniting provinces would remain unchanged. What *had* changed was that these laws could now be altered *either* by the Federal Parliament (under the power granted in section 91 and elsewhere) *or* by a provincial legislature (under the power granted in section 92 and elsewhere). However, the same section protected from such repeal, abolition or alteration, such laws that were enacted by, or existed under Acts of the British Parliament. Thus Westminster's legislative supremacy and the supremacy of Imperial statute were preserved.

Fears among French-Canadians that Québec could be outvoted on matters of constitutional amendment pushed Francophone politicians to prefer arbitration by Westminster. In other words, the Constitution was domiciled in Britain, and until agreement could be had to bring it home, Canadians were powerless to modify it. The framers of the federal order also accepted implicitly the jurisdiction of the Judicial Committee of the Privy Council, which acted as the final court of appeal on issues concerning the legal validity of federal and provincial legislation, even after the creation of the Supreme Court of Canada in 1875.[96] However, Canada's political elite adopted the convention that unanimous provincial consent was required for the making of federal legislation.[97]

[95] D.A. O'Sullivan, *A Manual of Government in Canada; or, The Principles and Institutions of our Federal and Provincial Constitutions* (Toronto, 1879), 59, as quoted in Oliver, 118–119.
[96] Oliver, 39, 114, 117–118.
[97] Ibid., 150–151.

2.4.4 The Statute of Westminster and the patriation of the Constitution

After the First World War, the White Dominions sought to acquire the full attributes of statehood. Eventually, the Imperial Conference of 1926 acknowledged that the Dominions were 'autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic and external affairs.'[98] The understanding was that formerly 'colonial' legislatures were no longer *subordinate*, but *coordinate* to Westminster. However, section 4 of the Statute of Westminster (1931) *did not* terminate the Imperial government's power to legislate for the Dominions.[99]

Meanwhile, Canadian politicians, meeting at successive federal-provincial conferences chose to preserve the *status quo ante* by virtue of section 7(1), and the preamble to the Statute of Westminster, which effectively left the British Parliament at the apex of the Canadian federal system.[100] Several factors concurred in delaying the Constitution's patriation. To begin with, the waning of the French language outside the Province of Québec became a source of resentment among French-Canadians who pressed for the recognition of duality in the form of bilingualism and biculturalism;[101] and Canadian Indians sought a revision of their status after the federal government had encouraged European settlement in breach of the self-government rights of First Nation inhabitants.[102] However, Canadian Indians' land claims in Québec; and their resolve to remain within the Federation, precluded agreement between the Ottawa government,

[98] Cmnd 2768 (1926), as quoted in Oliver, 47.
[99] Oliver, 49.
[100] Ibid., 171.
[101] Gagnon, in O'Neill & Austin, 14.
[102] Palmowski, 97, 349.

Québec, the other provinces, and Canadian Indians. In turn, this state of affairs fuelled Quebecers' separatist claims.[103]

In order to counter separatism, Prime Minister Pierre Trudeau turned to universalism and the idea of a 'judicial nation' – a polity founded on rationality – as the solution for the coexistence of multiple identities within one state. However, this project failed to materialize in 1971, 1975–76, and 1978–79 due to lack of provincial unanimity.[104] In view of this impasse, the federal government opted to patriate the Constitution via Westminster.[105] Furthermore, the Supreme Court declared the Québec government's objection to patriation null under the Constitution Act, 1982, since it 'contains a new procedure for amending the Constitution of Canada which entirely replaces the old one in its legal as well as in its conventional aspects.'[106]

Quebecers' hostility to the Constitution Act, 1982, derives from the fact that it failed to recognize: *either* Québec's 'distinct society' status; *or* the 'principle of duality'. Subsequently, for French-Canadians, pan-Canadian citizenship is perceived as their having to conform to the English-Canadian template. Furthermore, as a territorially-defined minority nation within a larger (multi)national state, Québec feels uneasy with an Anglophone institutional framework and federal policy preferences that are perceived as being corrosive of Québec's identity,[107] whereas the centralizing impact of judicial decisions has caused particular concern in Québec, because the Supreme Court is still perceived as a predominantly Anglophile institution.[108] Furthermore, the Charter of

[103] Ibid., 98.
[104] Gagnon, in O'Neill & Austin, 16–17, 19, 24.
[105] Special Joint Committee (1980–1), 4: 93–94, as quoted in Oliver, 133.
[106] *Re: Objection to A Resolution to Amend the Constitution* [1982] 806, as quoted in Oliver, 183.
[107] See Burgess, *Comparative Federalism*, 104, 111, 121–122, 130, 159, 219–220.
[108] Ibid., 159.

Rights and Freedoms' insistence upon entrenching the rights of Canadian citizens as individuals wherever they live in Canada renders invisible Québec's claims for specificity and sovereignty.[109] In other words, the Charter leaves 'no room for traditional federal principles based on the recognition of particularistic status';[110] hence the sense of 'unfinished business' at the heart of Canadian federalism. Indeed, this conflictive attitude contrasts sharply with the Swiss people's will to belong to a multi-ethnic and multi-cultural polity, as shall be seen in the following section.

2.5 The Swiss Confederation

2.5.1 Constituent elements of the Swiss nation

Switzerland has four constitutionally recognized national languages. German-speaking Swiss account for 64 per cent of the total population with French-speaking Romands, Italian-Swiss, Rheto-Romansch, and other ethnic minorities accounting for the rest.[111] Roman Catholicism claims 41.8 per cent of the population, with the respective figures for Protestants and Muslims being 35.2 and 4.3 per cent.[112] Furthermore, the borders between the linguistic, religious and cantonal groups intersect, rather than overlap. Given such demographics, Fleiner et al. observe that

> it is vividly debated whether there is a Swiss nation, and therefore whether Swiss nationality exists. […] Often the Swiss nation is depicted as a *Willensnation* – a nation based on the will of the People to belong to the state and the nation.[113]

[109] Under section 6, Canadians have every right '(a) to move and take up residence in any province; and (b) to pursue the gain of a livelihood in any province [without discrimination] among persons primarily on the basis of province of present or previous residence'.
[110] Gagnon, in O'Neill & Austin, 23.
[111] 'Swiss Federal Statistical Office', at: http://www.statistik.admin.ch (accessed 11 July 2009); and J.B. Minahan, *One Europe, Many Nations: A Historical Dictionary of European National Groups* (Westport, CT & London, 2000), 544, 659.
[112] Wright, 620.
[113] T. Fleiner, et al., *Swiss Constitutional Law* (The Hague, 2005), 145.

This chimerical nationhood is the product of successive invasions that have modified and added to the ethnic composition of the original inhabitants. Indeed, during the first century BC, Helvetia became the borderland between the Romanized Celtic, Burgundian and Rhaetian cultures, and the unconquered Germanic tribes north of the Danube. In the fifth century, the Alemanni occupied the Swiss plateau from the northeast, whereas the Latinized Rhaetians in the southeast defended their Romansch language and culture. By the tenth century, Helvetia consisted of twelve bishoprics,[114] which were brought together in 1033 under the jurisdiction of the Holy Roman Empire. However, the Empire's gradual decline enabled feudal dynasties to emerge as territorial powers, whereas the isolated communities in the mountains were practically autonomous.[115] Indeed, when the founder of the Habsburg dynasty Rudolph I, bequeathed Helvetia to his sons, the forest cantons of Uri, Schwyz, and Unterwalden refused to submit to Austrian rule, and on 1 August 1291 they contracted the *Everlasting League of Mutual Assistance* against outside interference. Furthermore, this Pact recognized the cantons' right to self-government, and established a system of arbitration for the resolution of inter-cantonal conflict. Other territories could join the League on concluding treaties with the founder states.[116] Indeed, by the mid-fourteenth century, it became the centripetal force for other districts, and apart from the Compact of Stans (1481) that regulated mutual alliances, there were no common institutions.[117]

The status of the sub-units depended on the treaty that linked them to the Confederation. For example, when Fribourg and Solothurn requested membership, they

[114] Luck, 398.
[115] Minahan,, 660–661; and N. Davies, *Europe: A History* (Oxford, 1996), 404.
[116] Fleiner, et al., 22.
[117] Minahan, 661; and Davies, 404.

were made to accept fewer rights than most other cantons to avoid the predominance of urban over rural cantons. Besides, there were other 'subjected', 'allied', or 'protected' territories, including the Vaud and the Valais in the southwest, the Diocese of Basle in the northwest, Aargau in the north, the bailiwick of Thurgau, the City and Chapter of St Gallen in the northeast, and Ticino and the Graubünden League in the southeast.[118]

When Napoleon invaded Switzerland in 1798, the Directory imposed an unpopular centralized Helvetian Republic, which he amended on 19 February 1803 with his *Act of Mediation*, under which the confederative nature of the Helvetian State was restored, whereas the Congress of Vienna reconstituted the pre-Napoleonic Confederation, with the addition of nine mostly non-German subjected, protected, or annexed territories.[119]

2.5.2 Evolution of the Swiss federal process

Under the Constitution of 7 August 1815, each of the twenty-two sovereign cantons had one vote in the *Diet*. An absolute majority decided all matters save foreign affairs, for which a three-fourths majority was required. Most cantonal governments remained in the hands of local aristocracies.[120] However, the 1815 Constitution soon proved archaic as the Industrial Revolution led to the creation of an urban working class, whereas the wars of independence in Greece and Belgium, and the July Revolution of 1830 in France ushered a period of republicanism across the continent.[121] Consequently, Swiss liberals, radicals, and entrepreneurs pressed their governments to reform the Confederation Pact,

[118] Fleiner, et al., 22; and Minahan, 430.
[119] Elazar, 155–156.
[120] D. Thomson, *Europe Since Napoleon* (Harmondsworth, 1966), 170.
[121] E.g. uprisings in Poland (1830–32), Germany (1830–33), and Italy (1831–38).

which hindered the free movement of capital, persons and goods across the constituent cantons. Indeed, between 1815 and 1849, each canton issued its own coinage, with Uri only having a decimalized currency system; and imposed customs to the detriment of inter-cantonal trade, whereas weights and measures lacked standardization.[122] Finally, the right of establishment of a person in a canton, other than one's own was hampered by restrictive statutes concerning cantonal and communal rights.[123]

However, the request for reform led to conflict between the liberal Protestant cantons that favoured centralized federalism, and the conservative Catholic cantons who wanted to retain the *status quo*. Thus, in December 1845 seven Catholic cantons reconstituted themselves into a separate political and military league (or *Sonderbund*), which the *Tagsatsung* (Assembly of the Confederation) declared unconstitutional, and which the confederal forces crushed in November 1847. Three months later, the *Diet* convened a constitutional committee that was attended by delegates from each canton, and a draft Constitution was submitted for ratification in the summer of 1848, which was approved by fifteen and a half cantons out of twenty-two.[124] At that point, the *Diet* overcame the unanimity requirement by legal fiat, when a majority of its members decided to adopt a Federal Constitution despite the negative votes of the Catholic cantons.[125] But in order to appease the dissenting cantons, the constitutional bargain

[122] A.H. Treschel, *Towards a Federal Europe?* (London, 2006), 20; and C.L. Krause & C. Mishler, *Standard Catalog of World Coins*, 6th edn. (Iola, WI, 1979), 1614–1640; and http://history-switzerland.geschichte.schweiz.ch/switzerland-federal-constitution-1848.html (accessed on 11 July 2009).
[123] B. Schoch, 'Switzerland – A Model for Solving Nationality Conflicts?' in Peach Research Institute Frankfurt – Report No 54/2000 (translated by M. Clarke), at: http://www.cypruspolicycenter.org (accessed on 8 July 2009), 28.
[124] Schoch, 28, 29; and Thomson 213.
[125] F. Mendez, 'Popular Input, Territoriality, and the Constitution-Making Process: Comparative Reflections on the European Union's Supranational Experience', in *Patterns of Constitutional Design: The Role of Citizens and Elites in Constitution-Making*, ed. J. Wheatley & F. Mendez (Farnham & Burlington VT, 2013), 152.

included the 'double majority' principle, that is, the majority of Swiss voters, and the majority of cantons, for subsequent constitutional changes.

Consequently, the Constitution of 1848 transformed Switzerland into a federal state based on the republican principles of representative democracy, and created Swiss citizenship alongside cantonal and municipal citizenships.[126] And under the revised Constitution of 1874, a unified army was established in response to the unification of Italy and Germany.[127] Other important novelties included: the introduction of the 'optional' referendum, which conferred veto power to the People, insofar as the People could counter decisions taken by the Federal Assembly;[128] the establishment of the Federal Court;[129] and the granting of cantonal and communal rights to any Swiss citizen settling in another canton after three months of residence, instead of the two years under the 1848 Constitution, when only cantonal rights were granted.[130] These principles remain at the core of the revised Constitution of 18 April 1999, which now includes a list of fundamental rights (Articles 7–35); and a statement on social goals (Article 41), which urges the federal and cantonal legislatures to guarantee equitable living conditions for Swiss citizens.

Watts points out that 'Switzerland alone among multilingual and multicultural federations had not set out fundamental individual and group rights in the constitution'.[131] He attributes this delay to Bern's greater concern with the intricate distribution of power

[126] http://history-switzerland.geschichte.schweiz.ch/switzerland-federal-constitution-1848.html
[127] Schoch, 33.
[128] Ibid. The right by which 30,000 Swiss citizens could compel the Legislature to consider (or reconsider) a Federal government policy or bill was introduced in 1891.
[129] Fleiner, et al., 24.
[130] http://history-switzerland.geschichte.schweiz.ch/switzerland-federal-constitution-1848.html
[131] R.L. Watts, *Comparing Federal Systems*, 2nd edn. (Montreal & Kingston, 1999), 120.

between the orders of government.[132] Indeed, Switzerland's political decisions rely heavily on consensus-building, rather than the bipolar majority system. This is manifest in the composition of the seven-member Swiss executive, which, according to Article 175(4) of the Constitution must equitably represent '[t]he various regions and language communities […] in the Federal Council'. Thus Switzerland's overwhelming German-speaking majority is partly offset by the presence of two or three French- or Italian-speaking Federal Councillors. Likewise, the four major political parties elected to the House of Representatives are guaranteed representation in the state executive under the so-called 'magic formula' which was devised by the political elite in the 1950s.[133] Furthermore, the Office of President of the Federal Council rotates every year, whereas Article 177(1) instructs the said Council to take its decisions as a collegial body, wherein the President is *primus inter pares*. In other words, the Swiss federal process has been characterized by the progressive refinement of a power-sharing compact that respects the polity's multilingual and multicultural diversity. By way of contrast, Germany's adoption of its current federal order was not so symbiotic.

2.6 Germany

2.6.1 Origins of the German nation

The genesis of the German nation is traceable to AD 486 when the Franks defeated the last Roman outposts in northern Gaul.[134] Three centuries later, Charlemagne extended the Frankish territories east of the Elbe,[135] whereas successive emperors claimed to be the temporal sovereigns of Latin Christendom, thus giving rise to the Holy Roman Empire's

[132] Ibid., 106; and Elazar, 175, 156.
[133] Fleiner, et al., 83.
[134] Luck, 147.
[135] Minahan, 289.

'somewhat mystical ideal [of] formal unity of government, based on coronation in Rome, memories of the old Roman Empire as well as Charlemagne, and devotion to the Roman Catholic Church.'[136] But whereas the Franks in Gaul adopted vernacular Latin, the eastern Franks and the subjected Germanic tribes spoke various languages that preceded modern German. And by virtue of the first division of the Frankish territories in 843, the Kingdom of East Francia became the nucleus of the German nation.[137]

As in Switzerland, feudalism led to the emergence of many dynasties, which led to territorial fragmentation, and the weakening of the Holy Roman emperor who was unable to prevent many aristocratic families from embracing the Reformation.[138] Eventually, Protestant gains hardened the religious and political divisions within the Empire, with the Treaty of Westphalia functioning as a basic law until August 1806, when Napoleon dissolved the Empire. Until then, German princes had the authority to conclude treaties among themselves and with foreign powers, as long as these treaties were not directed against the emperor.[139]

At the Congress of Vienna, the Act of Confederation created a polity of thirty-nine independent states, instead of the pre-Napoleonic 1,789 political units,[140] with the federative organ being the Frankfurt-based *Diet* (*Bundestag*). This German polity was without a head of state and administrative institutions, and there was neither a court, nor army. Furthermore, the *Bundestag* consisted of state representatives who served their rulers as delegates, rather than trustees. Constitutional amendments were virtually impossible, as they required the consent of all the states meeting in full session. Finally,

[136] Wright, 289.
[137] Minahan, 289.
[138] A. Gunlicks, *The* Länder *and German Federalism* (Manchester, 2003), 7, et passim.
[139] Ibid., 14.
[140] Ibid., 16–17.

many sensitive decisions such as the declaration of war required a two-thirds majority, whereas other routine business was conducted on the basis of simple majority decisions in an inner committee, or *engerer Rat*.[141]

During the eighteenth century, the fortunes of the German nation depended on two competing ideas. On the one hand, the southern states preferred being part of a 'Greater Germany' under Austrian leadership.[142] On the other, Prussia's national liberals favoured the creation of a 'Little Germany' under Prussian leadership.[143] But until the mid-nineteenth century, German nationalism lacked popular support, as poor communications confined people to the district where they were born, thus cultivating local, rather than national loyalties.[144] This type of society favoured political particularism, thus preserving Austrian supremacy. In other words, German statehood could be achieved if this objective were to be pursued by a power other than Austria.

2.6.2 Prussian leadership of the German *Volk*

The most powerful German state at that time was the Kingdom of Prussia, whose political ascendancy was confirmed during the Napoleonic Wars. Thus, Prussia was determined to challenge Austrian hegemony via its economic ascendancy and military supremacy. To begin with, Prussia abolished its sixty-seven internal tariffs in 1818 and established an internal customs union. Eventually, other German states sought a wider union to avoid paying duties whenever their goods passed through Prussia, whereas the launching of the *Zollverein* in January 1834 created a customs union of eighteen states. Eighteen years

[141] W, Carr, *A History of Germany 1815–1945*, 2nd edn. (London, 1979), 4; and D. Townson, *Dictionary of Modern History 1789–1945*, rev. edn. (Harmondsworth, 1995), 884–885.
[142] Townson, 284.
[143] Carr, 75–76.
[144] Gunlicks, 7–8.

later, nearly all the German states had joined the *Zollverein*. Thus Prussia came to dominate the German economy, since Austria was denied membership. Furthermore, the *Zollverein* was an essential adjuvant to German industrialization because it promoted the standardization of commercial law; created a large home market; and provided protection against foreign competition.[145] And as in the US and Switzerland, the expansion of the German railway network assumed great political significance, because it broke down provincial barriers. However, a multiplicity of monetary systems, and different systems of weights and measures across the *Zollverein* continued to hinder interstate commerce and trade. Thus Germany's entrepreneurial and middle classes became univocal in their demand for unification,[146] whereas Germany's economic ascendancy fuelled an aggressive brand of national liberalism. Indeed, three nineteenth-century historians and political writers, namely Heinrich von Sybel, Johann Droysen, and Heinrich von Treitschke were convinced that Prussia was destined to rule over Germany.[147] Actually, the Prussian invasion of Saxony, Hanover and Hesse-Cassel in June 1866 gave credit to Berlin's aspirations of grandeur, whereas the establishment of the North German Confederation followed Austria's defeat at the Battle of Sadowa.

Given the centuries-old sense of independence that characterized Germany's political evolution, the framers of the 1867 Constitution struck a delicate balance between state centralism advocated by the national liberals, and asymmetrical federalism. Thus, Prussian ascendancy was recognized in the person of the King of Prussia who was the President of the North German Confederation and commander-in-chief of the confederate army, with full responsibility for foreign policy and absolute power to declare war and

[145] Ibid., 25, 30; and Townson, 941.
[146] Carr, 30, 31, 77.
[147] Ibid., 76.

make peace, whereas the *Bundesrat* 'carried' the sovereignty of the polity, since it comprised the representatives of its twenty-two constituent states who: supervised administration through appointed committees; and voted in accordance with instructions from their state governments. However, Prussia had enough votes to veto legislation which she opposed. On the other hand, the elected members of the *Reichstag* (Lower House) represented the German people.[148]

The ensuing *Kaiserreich* Constitution of 1871 was an adjusted version of the 1867 Constitution, whose features reconfirmed the federation's asymmetrical nature. Once again, Prussia had seventeen of the fifty-eight seats in the *Bundesrat*, and only Bavaria, Württemberg and Saxony could tot up the fourteen votes required for a veto, on condition that they agreed to oppose Prussia on constitutional or military questions.[149] Furthermore the Constitution contained no provisions for minority rights despite the Empire's multi-ethnic composition.[150] However, Bismarck conceded to Bavaria: (1) the right to a permanent seat on the military committee of the *Bundesrat*; (2) separate representation at peace conferences; and (3) the presidency of a foreign affairs committee. Furthermore, Bavaria and Württemberg were granted 'reserved rights' over the control of their armed forces, as well as their postal and telegraphic services.[151] Nevertheless, the creation of the German state did not rest on the will of its people, but was imposed 'from above' as a result of war. Indeed, Wilhelmine Germany was a compromise between the forces of conservative federalism, the liberal unitary state principle, and Prussian military might.[152]

[148] Townson, 607; and Carr, 111–113.
[149] Gunlicks, 28; and Carr, 126.
[150] Carr, 130.
[151] H. Kinder & W. Hilgemann, *The Penguin Atlas of World History Volume II: From the French Revolution to the Present* (Harmondsworth, 1978), 76–77; and Finer, vol. III, 1601–1604.
[152] Carr, 125; Gunlicks, 340; and Townson, 579.

2.6.3 The making of the Federal Republic of Germany

After the Second World War, federalism was perceived as an appropriate solution for an occupied Germany. But this time the victorious Allies were the surrogate architects of German federalism. Indeed, at the Potsdam Conference (July–August 1945), they called for the 'decentralization of [Germany's] political structure and the development of local responsibility',[153] whereas American pluralist theory suggested that federalism could ward off the recurrence of a tyrannical state.[154] Besides, the Americans knew that this formula matched the aspirations of Germany's political elite. But first it was necessary to redraw the *Land* borders of a truncated Germany.

The re-creation of the post-war *Länder* was further complicated by the fact that the Allies Occupation Zones often cut across the borders of the constituent states previously established by the Wilhelmine and Weimar Constitutions. Furthermore, border changes were arbitrarily imposed by the Allies, rather than negotiated by, or agreed in conjunction with, the Germans. Eventually, the Western Allies instructed the eleven prime ministers of the *Länder* under their jurisdiction to draft an overarching constitution for their territories, and in August 1948, the Constitutional Convention duly met at Herrenchiemsee. In this case, the Parliamentary Council consisted of *Land* leaders and delegates who enjoyed virtual self-government. However, the establishment of the Federal Republic sanctioned the *de facto* partitioning of the German homeland until 1990, thus excluding the eastern *Länder* from the federal order, which they eventually readopted after the reunification of the two Germanys.

[153] *Potsdam Agreement*, section 2, paragraph 9.
[154] Gunlicks, 4–5.

2.7 Conclusion

From the foregoing comparative analysis, it is clear that whenever various sets of autonomous polities decide, or are compelled, to federate, the way that they may achieve union is majorly conditional upon the accommodation of ethno-cultural diversity of the constituting parts. And whenever a constitution includes satisfactory provisions that address such factors, and enjoys popular support, it carries a moral authority vested by the people. Indeed, authority thus achieved underscores the seemingly unambiguous notion that the state exists for the people, and is controlled by the people. Nevertheless, this analysis suggests also that power elites, and their resort to variable degrees of coercion, were fundamental to the constitution-making processes under review. In fact, according to Marx and Engels

> [t]he ideas of the ruling class are in every epoch the ruling ideas, i.e. the class which is the ruling *material* force of society is at the same time its ruling *intellectual* force. The class which has its means of material production at its disposal has control at the same time over the means of mental production.[155]

For example, a polity's durability invariably depends on the ability of elites to provide adequate constitutional provisions that underpin, *inter alia*, a polity's political sovereignty. For example, the difficulties that the newly independent American states experienced when trying to enforce international treaties, resolve inter-state disputes, or exert coordinated military force against potential foreign aggressors, prompted a militant Federalist elite to lobby successfully for the removal of the unanimity clause at the Philadelphia Convention, which transformed the US into a federal polity when the 1787 Constitution was ratified: (1) by fewer than five per cent of the nation's white adult male

[155] K. Marx & F. Engels, *The German Ideology* [1846] (New York, 1970), 64.

population;[156] and (2) when New Hampshire became the ninth of thirteen states to ratify it. Similarly, the Swiss overcame the unanimity requirement by legal fiat, when the *Diet* adopted the 1848 Constitution, despite the fact that six and a half cantons had rejected it. On the other hand, Canadian federalism stemmed from the Imperial government's assent to the introduction of a devolutionary process for its colonies of settlement. Consequently, a series of constitutional conferences were held in Canada and Britain, which involved territorial elites and the Crown government, but excluded popular assent. And in post-war Germany, the Western Allies, under the aegis of the Americans, were the surrogate architects of German federalism, with the (West) German people being indirectly represented at the Herrenchiemsee Conference of 1948 by the *Länder* leaders and delegates.

Without doubt, these top-down decisions overrode the people's sovereign will or preference for particularism. However, the elites' statecraft was necessary to put an end to enduring inter-state conflicts that stood in the way of constitutional settlements. For example, the First Ten Amendments of the US Constitution were designed to circumscribe the federal government's remit, but not just. Indeed, they were intended to accommodate the interests of the landed aristocracy that took part in the drafting of the Constitution.[157] Thus, under the Tenth Amendment, the landed gentry in the slave states could continue to uphold discriminatory legislation, which deprived African-Americans of their individual rights and freedoms until the passage of the Fourteenth and Fifteenth Amendments. On the other hand, the Swiss Constitution of 1848 provided for popular input with respect to subsequent constitutional reform. This took the form of a double

[156] Schneier, 3.
[157] Ibid., 27, 84.

majority of the people and the cantons, thus satisfying the democratic principles of 'one person, one vote', and 'one territory, one vote'. As for the (West) Germans, the political elite and the people saw the establishment of a democratic state as the first step toward their country's rehabilitation within the Western camp of a divided Europe, whereas Canada's elite have been trying hard to agree to constitutional changes that would bring the Province of Québec firmly into the constitutional order. Indeed, whereas the elite at the federal level were ready to satisfy Québec's claims for 'distinct society' status and bilingualism, first under the Meech Lake Accord (1987), and then under the Charlottetown Accord (1992), the provincial legislatures either failed to ratify the proposed amendments within the prescribed three-year timeframe under section 39(1) of Constitution Act, 1982, or the majority of the provinces rejected Québec's demands.[158]

Political economy was another important agent for the constitution-making processes of the four polities under review. For example, the US Confederation's economy was based on different monetary regimes, which rendered difficult the regulation of its financial system and inter-state trade. Thus, the Coinage Act of 1792 established the dollar as the Union's common currency,[159] which flanked the Spanish dollar until the passage of the Coinage Act of 1857, when the Spanish dollar ceased to be legal tender. Canada's monetary union also came in 1857, that is, ten years *before* the passage of the British North America Act, because monetary union was deemed necessary for Canada to be able to compete with its industrializing neighbour.[160] As for Germany, the Prussia-led *Zollverein* of 1834 paved the way for the consolidation of the *Kaiserreich* by 1871, complete with economic and monetary union under the goldmark

[158] Mendez, in Wheatley & Mendez, 153, 156, 157.
[159] Krause & Mishler, 1742.
[160] Ibid., 214.

regime in 1873. Similarly, the Industrial Revolution favoured Switzerland's establishment of a federal order in 1848 and monetary union two years later. Interestingly, economic integration was of cardinal importance for the four comparators to strike their respective federal bargain, with monetary union following the establishment of the federal order in the US, Switzerland, and Germany.

Ultimately, the longevity of these constitutional settlements depends on whether, and how, these charters have created a legal habit in the mind of their respective *pouvoir constituant*. In Switzerland, the 1848 and 1874 Constitutions created mechanisms via which constitutional reform and controversial political decisions depend on the double-majority rule. Indeed, the people and the cantons have the right to reject (or approve) constitutional reform and/or federal legislative proposals via referendum. One other way of fostering a 'we-feeling' or 'civic culture' is for elites to devise bills of individual rights, or charters of fundamental rights and freedoms. However, such guarantees may not always succeed in creating what former Canadian Prime Minister Pierre Trudeau called a 'judicial nation'. Consequently, judicial review of the national high courts assumes paramount importance for the social cohesion of compound polities. For example, the US Supreme Court rulings are crucial because the Constitution was crafted at a time when many safeguards and rights that one takes for granted, like criminal justice, the protection of socio-economic, civil, and minority rights, were not exhaustively addressed. Thus, US Supreme Court rulings make up for such lacunae.[161] On the other hand, the Constitutional Court of the Federal Republic of Germany was originally designed as the guardian of a wide array of social and economic rights and civil

[161] M.G. Rosnik, et al., *Political Science: An Introduction*, 5th edn. (Englewood Cliffs, NJ, 1994), 58 (note 7), and 334–340.

liberties,[162] but has also become the defender of national sovereignty in the wake of EU deepening. As for Canada, the Supreme Court has the delicate mission of defending ethno-cultural rights, especially whenever tensions resurface between Québec and the rest of Canada. For example, its ruling of 1998 admitted that the provinces had the right to press Ottawa for secession, even though the Constitution does not make provisions for exiting the federation.[163] Prima facie, this might put Canada's territorial integrity at risk. However, such a ruling may be interpreted as a sophisticated example of statecraft because its open-endedness signals to secessionists that the supreme law of the land does not compel them to remain within the constitutional order. Indeed, this ruling predates the adoption of Lisbon Article 50 TEU, which empowers any EU member state to quit the Union.

In the light of the foregoing, one may conclude that a number of factors push formerly independent or autonomous polities to first strike a federal bargain, and then resolve to keep it running. Foremost among these drivers are mutual security and defence concerns; and the pursuit of mutual economic gains that federal settlements purport to offer the constituent states. In the first instance, a common security and defence policy tends to guarantee the territorial integrity of sub-national units from external, as well as internal threats. In the second, economic and monetary union helps the constituent states to conduct intra-national commerce and trade with greater ease, while rendering such polities more visible and (possibly) more influential at the regional and/or global level. However, differences of a multicultural, multi-ethnic, multilingual, or socio-economic character within federations often cause tensions between the supranational and sub-

[162] Ibid., 46.
[163] R.L. Watts, *Comparing Federal Systems* 3rd edn. (Montreal & Kingston, 2008), 169–170.

national government levels. Hence the establishment of federal institutions like supreme judicial organs, which deliver rulings on disputes between the different levels of government; and the crafting of idiosyncratic mechanisms which address potential fault lines in the constitutional settlement by way of charters of fundamental rights and freedoms; and mechanisms which guarantee equitable multi-level governance, and the stability and longevity of federal state orders.

CHAPTER 3

FEDERAL CONSTITUTION-MAKING: SIX PROPOSITIONS THAT EMERGE FROM THE FEDERATIVE PROCESSES OF THE FOUR COMPARATORS

3.1 Introduction

According to Peters and Pierre, one of the fundamental tasks for any society is to govern itself in 'the pursuit of collective interests and the steering and coordination of society'.[164] And Michael argues that '[t]he longevity of successful democratic states is […] a history of communities finding ways to account for minority interests in the mainstream of public decision making'.[165] These analyses stem from the fact that since the end of the Second World War, and ever more so after the demise of Soviet communism, the recognition of human, and minority rights attached to democratic governance across Europe, has increasingly put pressure on the monolithic structure of the Westphalian nation-state order.[166] And Colomer argues that institutional pluralism cum federalism within the European context favours negotiations and co-operation among heterogeneous parties, which promote democratic consensus and political bargaining as a *modus operandi*, arguably 'at the cost of some political inefficiency and governmental and policy instability'.[167] Furthermore, a sense of joint identity among polities seeking con-federation; together with their collective interest in achieving a common loyalty to a

[164] B.G. Peters & J. Pierre, 'Governance, Government and the State', in *The State: Theories and Issues*, ed. C. Hay, et al. (Houndmills & New York, 2006), 209, 210.
[165] Michael, 33.
[166] G. Delanty, *Citizenship in a Global Age: Society, Culture, Politics* (Maidenhead & New York, 2000).
[167] J.M. Colomer (ed.), *Comparative European Politics*, 3rd edn. (London, 2008), 5.

federal government, constitute other 'federal qualities' that favour the establishment of stable federal orders.[168]

In the light of the foregoing, the aim of this chapter is to provide a framework which accounts for federation as an exercise in policy making extending over the historical timeframes of the US, Canada, Switzerland and Germany. Indeed, Chapter 2 reveals that there are at least six interlinked themes (or factors) which stimulate or determine federal processes, namely:

1) **initial triggers** which elicit the transferring of security and defence matters from the constituent-state-, to the federal level;
2) **purposive acts of human agency** which impinge upon the waxing (or waning) of the 'we-feeling';
3) **economic factors** and **technological developments**;
4) the crafting of **institutions and mechanisms** which enhance the constitutional settlement's legitimacy;
5) the **political recognition of sub-national competences** within the wider federal framework;
6) institutional provisions that consolidate the **stability** and **longevity** of federations.

These six themes constitute the main struts of this chapter, which in turn provide an adequate framework for an in-depth analysis of the politics of EU constitution-making that will feature in Chapters 4 through 9.

[168] See Watts, 3rd edn., 20–21.

3.2 Transferring of security and defence matters from the constituent-state-, to the federal level

The federal processes in the four comparators were triggered by a common exogenous factor, namely the creation of some unified front against what previously independent or

Table 3.1: Factors affecting the US, Swiss, Canadian, & German federal processes (Part 1)

Factors/Themes	US	Switzerland	Canada	Germany
1. Initial triggers				
Exogenous	opposition to British imperialist rule	opposition to Habsburg hegemony	American Civil War	opposition to Austrian hegemony
Imperial retreat/ civil war	American Revolution (1775–83); Peace of Paris (1783)	*Sonderbund* War (1847)	Treaty of Paris (1763); Canada Act (1982)	Battle of Sadowa (1866); Franco-Prussian War (1870–71)
Mutual defence	Articles of Confederation and Perpetual Union (1777)	Oath of the Everlasting League (1291)	British North America Act (1867)	Act of Confederation (1815); *Kaiserreich* Constitutions (1867; 1871)
2. Purposive acts of human agency				
Dominant sub-unit/s or powers	New England/Unionist states	Bern Canton	Province of Ontario	Kingdom of Prussia/ Western Allies
Accommodation of ethnic minorities/ recognition of fundamental rights	Thirteenth, Fourteenth & fifteenth Amendments (Abolition of slavery; extension of US citizen-ship; extension of male suffrage)	after *Sonderbund* War, respect for cantonal diversity under Federal Constitution (1848) and subsequent constitutions	Retention of French-style civil code in Province of Québec (Québec Act, 1774); Charter of Rights and Freedoms (1982)	Weimar Constitution (1919) provisions ending discrimination against Catholics
Territorial accretion	from 13 founder states (1776), to 50 states + 1 federal district by 1959	from 3 founder cantons (1291), to 26 cantons by 1978 (6 of which are half-cantons)	from 4 provinces (1867), to 10 provinces + 3 territories (1999)	Wilhelmine Germany: from 22 states (1867) to 26 states + 1 imperial territory (1871); Federal Republic: from 11 *Länder* (1949), to 16 *Länder* (1990)

Sources: Adapted from references quoted in Chapters 2 and 3.

autonomous polities perceived as alien or potentially invasive external powers. Thus, the North American Colonies severed their ties with Britain when the Imperial government was set to override the statutory autonomy of what were to be the founder states of the US, whereas Canadians decided to federate in 1867 in order to enhance their mutual military and defence capacities in the wake of US pan-continental expansionism. Likewise, in Mittel-Europa, opposition to Habsburg rule was the trigger that determined

the founding of the Swiss Confederation when in 1291, the three forest territories established the *Everlasting League of Mutual Assistance*; and six centuries later, the unification of Italy and Germany prompted the establishment of a Swiss federal army under the Federal Constitution of 1874. On the other hand, the establishment and completion of the *Kaiserreich* between 1867 and 1871 was Prussia's way of subtracting more than twenty German states from Habsburg hegemony, and installing the King of Prussia as supreme chief of the German federal army (see above Table 3.1).

By way of comparison, security and defence concerns have constituted an intermittent trigger to the Union's constitution-making process. For instance, Pyongyang's attack on South Korea in June 1950 was perceived in the West as a possible precursor to a Soviet attack on Western Europe. Consequently, in May 1952, France, Germany, Italy, and the Benelux signed the Treaty that was supposed to establish a supranational European Defence Community (EDC). However, this project could not materialize, once the French National Assembly rejected the EDC Treaty in August 1954, because of sovereignist concerns regarding the establishment of an integrated European army (with accompanying declarations and conventions concerning reciprocal security guarantees), in which Germany would be allowed to rearm.[169] Instead, the US-led NATO defence umbrella addressed Western Europe's mutual security and defence concerns, especially until the end of the Cold War, when the retreat of Soviet/Russian troops from Eastern Europe and the Soviet Union's breakaway republics rekindled the EU countries' security concerns along their eastern border. Indeed, such concerns prompted the establishment of an intergovernmental CFSP under Maastricht Pillar II; and the bringing

[169] See T.C. Salmon, 'European Defence Community', in *Encyclopedia of the European Union*, Dinan, 195–196.

of the Union's extra-Treaty conflict-prevention and peacekeeping operations (or Petersberg tasks) within the remit of the CFSP under the Treaty of Amsterdam (see thematic study in Chapter 4).

3.3 Purposive acts of human agency

Typically, federative processes are piloted by dominant sub-units or elites who: *either* inspire other polities to join a pre-existing federal order; *or* compel weaker sub-units to do so. And whenever the weaker sub-units are compelled to accept the will of the dominant agents, remedial measures (or purposive acts of human agency) are usually devised to create or restore the 'we-feeling'. For example, despite the fact that Switzerland's Catholic cantons were opposed to liberal-republican reform, and Germany's Catholic states preferred to remain attached to Austria rather than join Prussia, neither the Catholic cantons, nor Germany's Catholic states could match the military supremacy of their Protestant counterparts when things came to a head in both polities. Eventually, the Swiss *Diet* chose to appease the dissenting cantons by introducing the double-majority principle for subsequent constitutional reform in the Federal Constitution of 1848, whereas Articles 136–141 of the Weimar Constitution, 1919, mended the rift between Catholics and Protestants previously caused by Bismarck's *Kulturkampf* of 1871–87, thus guaranteeing the right to freedom of worship, and social, political and economic equality to all Germans, irrespective of their creed. And in the US, whereas the Civil War *did* reunify the split nation in the image of the Unionists, the adoption of the Fifteenth Amendment (February 1870), which extended franchise to African-Americans, took full effect a century later when the Supreme Court

emphatically ruled against the continued denial of this fundamental right. And in Canada, the main reason for the federal bargain was the French-Canadians' claims for cultural duality and autonomy *vis-à-vis* English-Canadians. Thus, it was decided that constitutional amendment, and the passage of federal law, rest upon unanimity among the provinces. This unwritten convention was deemed necessary to appease the French-Canadians, who thus clinched the right to veto constitutional initiatives that they perceived as diminishing their distinct identity. On the other hand, the Canadian Constitution Act, 1982, focused on the recognition and codification of a wide range of rights and fundamental freedoms, linguistic, and aboriginal rights. This was the political elites' attempt at trying to install an order aimed at satisfying claims for more visibility and autonomy irrespective of any one particular minority, rather than recognizing Québec's 'distinct society' status. However, this universalistic provision accounts for French-Canadians' sporadic calls for secession, and why a 'we-feeling' among Canadians seems hard to set (see above, Table 3.1).[170]

Actually, the purposive acts of Europe's power elites have extended the Union's exclusive and shared competences over a wide range of policy areas without much regard to popular input or regular consultation. Indeed, it will be argued that these top-down acts of human agency have affected the development of the 'we-feeling' among Europeans, especially when they were faced with the possibility of losing 'their' representative in the College of the European Commission (see thematic study in Chapter 5).

[170] A.H. Birch, *Concepts and Theories of Modern Democracy*, 2nd edn. (London & New York), 20, 21, 25–27; and Burgess, *Comparative Federalism*, 122.

3.4 Economic factors and technological developments

The previous chapter also shows that economic considerations and technological innovation elicited constitutional reform in all four comparators. For example, Germany and Switzerland's pre-federal constitutions proved archaic and inadequate in the wake of the Industrial Revolution because both polities were made up of highly fragmented internal markets lacking standardization across, and within, their constituent territories. For example, in Prussia alone, the existence of sixty-seven internal tariffs was an obstacle to the liberal trade policy that matured during the Industrial Revolution. In fact, Prussia abolished these tariffs in 1818, and established an internal customs union. And since Prussia charged heavy duties on goods passing through its territory, eighteen states sought a wider *Zollverein*, which materialized in 1834.[171] And as Germany's middle class and business community grew in economic and social power, they became increasingly vocal in their demand for national unity.[172] Actually, a similar process materialized in Switzerland, prompting the adoption of the Federal Constitution of 1848 and further constitutional reform in 1874, which transformed the cantons into one economic and monetary space, with the right of establishment for all Swiss nationals, irrespective of their canton of origin. In other words, economies of scale favoured the transformation of the Swiss and German confederations into more centralized federations. And in Canada, economies of scale favoured monetary union a decade *before* the passage of the British North America Act, 1867 (see below, Table 3.2). Furthermore, the US and Canada's pan-continental nation-building depended also on technological progress. For example,

[171] Townson, 941.
[172] Carr, 30, 31, 77.

nineteenth-century technological developments in river steamship navigation and the expansion of the rail and canal networks were of capital importance for the transposition

Table 3.2: Factors affecting the US, Swiss, Canadian, & German federal processes (Part 2)

Factors/Themes	US	Switzerland	Canada	Germany
3. Economic Factors				
Pre-federal	—	—	monetary union (1857)	*Zollverein* (1843)
Technological development	Industrial Revolution	Industrial Revolution	Industrial Revolution	Industrial Revolution
Economies-of-scale Rationale	monetary union (1792), and gradual economic integration of accession states	monetary union (1850), and completion of integrated economic space	integrated economic space	economic and monetary union under goldmark regime (1873)
4. Legitimacy				
Method of constitution-making	Philadelphia Constitutional Convention (1787)	ratification of Federal Constitution (1848) by *Diet*'s legal fiat	British Imperial Statute (1867), and UK Act of Parliament (1982)	Herrenchiemsee Constitutional Convention (1949)
Formation of the federal order	consensual federal bargain (1777–89), followed by gradual nationwide prevalence of Unionists' state order	consensual federal bargain (1291–1815); prevalence of the *konkordanz* system and *Willensnation* since 1848	coerced 'putting together' (Canada Acts, 1791, 1840); recognition of duality (Constitution Act, 1867); recognition of multi-culturalism (Constitution Act, 1982)	forced 'putting together' (1867–1871); consensual federal bargain under tutelage of US pluralist political theory (1949)
Constitutional amendment procedures	amendment proposals by: at least two-thirds of members of both Houses of Congress; or two-thirds of all US State Legislatures, must be ratified by at least three-quarters of all US State Legislatures or their appointed conventions	popular initiative for total, or partial, revision of Constitution (mandatory referendum). Nationwide majority of votes in the majority of cantons and the majority of Swiss population ('double majority' principle)	common resolutions by at least two-thirds of the Legislative Assemblies of all provinces representing in aggregate at least 50% of national population (Constitution Act, 1982)	approval by at least two-thirds of all members in both Houses of the Federal Parliament

Sources: Adapted from references quoted in Chapters 2 and 3.

of the US and Canadian federal state templates across North America. For instance, a massive population movement occurred after May 1869, when the Union Pacific Line and the Central Pacific Railroad linked Omaha City in Nebraska with Sacramento in California.[173] And since no constituent state government had *either* the resources, *or* the jurisdiction to tackle the problem related to this phenomenon, Congress established the first federal agency to regulate the railroads with the passage of the Interstate Commerce

[173] Jenkins, 121.

Act of 1887.[174] Similar technological developments were instrumental in Canada's westward expansion. For example, British Columbia acceded to the Dominion in 1871 *after* being promised a transcontinental railway link.[175]

In the mid-1950s, similar economic considerations pushed the six European states that had launched the coal–steel pool in 1952, to establish a common market as a first step toward the integration of their national economies into a single market, which the onset of economic neo-liberalism rendered ever more necessary for Europe's corporate bosses to compete in a globalizing economic environment. Furthermore, the deregulation and completion of the single (or internal) market was to prompt the Commission and federalist-leaning governments to call for the replacement of the national currencies by a single currency, despite the fact that the TEC did not envisage the establishment of a sovereign state. Thus, it seemed natural to explore whether the member states were actually ready to achieve full economic and monetary union, once Maastricht had set the timetable for monetary union (see thematic study in Chapter 6).

3.5 The question of legitimacy

According to Finer, liberal democratic constitutionalism stands on: (1) restricting the government's arbitrary rule and at the same time recognizing the rights of the individuals and associations that constitute the society; (2) defining gubernatorial rules, either in a written document or through a mixture of written law, conventions, and common law principles; (3) recognizing the constitution as the supreme law of the land; and (4) abiding by the constitution. In the absence of these principles, Finer argues that 'the civil

[174] A. Sinclair, *A Concise History of the United States*, rev. edn. (London, 1970), 123; and Feeley & Rubin, 110–115.
[175] Lenman, 136; and Townson, 120–121.

rights of individuals would be open to interpretation, change, or even suspension, according to the will, even the whim of the ruler'.[176] These four principles matured in the US during the last quarter of the eighteenth century. Indeed, the War of Independence had been premised on the view that authority flowed from the people, who had the right to 'constitute' their own government. And since the people could not all gather at one place, the Founding Fathers decided that the drafting of the US Constitution proceed via the calling of the Philadelphia Convention. Nevertheless, the way it operated is questionable by today's standards. First, it met in secret. Second, American Indians and African-Americans were excluded from the Convention, despite the egalitarian *élan* of the Declaration of Independence. Third, ratification took place at elected conventions, and not by the already existing state legislatures.[177] Fourth, Thompson questions the Founding Fathers' democratic and egalitarian credentials, for whom 'the ownership of property was the touchstone of worth'. In fact, 'only one of [the Framers] was a yeoman farmer, only one spoke for the debtors; none of the states they represented had universal male suffrage, and state franchises were automatically the federal franchises; [furthermore] they omitted altogether the "rights of man"'.[178]

Indeed, C.W. Mills suggests that far from being an independent arbiter of the national interest, every State is dominated by the power elite comprising politicians, military personnel and corporate bosses who mould public policy and opinion to suit their own ends.[179] And for Mosca, this is inevitable because all human societies are divided

[176] Finer, vol. III, 1570–1571.
[177] See M.I. Urofsky, *A March of Liberty: A Constitutional History of the United States* (New York, 1988), 173, 274; and B. Bailyn (ed.), *The Debate on the Constitution. Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification Part One: September 1787 to February 1788* (New York, 1993), 1083–1103.
[178] Thompson, 145.
[179] C.W. Mills, *The Power Elite* (New York, 1956), 292.

into elites (i.e. minorities) who constitute the government, and majorities ruled by political elites. Mosca also posits that the ruling class develops a 'political formula' by which it justifies its rule to the rest of the society.[180] For example, the American Federalists drummed up their support for a more centralized polity with their systematic attacks on the *Articles of Confederation* in eighty-five essays published between 1787 and 1788. Nevertheless, one has to acknowledge the novelty of the 'convention method'. Indeed, America's power elite were the first to devise a representative mechanism to transform the US Confederation into 'a more perfect union'. On the other hand, Canada's federal order was constituted by British Imperial legislation. Thus, Canadians did not assent directly to the British North America Act, 1867. Indeed, once the framers of the federal order were agreed on the remit of the Constitution, Westminster ratified it. Likewise, British legislation determined the accession of five other provinces, with only the people of the Dominion of Newfoundland voting in a referendum to join Canada in 1949.[181] And unlike the US (1787), Swiss (1848), and German (1949) constitutions, the British North America Act (1867) made no formal provisions for constitutional amendment, meaning that until 1982, Westminster rather than Ottawa, had the authority to amend the Constitution (see above, Table 3.2).

As for post-war Germany, the role of the victorious Allies was central to the reinstatement of federalism. Furthermore, the Basic Law's intricate checks and balances were crafted by the elected representatives of the eleven constituent *Länder* to avoid the recurrence of the *Vaterland*'s belligerent past. This explains why the framers of the current Basic Law 'placed major emphasis on the formation of a constitutional state, the

[180] G. Mosca, *The Ruling Class* (New York, 1939), 53, 70, 190–192.
[181] Oliver, 37–38.

independence of the judiciary, judiciary review and the establishment of a powerful Federal constitutional Court'.[182] This 'emphasis' was intended to foster the formation of a law-, and court-minded people to the point that '[t]here is hardly an area of human relations in Germany untouched by some rule, order or regulation'.[183]

Again, by way of comparison, the founding fathers of the EC reflected the will of Europe's power elite who presumed that the European project would continue to enjoy the permissive consensus of the member states' *demoi*. However, once the EC seemed to have taken a federalist route in the wake of post-Wall events, the political elite soon came to realize that their imaginative plans for deeper political and economic union within a wider Union did not match the expectations of certain national electorates, as may be construed from the negative votes in a handful of post-Maastricht referenda on EU treaty reform; hence the pro-democracy agents' call for active involvement of European citizens in the Union's legislative process (see thematic study in Chapter 7).

3.6 Recognition of sub-national units' competences within the federal framework

The straightforwardness of the US Constitution reflected the Founding Fathers' federalist *telos*, whose preference for the creation of a 'common national community' was to facilitate the exponential transfer of a symmetrical federal order across North America. On the other hand, North Carolina and Rhode Island's objections to an overly strong central government won the founder states and their people the right to retain, by virtue of the Tenth Amendment of December 1791, '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States'. Nevertheless, Bryce posits

[182] Colomer, 82.
[183] D. Kommers, *Judicial Politics in West Germany. A Study of the Federal Constitution* (Beverly Hills, 1976), 50.

that the success of the American national experience ultimately rests upon the Federal government's direct authority over all citizens (irrespective of the state governments), which is underpinned by the Supreme Court's judicial review.[184] Indeed, this kind of authority was crucial in giving rise to 'a legal habit in the mind of the nation', which makes it possible for 325 million citizens to identify with the American nation, despite their mixed ethno-cultural backgrounds.

On the other hand, a similar legal habit between the federal and sub-national orders is hard to come by in Canada because Ottawa's prolonged attachment to Westminster strengthened the position of English-Canadians *vis-à-vis* the Francophone minority. Thus, Québec's claims for asymmetry clashed with Ontario's original preference for a centralized federal order, until the constitution makers agreed that Canada was to be re-founded on the seemingly contradictory imperatives of unity and diversity. The outcome was a formula which involved: the fusion of executive and legislative powers typical of Britain's parliamentary sovereignty, with the idea of a basic territorial dispersion of power; and the recognition, under sections 92–95 of the British North America Act (1867), of the 'exclusive powers of provincial legislatures' in various, and at times sensitive, policy areas (see below, Table 3.3).

However, Burgess argues that the Westminster model 'is flawed in the extent to which its adversarial nature and majoritarian thrust can serve to exclude territorial minorities, leading in the case of Canada–Quebec relations to dissonance and even de-legitimisation'.[185] This tension is fuelled, for example, by 'the prime-ministerial patronage powers when appointing members to the Canadian Senate where party interests

[184] See page 37.
[185] Burgess, *Comparative Federalism*, 201.

Table 3.3: Factors affecting the US, Swiss, Canadian, & German federal processes (Part 3)

Factors/Themes	US	Switzerland	Canada	Germany
5. Sub-units within federal framework				
Constitutional provisions *re*: powers of sub-national units	Tenth Amendment, 1791	Federal Constitution, 1999, Article 3	sanctioned in the Preamble to Constitution Act, 1867	sanctioned under Article 28 of the Basic Law
Concurrent powers	—	entrenched in constitution	entrenched in constitution	entrenched in constitution
Type of federal order	symmetrical federalism	symmetrical federalism	asymmetrical federalism	symmetrical federalism
The executive.	consensus-driven executive especially in split-party Congress scenarios	consensus-driven executive; cross-party executive composed of national ethnic groups	bi-polarity determined by ethnic duality or party ideology (or both)	consensus-driven executive after formation of coalition government
6. Stability & Longevity				
Financial equivalence at constituent state level and/equality safeguards for citizens	US Constitution, Article 1, Section 8, paragraph 1	Federal Constitution, 1999, Article 135	Constitution Act, 1982, Section 36	Basic Law, Article 72, paragraph 2 ; and Article 107, paragraph 2
Representation in Upper Chamber	2 senators per constituent state	2 senators per canton; 1 senator per half-canton	proportional representation in Senate	weighted representation of *Länder* in *Bundesrat*
Representation of small sub-units *vis-à-vis* large sub-units in Upper Chambers	1 senator for Wyoming represents *c*.282,000 inhabitants compared to 1 senator for every 18.63 million Californians	1 deputy for half-Canton Appenzell Inner Rhodes represents *c*.15,500 inhabitants compared to 1 deputy for *c*.653,800 inhabitants of Zürich Canton	1 Nunavut Territory senator represents *c*.33,200 inhabitants compared to 1 senator for *c*.550,500 Province of Ontario inhabitants	1 delegate for Bremen represents *c*.221,000 inhabitants, compared to 1 delegate for every 3.01 million inhabitants of North Rhine-Westphalia
Idiosyncrasies in federal government institutions	observer status of associated territories (e.g. Puerto Rico) in US Congress[1]	rotary Presidency of the Federal Council	over-representation of Québec in Supreme Court	rotary Presidency of the *Bundestrat*
Charters of Rights	Bill of Rights (1791)	Fundamental Rights and Liberties (1999)	Charter of Rights and Freedoms (1982)	Basic Rights (Articles 1–19 under Basic Law); Articles 136–141 of Weimar Constitution (appended to Basic Law)
National citizenship	*ius soli* (Fourteenth Amendment, Section 1)	*ius sanguinis*	*ius soli*	*ius sanguinis* + Alien Law (1990, 1999) provisions for *ius soli* [2]

Sources: Adapted from references quoted in Chapters 2 and 3.

[1] A.H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations (Dordrecht, 1989), 6.*

[2] M. Lister & E. Pia, *Citizenship in Contemporary Europe* (Edinburgh, 2008), 144–146.

and regional groupings determine the size and character of the second chamber.'[186] Consequently, the Westminster model is at the centre of incessant remonstrations from Francophone and First Nation Canadians for the recognition of duality and regionalism.

Actually, such remonstrations have transformed Canada into an ever more decentralized federation. For example, in February 1999, Ottawa and all the provinces bar Québec, signed the 'Framework for Improving the Social Union of Canadians', which inaugurated: (1) a new era in executive federalism and a new phase in federal–provincial cooperation; (2) collaboration and information-sharing in the initiation and financing of social programmes; and (3) the creation of a mechanism for dispute resolution. And inter-provincial cooperation assumed wider scope in 2003 when the thirteen First Ministers established an interprovincial Council in order to achieve 'federalism without Ottawa', by establishing common standards and procedures in negotiations with the central government.[187]

By way of contrast, Switzerland is a consensus-oriented democracy, which eschews Westminster's majoritarian system in a bid to guarantee the highest degree of compromise for its citizens.[188] This choice was deemed necessary especially when Switzerland's ethnic-German homogeneity ended in 1815, as trilingual Graubünden, and the French-, and Italian-speaking territories, were granted full canton status.[189] And in conformity with its *konkordanz* system,[190] the federal institutions include representatives of the autochthonous *demoi* and their party representatives (see above, Table 3.3). Thus, Switzerland's four major political parties are proportionally represented in the executive,

[186] Ibid., 206.
[187] Watts, 3rd edn., 119, 120.
[188] Fleiner, et al., 59.
[189] Burgess, *Comparative Federalism*, 82.
[190] Fleiner, et al., 23–24; and Burgess, *Comparative Federalism*, 201.

legislature, and judiciary. And since this consensus-oriented mechanism tends to disable any party from acting as an effective parliamentary opposition, the Swiss people and the cantons are constitutionally empowered to fulfil this function. Indeed, all federal acts are considered ratified: *either* silently by the people; *or* by virtue of a positive vote via the optional referendum, whereas the Federal government 'goes out of its way to seek the opinion of cantons, economic interests and professionals both before and during parliamentary consideration of its proposals.'[191] In other words, the formal and informal institutions of direct democracy promote power-sharing practices and consensus that *do not* suppress the politics of diversity. Indeed, the Constitution leaves the Federal government largely dependent upon the cantons for legislative administration, so much so that one-fifth of Switzerland's federal legislators, are also members of the cantonal legislatures.[192] This *modus operandi* is somehow replicated in Germany's brand of 'cooperative federalism'. Indeed, all *Länder* have permanent missions in Berlin, whereas *Bundesrat* committees for each *Land* liaise between sub-national and federal ministers, and among bureaucrats of other missions. Besides, *Länder* representatives constitute the visible link between the two orders, since they divide their time between Berlin and their respective home capital.

Contrary to the formulae that the framers of the US, Swiss, and German constitutions have crafted in order to foster a common national habit or civic culture that underpin a vital symbiosis between their respective federal, and sub-national orders, the Union's High Contracting Parties seem to have been unsuccessful, or not committed enough, in fostering a similar legal habit via which Europeans would come to accept the

[191] C.H. Church, 'Switzerland: A Paradigm in Evolution', in O'Neill & Austin, *Democracy and Cultural Diversity* (Oxford, 2000), 100.
[192] Watts, 3rd edn., 31.

transfer of a fully-fledged federal order across the EU. Hence the member states' post-Maastricht request for a more active role of their domestic parliaments in the Union's legislative process according to the principle of subsidiarity (see thematic study in Chapter 8).

3.7 Institutional provisions that secure stability and longevity of federal polities

The longevity of federal polities ultimately depends on *how* power elites cater for the presence and leverage of minorities in multicultural and/or multi-ethnic polities in order to foster the 'we-feeling'. In the US, the 'melting pot' strategy has created a mindset based on constitutional patriotism,[193] whereas the Helvetians' *Willensnation* rests upon the bottom-up duality of Swiss citizenship, whereby a person's municipal and cantonal citizenship automatically entitles him or her to national citizenship. Thus, American and Swiss citizens have succeeded in fostering an 'additional' national identity.

Parity of the constituent units is another important element which underpins many federal settlements. For example, the US and Swiss sub-national units are equally represented in both Senates, whereas the rotary presidencies of the Swiss Federal Council and the German *Bundesrat* underscore the parity of the Swiss *demoi* and the German *Länder* in their respective federal framework. On the other hand, the framers of the Canadian Constitution were compelled to craft asymmetrical arrangements to meet the French-Canadians' diffidence of an Anglophone institutional framework and policy preferences, especially the centralizing impact of judicial decisions, that Québec perceives as corrosive of its distinct identity; hence the appointment of three Supreme Judges from Québec, against six from the other provinces. This sense of appeasement is

[193] See pages 38–40.

also evident in Canada's Charter of Fundamental Rights and Freedoms, wherein eight sections out of thirty-six deal with the equality of status of French and English as official languages in federal institutions, and at the provincial level.[194]

In other words, despite all efforts to create equitable federal orders, Duchacek argues that the quest for symmetry remains a myth since:

> there is no federal system in the world in which all the component units are even approximately equal in size, population, political power, administrative skills, wealth, economic development, climatic conditions, predominance of either urban or rural interests, social structure, traditions, or relative geographic location.[195]

Indeed, equal representation in the US Senate leads to the anomalous situation where Wyoming's vote counts 66 times more than California's. Likewise, Bremen's vote counts 13.6 more than North Rhine-Westphalia's in the *Bundesrat* (see above, Table 3.3). Similarly, federal party politics may produce electoral results to the chagrin of the less populated constituent states. For instance, US political parties contest presidential elections in the knowledge that the eleven most populous states theoretically hold a majority of Electoral College votes needed to elect the president. Thus, Duchacek argues that constituent states may vary in their: (1) attachment to the federation; (2) willingness to contribute to, or abide by federal programmes; and (3) insistence on the scope of territorial autonomy. And Burgess argues that this 'disparity of power ingredients [may] lead the most prosperous component units to resent federalism if the perceived economic benefits of union are not commensurate with their financial contributions'.[196]

Many of the issues discussed here, like the political and philosophical implications behind the establishment of a Swiss-style bottom-up dual citizenship backed

[194] 'Canadian Charter of Rights and Freedoms', sections 16–23.
[195] I.D. Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* (New York, 1970), 280.
[196] Burgess, *Comparative Federalism*, 218.

by a treaty-entrenched charter of fundamental rights seem difficult to adopt by a Union currently made up of twenty-eight countries whose level of attachment to the European project has come to vary considerably. Thus, whereas the citizens of the four comparators have come to accept the procedure under which the votes of the less populous and less prosperous sub-national units may count as much, or more, than those of the most populous and prosperous in their respective upper house, it is interesting to see how the EU countries look at a similar voting system for the Council of Ministers, which represents the last bastion of national sovereignty (see thematic study in Chapter 9).

3.8 EC/EU constitution-making: an overview

By way of comparison, Europe's approach to federalism is different from the routes taken by the four comparators. To begin with, the US, Canada, Switzerland, and Germany achieved their federal settlement via: *revolution* (the US Confederation); *military conquest* (Canada); *civil war* (Switzerland and the US); *armed conflict* (Wilhelmine Germany); or *gradual disengagement from colonial rule* (Canada), that are unthinkable to Europeans. Indeed, Jean Monnet and the other founding fathers of the European Communities were aware of Europeans' attachment to their national state; hence the gradualist approach to integration, especially when the Congress of Europe (1948) failed to live up to its federalist expectations, and the constitutional avenue came to be replaced by the French Foreign Minister Robert Schuman's call for the establishment of a Franco-German union with the possibility for other European countries to partake of a wider European union.[197]

[197] D. Dinan, *Origins and Evolution of the European Union* (Oxford, 2006), 300–303.

Table 3.4: Constitutional development of the EC (1951–1985)

15 April 1951
Belgium, France, Germany, Italy, the Netherlands, and Luxembourg sign Paris Treaty establishing European Coal and Steel Community (ECSC).

institutional design: High Authority, Council of Ministers, Common Assembly, and European Court of Justice (ECJ) are set up.

operative: 23 July 1952 (expired on 23 July 2002).

27 May 1952
ECSC Six sign Paris Treaty establishing the European Defence Community (EDC).

French National Assembly rejects the Treaty on 30 August 1954. EDC does not come into effect.

25 March 1957
ECSC Six sign Rome Treaties establishing the European Economic Community (EEC) and the European Atomic Agency (EURATOM). Integration is extended to all sectors of the economy.

institutional design: Separate Commissions and Councils of Ministers are created for the EEC and EURATOM. A single ECJ and a single European Parliamentary Assembly (renamed European Parliament in 1962) for the three Communities are created.

operative: 1 January 1958.

8 April 1965
The Six sign Brussels Treaty which merges the separate High Authority/Commissions and Councils of Ministers of the three Communities.

operative: 1 July 1967.

22 April 1970
The Six sign Luxembourg Treaty which amends certain budgetary provisions.

objective: gradual introduction of 'own resources' system.

1 January 1973
Denmark, Ireland, and the UK join the EC.

Paris Summit, 9–10 December 1974
institutional design: European Council of the Heads of State or Government of the EC is created.

Article 2 of Single European Act of 1986 (see Table 3.5 below) gives legal basis to European Council.

13 March 1979
The European Exchange Rate Mechanism (ERM) is introduced as part of the European Monetary System (EMS). All EC member states, except UK, are required to maintain exchange rates within certain fluctuating margins.

objective: to reduce exchange rate variability and achieve monetary stability in EC.

1 January 1981
Greece joins the EC.

14 June 1985
Belgium, France, Germany, Italy, and Luxembourg sign extra-Treaty Schengen Agreement.

objective: creation of a borderless area to facilitate the free movement of people within the EC/EU.

operative: 26 March 1995.

Source: *Treaties of the European Union*, and various secondary sources.

Thus the process via which the European Coal and Steel Community (ECSC) was established was the classical intergovernmental conference (IGC), whereby agreement was conditional upon unanimity among the six founder states. Actually, this *modus operandi* has been the preferred method of treaty reform whenever the Euro-polity's deepening and widening prompted the need of new or enhanced EC institutions, and/or policy-making mechanisms. Thus, the Union is a unique, albeit unfinished, creation, as far as constitution-making goes. Actually, there is no other compound polity which has reformed its basic treaties so often, because European integration was conceived by its advocates as an open-ended project with a federalist *telos* as a possible constitutional horizon. Thus, when in 1957, the Six established the European Economic Community (EEC) with the scope of creating 'an ever closer union among the peoples of Europe' via the establishment of a common market, and the progressive approximation of the economic policies of its member states, the EC institutions needed to assume greater vertical executive, legislative, and judicial competences in order to bring about a harmonious development in the economic activities and relations between the EC states.[198] Indeed, the EC's supranational competences in the four freedoms (of goods, services, capital and labour), were partly established in the founding Treaties of 1951 and 1957, and eventually extended by EC legislation, and ECJ judicial review. Furthermore exogenous forces were to prompt the completion of the single market by the end of 1992, which the member states deemed necessary for them to regain competitiveness *vis-à-vis* the more liberalized Japanese and US economies; hence the signing of the Single European Act in 1986. On the other hand, once enlargement became a pan-continental

[198] *EEC Treaty*, 'Preamble', and Article 2.

process in an unstable post-Wall geopolitical setting, political union, as well as security and defence concerns assumed relevance almost at par a with economic and monetary

Table 3.5: Constitutional development of the EC/EU (1986–2001)

1 January 1986
Spain and Portugal join the EC.

17 and 28 February 1986
EC countries sign Single European Act (SEA).

objective: completion of the frontier-free internal market by 31 December 1992.

7 February 1992
EC countries sign the Treaty on European Union (TEU) agreed at Maastricht in December 1991.

objective: introduction of single currency by 1999, and completion EMU.

constitutional design: inclusion of CFSP (Pillar II) and JHA (Pillar III) in Treaties.

institutional design: European Monetary Institute (EMI) is established on 1 January 1994. European Central Bank (ECB) to replace EMI.

differentiated integration: UK opts out of monetary union, and clinches protocol that exempts her from implementing the 1989 Social Charter. Denmark obtains opt-outs concerning, *inter alia*, monetary union, JHA, and CFSP, after 'no' vote in 2 June 1992 referendum.

operative: 1 November 1993.

1 January 1995
Austria, Finland, and Sweden join the EU.

2 October 1997
EU countries sign Amsterdam Treaty. Amsterdam incorporates the 1989 Social Charter; the 1985 Schengen Agreement; and the 1992 Petersberg tasks.

differentiated integration: Amsterdam establishes the principle of 'enhanced cooperation', which allows certain member states to work more closely together in selected areas. Ireland and the UK opt out of Schengen Agreement.

institutional design: Office of High Representative for the CFSP is created.

operative: 1 May 1999.

Nice European Council, 7–9 December 2000
Nice Council proclaims the Charter of Fundamental Rights of the EU previously crafted by the Convention established by the Cologne European Council of June 1999.

26 February 2001
EC countries sign Nice Treaty. It makes changes to the structure of the College of the Commission; introduces triple-majority voting in the Council; and reallocates seats in EP in view of the 2004 and 2007 enlargements.

operative: 1 February 2003.

Source: same as for Table 3.4.

union; hence the signing of the TEU in February 1992, which set the timetable for monetary union, *and* established the CFSP and JHA (Pillars II and III), alongside the EC Pillar. In other words, the European project assumed a more defined political dimension, four decades after the signing of the Rome Treaties (see above, Tables 3.4 and 3.5).

Maastricht's call for a deeper Union seemed to presage what Monnet had hoped would result in a qualitative evolution in the political, economic, and constitutional relations between the integrating states and their *demoi*, in such a way that a federal 'leap of faith' would materialize when 'the forces of necessity [made it] seem natural in the eyes of Europeans.'[199] However, the following decade was characterized by the signing of the Amsterdam (1997) and Nice (2000) Treaties, which fell short of such expectations, whereas the anticipated accession of twelve new member states scheduled for the first decade of the twenty-first century prompted treaty reform to cater for a pan-European, rather than a Western European compound polity. Thus, the Laeken Council of December 2001 decided to launch the European Convention, during which the representatives of the participating countries and leading EU institutions were mandated with the task of drafting a treaty that was supposed to endow the Union with a more permanent constitutional framework (see below, Table 3.6).

The novelty of the 'convention method' *vis-à-vis* the previous IGCs was that among the 269 delegates who took part in the crafting of the draft Constitutional Treaty, the majority were not the government representatives of the participating countries, but a wider composite body of national and European MPs, alongside the representatives of six EU institutions. Furthermore, the delegates of the thirteen candidate countries had the opportunity to participate in the Convention proceedings like the delegates of the member

[199] J. Monnet, *Memoirs* (New York, 1978), 295.

Table 3.6: Constitutional development of the EU (2001–2013)

Laeken European Council, 14–15 December 2001
Laeken Council launches Convention on the Future of Europe, which takes place between 28 February 2002 and 18 July 2003.

18 July 2003
European Convention adopts *Draft Treaty establishing a Constitution for Europe*.

1 May 2004
Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia join the EU.

29 October 2004
EU countries sign Constitutional Treaty. TEC (1957), TEU (1992), and EU Charter of Fundamental Rights (2000) are incorporated into Treaty.

29 May and 1 June 2005
French and Dutch electorates reject Constitutional Treaty.
'Period of reflection' follows, during which member state governments seek possible outline for Reform Treaty based on Constitutional Treaty.

1 January 2007
Bulgaria and Romania join the EU.

13 December 2007
EU countries sign Lisbon Treaty.

constitutional design: Lisbon Treaty comprises two separate treaties, i.e. TEU and TFEU; EU Charter of Fundamental Rights becomes an annex to Treaty.

institutional design: Maastricht's three-pillar structure is abolished. New key positions of President of the European Council; and High Representative of the Union for Foreign Affairs and Security Policy are created. Double-majority voting system in Council is adopted.

operative: 1 December 2009.

2 February 2012
Eighteen member states sign *Treaty establishing the European Stability Mechanism*

operative: 27 September 2012.

2 March 2012
All EU member states, except Czech Republic and UK, sign *Treaty on Stability, Coordination and Governance in the EMU*.

operative: 1 January 2013.

1 July 2013
Croatia joins the EU.

Source: same as for Tables 3.4 and 5.5.

states, and table contributions for treaty reform; and/or suggestions for amendment to the Constitution's draft articles, *either* in their personal capacity, *or* together with the delegates of other countries. Indeed, it is for this reason that we consider the run-up to the Convention as the maturation of Europe's **quasi-constitutional moment**.

The decision to explore *how* the six identified themes of federation have, or have not, impinged upon the Union's constitutional framework stems from the fact that each theme featured, at one time or another, in the Union's constitution-making process. Thus, each of Chapters 4 through 9 features a thematic study, which illustrates how Europe's constitution-makers dealt with each factor in their attempt to reach a more permanent constitution for the EU.

In dealing with the triggers which elicit the transferring of security and defence matters from the constituent-state-, to the supranational level, Chapter 4 assesses the member states' reaction to the post-Maastricht resolve to establishing a CSDP for the EU. As for purposive acts of human agency, Chapter 5 explores *how* the member states reacted to the idea of downsizing the College of Commissioners to less than the number of member states, once the Union comprised twenty-seven countries or more. As for economic factors, Chapter 6 deals with the member states' resistance to the proposed deepening of the economic and fiscal arm of EMU; and with how the onset of the global financial crisis of 2008 prompted the signing of two post-Lisbon accords that were meant to restore EMU's stability, especially in the euro area. With regard to the enhancement of the Union's legitimacy, Chapter 7 deals with the crafting of the ECI. As for the recognition of the national and sub-national competences *vis-à-vis* the Union's supranational powers, Chapter 8 focuses on the enhancement of the Protocol on the

application of the principles of subsidiarity and proportionality; and the Protocol on the role of the national parliaments in the EU. Finally, for the institutional provisions that guarantee the stability and longevity of the Euro-polity, Chapter 9 deals with the member states' wariness *vis-à-vis* the political and philosophical implications of post-national citizenship; and the consolidation of the 'we-feeling', which in theory would facilitate the Europeans' acceptance of decision-making based on double-majority voting in the Council. Indeed, it is to the transposition of these issues of federation from the US, Canadian, Swiss, and German context, to the Union's own constitution-making process, that the study now turns.

CHAPTER 4

IN SEARCH OF A COMMON SECURITY AND DEFENCE POLICY

4.1 Introduction

The European project knows its origin to the Nazi-fascist débâcle. Indeed, the Union's founding fathers hailed from countries that were twice at war with each other, and whose personal recollections and experiences, or those of their fathers, made them supportive of European integration. For example, the future French President Charles de Gaulle, and the father of the European Commission's sixth President Jacques Delors had fought the Germans in the Battle of the Somme (1916). Fighting for the other side was Hans Kohl, the father of Germany's sixth Chancellor Helmut Kohl;[200] and the younger Kohl was born in Ludwigshafen am Rhein, whose border location was to enwrap him in the post-war Franco-German relationship.[201] Other founding fathers hailed from similar border locations. For example, the Federal Republic's first Chancellor Konrad Adenauer was born in Cologne, a Rhineland city that had been demilitarized and occupied by Allied troops after 1918. Italy's first post-war Prime Minister Alcide de Gasperi was born in the province of Trento, which until 1918 was part of the Austro-Hungarian Empire,[202] whereas Luxembourg-born Robert Schuman became a French citizen when Alsace-Lorraine returned to France in 1918.[203]

These experiences moulded a political elite strongly committed to Franco-German reconciliation within a wider European framework. And in this resolve, they were

[200] C. Booker & R. North, *The Great Deception: Can the European Union Survive?* (London, 2005), 6.
[201] Dinan, *Encyclopedia of the European Union*, 317–318.
[202] Palmowski, 161.
[203] Dinan, *Encyclopedia of the European Union*, 414–415.

staunchly supported by Jean Monnet, a French bureaucrat, whose intermediary experiences as a League-of-Nations deputy secretary-general; advisory roles to several French governments; and ability to procure US military and financial support for war-torn Europe, made him the principal factotum behind the politicians that were to launch the European project.[204]

However, Europe's nation-state order could not easily be brushed aside in a post-war scenario characterized by revanchism. Consequently, the Union's founding fathers had to exploit 'landmark moments' upon which they could create a Euro-polity in which the constituent states would auspiciously refrain from using a major share of their resources to maintain key industries for national defence, and opt instead for prosperity and vital social progress based on the transformation of their restricted national economies into a single economic unit. They also hoped that the leaders of a united Europe would one day craft a common foreign, security and defence policy that would restore her international standing in a post-war era characterized by rapid decolonization and the Cold War.

In the light of the foregoing, a number of landmark moments that animated Europe's integration process have been identified, with the first occurring on 9 May 1950, when the French Foreign Minister Robert Schuman proposed the creation of a Franco-German coal–steel pool, which was intended to ward off another armed conflict. Thus, in section two it is argued that the establishment of the European Coal and Steel Community (ECSC) had the making of a transnational security and defence pact, since its founder states were committed to refraining from using their coal and steel capacities to rearm and engage in war against each other. Section three posits that the demise of Soviet

[204] See Booker & North, 60–127.

communism constituted another trigger, which occasioned the breach of the Iron Curtain; and stoked fears that a reunified Germany would operate more independently of its EC partners. Furthermore, the end of the Cold War triggered an unprecedented wave of applications for EC/EU membership, since Europe's neutral and post-Socialist states were no longer impeded from doing so by a dismembered Soviet Union, whereas fears that the defunct communist bloc could create security problems along the Euro-polity's eastern border triggered a debate on whether it was opportune for the EC leaders to launch a common foreign and security policy. Likewise, the Gulf and Balkan crises of the 1990s elicited a parallel debate on whether the EC ought to adopt a defence policy, which would enable her to become a credible post-Wall actor in civilian and military operations outside the EC/EU. The thematic study in this chapter takes the cue from the events that occurred during the Gorbachev era that were characterized by the signing of the Single European Act (1986), and the TEU accords (1992). But since Maastricht failed to endow the Union with an effective security and defence policy, this thematic study investigates the post-Maastricht forces and processes that were to determine the contours of the Union's security and defence policy that emerged under Lisbon after a gruelling debate that spanned over a Constitutional Convention, four IGCs, and a problematic ratification process.

4.2 The initial trigger

The destruction that the Second World War caused as it unfolded, forced Euro-federalists like Altiero Spinelli and Jean Monnet to ponder upon European integration as a remedy

to the excesses of an international order based on competing, and often belligerent nation states. For example, in a memorandum dated 5 August 1943, Monnet wrote that:

> There will be no peace in Europe, if the states are reconstituted on the basis of national sovereignty with all that implies in terms of prestige politics and economic protectionism. If the nations of Europe adopt defensive positions again, huge armies will be necessary. Under the future peace treaty, some nations will be allowed to re-arm; others will not. That was tried in 1919; we all know the result.[205]

Eleven months later, Resistance representatives from Czechoslovakia, Denmark, France, Italy, the Netherlands, Norway, Poland, and Yugoslavia adopted the Spinelli-inspired *Draft Declaration of the European Resistance Movements*, which affirmed that the post-war world order

> must be based on respect of the human individual, on security, on social justice, on the complete utilization of economic resources for the benefit of the whole and on the autonomous development of national life.[206]

The delegates also stressed that these aims could not be fulfilled 'unless the different countries of the world agree to go beyond the dogma of the absolute sovereignty of the state and unite in a single federal organization.'[207] But the idea that Europe should have its 'Philadelphia Convention' did not gather momentum at the Congress of Europe of 1948 because of divergences between the British-led intergovernmentalists, neutrals, and Euro-federalists. For example, defence was shelved because of the membership of two neutrals (Ireland and Sweden) to the Council of Europe; and because parallel talks on the establishment of an Atlantic Alliance between ten western European states, Canada, and the US were underway.[208] Thus, the 'constitutional avenue' was shunned.[209] Meanwhile,

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[205] As quoted in Booker & North, 31.
[206] 'Draft Declaration of the European Resistance Movements July 1944', in R. Vaughan, *Post-War Integration in Europe* (London, 1976), 17.
[207] Ibid.
[208] D.W. Urwin, *A Political History of Western Europe Since 1945*, 5th edn. (London & New York, 1997), 76–77.
[209] R. Dehousse & P. Magnette, 'Institutional Change in the EU', in *The Institutions of the European Union*, 2nd edn., ed. J. Peterson & M. Shackleton (Oxford, 2006), 18–19.

the US and Britain sponsored the creation of the Federal Republic as a Cold War bastion. This implied that Germany was on the road to recovering its sovereignty, and that France's post-war control over Germany through the International Ruhr Authority was about to end.[210] Thus Paris launched its own bid to anchor Germany within a French design for Europe, and on 9 May 1950, Schuman publicly declared that a united Europe could be formed 'by taking measures which work primarily to bring about real solidarity [with] the elimination of the age-old opposition of France and Germany.'[211] In his view, this objective could be achieved if Franco-German coal and steel resources were to be entrusted to, and administered by a supranational Authority. Indeed, Schuman and Monnet's bid was to divert 'the context of international relations […] from the competitive power politics that led to war into new areas of unity and cooperation that transcended the state.'[212]

For Chancellor Adenauer, the prospect of Germany being treated as an equal contracting party during the coal–steel IGC represented a momentous development for Western security. Likewise, the Benelux countries were interested in the Schuman Plan, because of the high degree of interdependence along their respective border regions with France and the Federal Republic. Furthermore, they tended to support any initiative that reduced the risk of war between their larger neighbours.[213] And on his part, Italian Premier de Gasperi was determined to rebuild Italy's international reputation after the Nazi–Fascist interlude, and anchor her within the Western camp.[214] But the fate of the

[210] Urwin, 83.
[211] 'The Schuman Declaration', in Harryvan & van der Harst, 61.
[212] Burgess, *Comparative Federalism*, 229.
[213] See, W. Nicoll & T.C. Salmon, *Understanding the New European Community* (Hemel Hempstead, 1994), 215, 217.
[214] S. George & I. Bache, *Politics in the European Union* (Oxford, 2001), 60.

Schuman Plan ultimately rested upon Germany. Indeed, in February 1951, John McCloy, the US High Commissioner responsible for the American Occupied Zone, presented Adenauer with a stark choice: he either accepted the Schuman Plan, or else the Federal Republic would have to accept Four-Power rule, neutralization, and decartelization of German coal and steel on French and US terms.[215] Adenauer was thus constrained to accept the offer, and on 18 April 1951, the governments of France, Germany, Italy and the Benelux signed the Treaty of Paris which established the ECSC. On one hand, the import of the ECSC agreement is open to discussion. On the other, Europeans could be told that Franco-German cooperation was possible,[216] and that European integration could translate into peace and prosperity.[217]

4.3 Pan-European triggers in the Gorbachev era

During the Cold War, European integration was associated with Atlanticism. Indeed, the Warsaw Pact refused to recognize the existence of the EC, dismissing it as the side-kick of NATO.[218] Actually, the EEC founder states were all NATO members, with Ireland being the only neutral country out of the six that joined the Community between 1973 and 1986. Actually, other neutrals like Austria, Finland and Sweden could not join the EC because Moscow considered their neutrality incompatible with EC membership. Thus, the continental neutrals sought surrogate ties with the EEC via their EFTA membership,

[215] J.R. Gillingham, 'The German Problem and European Integration', in *Origins and Evolution of the European Union*, ed. D. Dinan (Oxford, 2006), 71.
[216] See J.R. Gillingham, 'European Coal and Steel Community', in D. Dinan, *Encyclopedia of the European Union* (Houndmills, 2000), 180–181.
[217] O. Ruchet, 'Cultural diversity, European integration and legitimacy of the EU: A review of the debate', in *Cultural Diversity and the Legitimacy of the EU*, eds D. Fuchs and H.-D. Klingemann (Cheltenham & Northampton, MA, 2011), 6.
[218] Nicoll & Salmon, 305.

whereas the Warsaw Pact countries were peremptorily precluded from partaking of the European project.

Things were destined to change after Mikhail Gorbachev assumed the leadership of the Soviet Union in March 1985. Indeed, in his *Perestroika* speech to the Twenty-Seventh Congress of the Communist Party of the Soviet Union, Gorbachev admitted that the communist system had failed, and that the USSR needed to democratize its political and economic regimes. Furthermore, he championed the idea of a 'common European home', by which he meant a Europe stretching from the Atlantic to the Urals.[219] And in his *Perestroika: New Thinking for Our Country and the World* (1987), he declared obsolete the Cold War and Europe's post-Yalta geopolitical order.

These declarations coincided with the negotiation and the ratification process of the SEA; the floating of EMU; the breach of the Iron Curtain; and the subsequent demise of the Warsaw Pact. Indeed, the repercussions of these events were far-reaching. To begin with, a reunified and stronger Germany prompted fears that she would operate more independently of its EC partners. Consequently, the French President Mitterand deemed it opportune to lock Germany within a political union, whereas Chancellor Kohl repeated the old predicament that German activism could best be disavowed if the Federal Republic formed part of a deeper Europe.[220] Concurrently, the evolving post-Wall scenario triggered a renewed interest in European integration, as six neutral and/or non-aligned countries applied for EC membership between July 1989 and May 1992. Likewise, fears that the imploded communist bloc would trigger mass migration into the EC required greater cooperation in transnational security, justice and home affairs.

[219] C. Pollacco, *European Integration: The Maltese Experience* (Malta, 2004), 98.
[220] I. Bache, et al., *Politics in the European Union*, 3rd edn. (Oxford, 2011), 160–161.

Other international events, such as the Gulf crisis of 1990–91, and the start of the Yugoslav wars in June 1991 ensured that discussions on *how* the EC could become an effective international actor raised interest in initiatives designed at creating a common foreign and security policy.[221] Furthermore, the Union had every interest to circumscribe the propagation of extreme nationalism that could lead to secessionist conflicts of the Yugoslav type in the multi-ethnic countries that aspired to accede to the Union.[222] Thus, the idea of developing a common foreign, security and defence policy flanked the original plans for EMU. However, the problem was *how* to achieve commonality in these sensitive policy areas, and *guarantee* the singularity of member-state sovereignty.

These considerations gave rise to an additional IGC on political union that ran parallel to the one on EMU. Thus, at the Maastricht Council of December 1991, the EC leaders included the CFSP and JHA in the TEU as additional intergovernmental pillars to the supranational EC pillar.

Under the new Maastricht accords, the Union was committed 'to assert[ing] its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence'.[223] Furthermore, the member states agreed that

> [t]he policy of the Union […] shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.[224]

[221] H. Smith, *European Union Foreign Policy: What it is and What it Does* (London & Sterling, VA, 2002), 94; and *Agence Europe*, 20 April, 1990.
[222] Pollacco, *European Integration*, 161–162.
[223] *Maastricht Treaty*, Title I, Article B.
[224] Ibid., Title V, Article J4(4).

In this way, Ireland's neutrality; Denmark's limited Alliance involvement; the Atlanticists' greater participation in NATO initiatives; and Britain and France's nuclear, and UN Security Council leadership roles were secured. And by keeping the CFSP and JHA outside the Rome Treaty, the European Council had balanced the aspirations of federalist-leaning states like the Benelux, Germany and Italy, with Britain, Denmark, Ireland and Portugal's preference for a more intergovernmental approach.[225]

The TEU was agreed as Soviet troops started withdrawing from the former Warsaw Pact countries. In the meantime, ten central and eastern European countries (CEECs) plus Cyprus and Malta applied to join the EU, whereas Austria, Finland and Sweden became full EU members in January 1995. Meanwhile, the Madrid European Council of December 1995 declared that the eastern enlargement was 'both a political necessity and a historic opportunity for Europe' and that it would 'ensure the stability and security of the continent and [...] offer the applicant States and the current members of the Union new prospects of economic growth and general well-being.'[226] In other words, the EU leaders correlated the crafting of a common foreign, security and defence policy with the looming prospect of an enlarged Euro-polity stretching from Brest in France to Brest on the Polish–Belorussian border. But despite the rhetoric of the Madrid summit, little was done to kick-start a policy area that many national capitals wished to keep out of the Union's framework. Thus, via new formulae like 'enhanced cooperation' and 'constructive abstention', the Amsterdam Treaty attempted to by-pass the constraining need for unanimity, whenever the foot-draggers did not concur on particular policy areas

[225] Smith, 96.
[226] European Council, 'Presidency Conclusions: Madrid European Council, 15 and 16 December 1995', *Bulletin of the European Union*, no. 12, 1995, point I.25.

under Pillars II (CFSP) and III (JHA). On the other hand, the unanimity clause continued to guarantee the member states' sovereignty in security and defence.

At the institutional level, Amsterdam Articles J.8(3) and J.16 created the new post of Secretary-General of the Council, whose appointee was to exercise the function of external High Representative for the CFSP; and assist the Council in matters coming within the scope of the CFSP by

> contributing to the formulation, preparation and implementation of policy decisions, and, when appropriate and acting on behalf of the Council at the request of the Presidency, through conducting political dialogue with third parties.

In other words, the High Representative's dependence on the Council, curtailed his or her political clout when handling the Union's external relations. As for the conduct of military operations, Article J.7(2) brought the so-called Petersberg operations within the scope of the CFSP. However, in order to carry out its humanitarian and rescue tasks, peacekeeping, crisis management and peace-making operations, the Union was to avail itself of the Western European Union (WEU),[227] a military organization outside the EU framework. Thus, one of the challenges that the EU leaders faced as the twentieth century drew to a close was *how* to subsume defence matters under the Union's institutional framework. Indeed, it is to this core issue that the chapter now turns.

4.4 Thematic study: European defence – a question of flexibility

4.4.1 The opening gambits

Speaking of the Union's failure to play a key role in the resolution of the Yugoslav crisis, Austrian MPs Hannes Farnleitner and Reinhard H. Bösch concurred 'that effective

[227] *Amsterdam Treaty*, Article J.7(3).

diplomacy must be backed up by credible military assets and capabilities.'[228] In other words, the prevailing intergovernmental nature of the Union's security and defence policy deprived it of any coercive power. But according to Howorth, this state of affairs changed in December 1998 during the Franco-British summit in Saint-Malo, when a traditionally Atlanticist UK government decided to embrace EU defence and security cooperation.[229] Subsequently, the Cologne European Council drew the outlines required for the strengthening of ESDP to countervail the scaling down of US involvement in European security and defence at a time when the Clinton administration no longer considered Russia a real threat to its European allies.[230] Thus, at the Helsinki European Council of December 1999, the EU leaders confirmed their intention to activate the Petersberg tasks by 2003, in order to endow the Union with the autonomous capacity to launch and conduct military operations (on a voluntary basis) in response to international crises where NATO was not engaged.[231]

This so-called 'Helsinki Headline Goal' prompted the creation of appropriate decision-making, and crisis management structures, namely:

1. the Political and Security Committee (PSC), to exercise political control, and determine the strategic duration of crisis management operations under the responsibility of the Council;

[228] European Convention, 'Contribution by Mr Hannes Farnleitner and Mr Reinhard E. Bösch, members of the Convention: "A new impetus to the European Security and Defence Policy"', CONV 437/02, CONTRIB 158, Brussels, 28 November 2002, 2.
[229] J. Howorth, 'The European Draft Constitutional Treaty and the Future European Defence Initiative: A Question of Flexibility', in *European Foreign Affairs*, 9 (Kluwer Law International, 2004), at: www.cap.lmu.de/transatlantic/download/howorth.pdf (accessed on 9 January 2015), 2.
[230] European Council, 'Presidency Conclusions: Cologne European Council, 3 and 4 June 1999', 150/99 REV 1, Annex III: 'European Council Declaration on Strengthening the Common European policy on Security and Defence', 33–42.
[231] European Council, 'Presidency Conclusions: Helsinki European Council, 10 and 11 December 1999', paragraphs 27, 28.

2. the Military Committee within the Council, to provide and exercise military advice and command over all military activities;
3. the Military Staff, to supply military expertise; and
4. the common capabilities goals at member-state level, which comprised command and control, reconnaissance and strategic transport.[232]

On the other hand, Nice precluded the financing of military operations out of the Community budget; and failed to register substantial inroads in the Union's foreign, security and defence policy. Meanwhile, the 9/11 terrorist attacks obfuscated the once clear-cut dividing line between internal and external security.

Against this backdrop, the Laeken Declaration of December 2001 recalled that the overwhelming majority of Europeans wanted, *inter alia*, that the Union:

1. assume a leading role as 'a power resolutely doing battle against violence, all terrorism and all fanaticism';
2. be more involved in foreign affairs, security and defence;
3. deal more effectively with trouble spots in and around Europe and the rest of the world by updating the Petersberg tasks.[233]

Arguably, the resolve of crafting a firmer security and defence policy had emerged. But the big question was: to what extent were the national capitals ready to cooperate in what is commonly considered as the last (or first) bastion of state sovereignty?

[232] 'Council Decision 2001/79/CFSP', and 'Council Decision 2001/80/CFSP', of 22 January 2001; and European Convention, 'Final report of Working "Group VIII – Defence"', CONV 461/02, WG VIII 22, Brussels, 16 December 2002, 7.
[233] European Council, 'Presidency Conclusions: European Council meeting in Laeken, 14 and 15 December 2001', SN 300/1/01 REV 1, Annex I: 'Laeken Declaration on the Future of the European Union', 20, 21, 22.

4.4.2 First proposals for a not-so-common CSDP

Once the Convention got underway, the Praesidium indicated in an early Note on Working Methods that the Chairman or a significant group of conventioneers could recommend that the Praesidium set up Working groups (WGs), with the mandate to focus on specific questions that could not be examined in depth in the plenary.[234] The development of the Union's common security and defence policy (CSDP) was one such question about which the Praesidium agreed to establish two WGs, namely:

1. WG VII on External Action composed of fifty members, with the Convention Vice-Chairman Jean-Luc Dehaene as Chair, and
2. WG VIII on Defence composed of forty members, with the Commission Representative Michel Barnier as Chair.

Thirteen participants from both committees represented the EP and the Commission (see below, Table 4.1), whereas another seventy-three members represented the national parliaments or governments of the twenty-eight participating countries.[235]

The internal debates within both WGs showed that for twenty-seven contributors from twelve member states and four candidate countries, the ESDP ought to become an integral part of the Union's external action. Furthermore, ten contributors from WG VIII posited that the enhanced cooperation mechanism already in place for the CFSP ought to

[234] European Convention, 'Note on Working Methods', CONV 9/02, Brussels, 14 March 2002, Article 15, 'Working Groups', 7.

[235] European Convention, 'Composition of the "second wave" of Working Groups', CONV 243/02, Brussels, 11 September 2002, 2–5. Of these 90 participants, 52 tabled 85 working documents on 'defence' and 'external action' in relation to the ESDP.
Other four chapters falling under 'external action', namely: the Common Commercial Policy; cooperation with third countries and humanitarian aid; international agreements; and the role of the Union with third countries, do not feature in this analysis.

Table 4.1: Committee composition of WG VII & WG VIII by component group

Component Group	External Action (WG VII)	Defence (WG VIII)	Totals
Presidency	1	1	2
Commission	1	1	2
EP	7	4	11
Member state government	13	6	19
Member state Parliament	10	14	24
Candidate country government	8	3	11
Candidate country Parliament	8	11	19
Observers	2	0	2
Totals	**50**	**40**	**90**

Source: European Convention, 'Composition of the "second wave" of Working Groups', CONV 243/02, Brussels, 11 September 2002, 2–5.

apply to the ESDP.[236] However, the deepening of the ESDP met a series of divergent views. The first variance was about whether the ESDP was to be autonomous of NATO's security and defence structures. To begin with, the Belgian MP Marie Nagy was the only delegate to propose that the Union be independent of NATO and have its own army,[237] whereas fifteen contributors from thirteen countries argued that the ESDP remain compatible with the cooperation structures of the Atlantic Alliance, and that the Union and NATO's security and defence structures be mutually reinforcing. On the other hand, German Left-wing MEP Sylvia-Yvonne Kaufmann and seven national MPs[238] concurred that an enhanced ESDP ought to provide the Union with adequate capabilities in order to contribute to world peace and stability, in conformity with the principles of the UN Charter and international law; and six members suggested that the Petersberg tasks be upgraded to include:

[236] These were the national government representatives of France, Germany, Greece, and Poland; the Dutch MP Wim van Eekelen; the Italian MP Lamberto Dini; the Spanish MPs Josep Borrell and Diego López Garrido; the UK MP Gisela Stuart; and the Spanish MEP Carlos Carnero González.
[237] WG VIII, *Working document 8*, Brussels, 30 October 2002, 2, 4, and 11.
[238] These were Marie Nagy (Belgian); Kimmo Kiljunen (Finnish); Proinsias De Rossa and John Gormley (both Irish); Puiu Hasotti (Romanian); Slavko Gaber (Slovenia), and Kenneth Kvist (Swedish).

1. conflict prevention;
2. joint disarmament operations;
3. military advice and assistance to third countries (defence outreach);
4. post-conflict stabilization; and
5. support for third countries' authorities in the fight against terrorism.[239]

The possible enhancement of the Union's mutual security guarantees constituted yet another divisive issue. For example, the French and German government representatives, and Portuguese MP Maria Eduarda Azevedo suggested that the member states introduce a solidarity clause.[240] But this proposal was rejected by the Finnish MEP Esko Seppänen, on the grounds that the Union was not to become militarized,[241] whereas British MP Gisela Stuart and the Polish government representative Danuta Hübner argued that NATO Article 5 was enough to avert any terrorist threat.[242] Objections were also raised by Swedish and Irish members in defence of their country's neutrality. And when eight members proposed that another clause on collective defence feature in the Constitutional Treaty, the main objectors were Stuart and Hübner, who defended their Atlanticist preferences once more.

The fragmentary nature of the ESDP resurfaced when Gisela Stuart, and Finnish contributors Piia-Noora Kauppi (MEP) and Kimmo Kiljunen (MP), proposed that closer cooperation be open to members: (1) wishing to carry out the most demanding tasks; and (2) having the capacity to meet the requirements for military commitments. On the other

[239] See, WG VIII, *Working documents 23*; *24*; *28*; *30*; *32*, *39*; and *42* Brussels, various dates.
[240] European Convention, 'Contribution by Mr Dominique de Villepin and Mr Joschka Fischer, members of the Convention, presenting joint Franco-German proposals for the European Convention in the field of European security and defence policy', CONV 422/02, CONTRIB 150, Brussels, 22 November 2002, 2; and WG VIII, *Working document 37*, Brussels, 4 December 2002, 4.
[241] WG VIII, *Working document 35*, Brussels, 4 December 2002, 2.
[242] WG VIII, *Working document 27*, Brussels, 4 December 2002, 3; and WG VIII, *Working document 25*, Brussels, 21 November 2002, 2.

hand, the French government representative Dominique de Villepin and his German counterpart Joschka Fischer raised controversy when they jointly proposed that closer defence cooperation 'could be similar to the specific form of cooperation for the introduction and management of the Euro as set up in the Maastricht Treaty'.[243] This was read by Kiljunen, the Greek MP Marietta Giannakou, and Latvian MP Rihards Piks as the *de facto* creation of a two-tier membership of ESDP.

Another hot debate concerned the financing of military operations. Many members agreed that national defence budgets needed to be increased, examined, or revised, but only six members concurred that a modest fund based on national contributions be made available to cover the preparatory stage of a Union operation,[244] whereas Hübner and Azevedo favoured the setting up of an expenditure mechanism to cover common costs from the Community budget.[245]

Just as contentious was the proposal regarding the establishment of a European common market in the armaments sector.[246] The main objectors were the British, who preferred buying their armaments on the open market.[247] Likewise, the proposal for the setting up of a European Armaments (and Strategic Research) Agency, which would become a Capabilities Agency with the remit to monitor the member states' quantitative and qualitative capabilities,[248] was turned down by Seppänen, the Swedish MP Kenneth Kvist, and the Portuguese government representative Manuel Lobo Antunes. On the other

[243] WG VIII, *Working document 36*, Brussels, 4 December 2002, 17.
[244] These were the national government representatives of Poland and Portugal; three national MPs, namely Wim van Eekelen (Dutch); Marietta Giannakou (Greek); and Slavko Gaber (Slovene); and the Finnish MEP Piia-Noora Kauppi.
[245] WG VIII, *Working document 34*, Brussels, 4 December 2002, 3; and WG VIII, *Working document 37*, Brussels, 4 December 2002, 3.
[246] These were the national government representatives of Greece, Poland, and Turkey; and three national MPs, namely: Marie Nagy (Belgian), Kimmo Kiljunen (Finnish), and Puiu Hasotti (Romanian).
[247] WG VIII, *Working document 23*, Brussels, 21 November 2002, 5.
[248] CONV 461/02, 22, 24.

hand, the Italian MP Lamberto Dini proposed that opt-ins could be included in order to make it possible for the largest number of member states to eventually join the Armaments Agency,[249] whereas the French and German government representatives proposed that the strengthening of military capabilities take the form of a protocol, under which like-minded states would develop new forms of cooperation: (1) in the harmonization of their military requirements; (2) the sharing of their capabilities and resources; and (3) specialization.[250]

In the Final Reports of WGs VII and VIII (both published in mid-December 2002), there was general agreement that the Union's standing as a global actor needed to be enhanced, in view of the fact that the EU was committed to deploying its Rapid Reaction Force by 2003. Thus the Convention needed to decide *who* was to be charged with the Union's upgraded Petersberg tasks. Apropos, Dehaene and Barnier proposed an institutional design, under which the officer for external relations *and* the CSDP would operate in conjunction with the Council and the European Council. This design was supported by twenty members from nine member states and three candidate countries, for whom the double-hatted High Representative for the CFSP would act also in the CSDP under the Council's authority; become a full member of the College of the Commission; and possibly replace the Troika when representing the EU externally. Furthermore, several members suggested that the High Representative have:

1. a degree of autonomy to finance CFSP activities with clear guidance from the PSC;

[249] European Convention, 'Contributo del Sen. Lamberto Dini, membro della Convenzione: "La Difesa Europea"', CONV 301/02, CONTRIB 102, Brussels, 26 September, 2002, 4–5.
[250] WG VIII, *Working document 36*, 18.

2. the right of initiative in crisis management matters, including the right to decide when to start military operations approved by the Council;
3. responsibility for the coordination of said operations; and
4. the power to act as commander in charge of military operations, and of personnel in charge of civilian aspects of military operations.[251]

As for political accountability, the High Representative would report to Council regularly for the duration of operations. Finally, seventeen members from eight member states and two candidate countries proposed that there be a regular exchange of views upon CFSP and ESDP issues with *either* the EP *or* the national parliaments *or* both.

4.4.3 The Praesidium proposes, and the Convention disposes

After evaluating the Final Reports submitted by both WGs and other contributions, the Praesidium published their first draft proposals on the Union's external action on 23 April 2003. The draft articles which concern this chapter are:

- draft Article 14, under 'Title III: The Union's competences';
- draft Article 30, and Article X (Solidarity clause), under Part I, Title V;
- draft Articles 17–22, under Part II, Title B; and
- draft Article X (implementation of the Solidarity clause), under Part II, Chapter X of the draft Constitution.[252]

Draft Article 30 proposed making the CSDP an integral part of the CFSP, and anticipated the progressive framing of a common defence policy for the Union, if the European

[251] European Convention, 'Final report of Working Group VII on External Action', CONV 459/02, WG VII 17, Brussels, 16 December 2002, 5; and CONV 461/02, 17.
[252] European Convention, 'Draft Articles 1 to 16 of the Constitutional Treaty', CONV 528/03, Brussels, 6 February 2003, 9; and 'Draft Articles on external action in the Constitutional Treaty', CONV 685/03, Brussels, 23 April 2003, 15–17, 42–49, 72.

Council, acting unanimously, so decided. Meanwhile, the CSDP was to enable: the Council to deploy civilian and military forces in tasks outside the Union in accordance with the principles of the UN Charter; and the member states to establish multinational forces under the proposed Franco-German structured cooperation, without prejudice to the obligations of certain member states who saw their common defence realized in the Atlantic Alliance.

These Praesidium proposals and others that will feature in the text below triggered 335 suggestions for amendment by 151 conventioneers from all participating countries (see below, Table 4.2). Most of them were meant to downscale the CSDP's proposed remit.[253] For example, the entire Latvian delegation and six Eurosceptics from the Czech Republic, Denmark, Finland and the UK, requested that Article 30 be deleted *in toto* because they deemed defence to be a no go area and the preserve of the national governments,[254] whereas the UK Conservative MP David Heathcoat-Amory took the view that NATO ought to remain the Union's foremost defence Alliance, without prejudice to the position of neutral states.[255] On the other hand, three Left-wingers concurred that the EU should not develop into a defence organization of the NATO or WEU type.[256] Furthermore, the Irish MP John Gormley joined Swedish MP Renée Wagener and Austrian MEP Johannes Voggenhuber in suggesting that the Union deploy

[253] The first draft of Articles under review triggered 256 amendments. Subsequent drafts triggered another 79 amendments.
[254] The Eurosceptics were Jan Zahradil (Czech MP); Jens-Peter Bonde (Danish MEP); Esko Seppänen (Finnish MEP), Timothy Kirkhope, and the Earl of Stockton (UK MEPs); and David Heathcoat-Amory (UK MP).
[255] Amendment Form, 'Suggestion for Amendment of Article: 30 (Part I Title V p.15), by Mr David Heathcoat-Amory', 1.
[256] Amendment Forms, 'Suggestion for Amendment of Article: 30 (part I), by Mr Kvist', 1; and 'Title V: Suggestion for amendment of Article: 30, by Members Voggenhuber, Wagener', 1–3.

Table 4.2: Classification by country of origin of delegates who tabled amendments to draft Articles 14, 30, 17–22, and Article X (Subsidiarity clause)

	MEPs	National Gov. Reps	National MPs	European Commission	Totals
Austria	3	1	2	-	6
Belgium	1	1	3	-	5
Denmark	3	2	4	-	9
Finland	2	2	6	-	10
France	4	1	3	-	8
Germany	4	1	3	-	8
Greece	-	1	3	-	4
Ireland	1	1	1	1	4
Italy	2	2	3	1	8
Luxembourg	-	2	3	-	5
The Netherlands	1	2	3	-	6
Portugal	3	2	4	-	9
Spain	1	1	2	-	4
Sweden	-	2	4	-	6
UK	5	1	3	-	9
Bulgaria		1	2		3
Cyprus		-	3		3
Czech Republic		1	3		4
Estonia		1	5		6
Hungary		1	3		4
Latvia		2	4		6
Lithuania		-	3		3
Malta		2	2		4
Poland		1	2		3
Romania		-	3		3
Slovakia		2	3		5
Slovenia		1	2		3
Turkey		1	2		3
Totals	**30**	**35**	**84**	**2**	**151**

Source: Conventioneers' suggestions for amendment to Articles mentioned in title.

its military and civilian means solely under a UN mandate.[257]

As for the Petersberg operations, draft Article 17 adopted all the additional tasks proposed by WG VIII, whereas fourteen delegates from eight member states emphasized

[257] Amendment Form, 'Suggestion for amendment of Article: 30 by Mr John Gormley', 1.

the need to include support action in a wider range of non-combatant tasks to cover natural or man-made disasters; civil protection; human rights protection; and emphasized that the guiding principle of the Petersberg tasks be crisis prevention by non-military means, rather than the pre-emptive rationale.[258] Nonetheless, draft Article 30(3)(7); the Solidarity clause; and draft Article 21, solicited the member states to:

1. improve their military capabilities, and make military and civilian capabilities available to the CSDP;
2. make multinational forces available to the CSDP;
3. offer aid and assistance to any member state participating in military cooperation operations, if that member state fell victim to armed aggression on its territory.

With regard to point 1, the Praesidium proposed the establishment of the European Armaments and Strategic Research Agency to coordinate, harmonize, and enhance the member states' military capabilities by:

- identifying their military capability, and evaluating the observance of their capability commitments;
- promoting compatible procurement methods;
- proposing multilateral projects to help coordinate military capabilities;
- supporting joint defence technology research;
- strengthening the technological base of the defence sector;
- improving the effectiveness of military expenditure.[259]

As for point 2, the Praesidium opted for the establishment of 'structured cooperation'. But this idea was rejected by forty-six conventioneers of nine member states and four

[258] Amendment Form, 'Suggestion for amendment of Article: 17, by Dr Sylvia-Yvonne Kaufmann', 1.
[259] Draft Article 19.

candidate countries. Indeed, thirty-four members called for its deletion, whereas five members of the Finnish delegation feared that the Franco-German defence Euro-zone would lead to the institutionalized division of the CFSP, and deny certain EU countries the right to participate in the CSDP.[260] On the other hand, a smaller group of eleven delegates from Luxembourg, Portugal, and Spain suggested that the procedures of 'enhanced cooperation' already in place constitute the guiding principles for the conduct of the Union's more binding commitments.[261]

Point 3 (mutual defence), triggered another wave of objections from forty-five conventioneers. For example, Kaufmann argued that the experiences of the UK (Northern Ireland), and Spain (the Basque country) showed that there is no military solution to end terror; and that common police and judicial policies were already in place to fight terrorism.[262] On the other hand, the Turkish government representative Oğuz Demiralp, and his Dutch counterparts Thom de Bruijn and Gijs de Vries concurred that NATO offered enough mutual defence guarantees for its members, whereas the majority of the British and Danish delegates took the view that the member states work in close cooperation with NATO as part of the strategic partnership in crisis management between the EU and NATO. On a different note, the Irish government representative considered draft Article 21 'not appropriate', whereas twenty-one delegates from nine member states

[260] Amendment Forms, 'Suggestion for amendment of Article: 20, by Kimmo Kiljunen', 1; and 'Suggestion for amendment of Article: 20, by Teija Tiilikainen, Antti Peltomäki, Matti Vanhanen, and Riitta Korhonen', 1–2.

[261] This group included four government representatives: Jacques Santer and Nicolas Schmit (Luxembourg), Manuel Lobo Antunes (Portugal), and Ana Palacio (Spain); six national MPs: Paul Helminger and Ben Fayot (Luxembourg), Eduarda Azevedo and António Nazaré Pereira (Portugal), Josep Borrell and Diego López Garrido (Spain); and Spanish MEP Carlos Carnero González.

[262] Amendment Form, 'Suggestion for amendment of Article: X (Beistandsklausel), by Dr Sylvia-Yvonne Kaufmann', 1 (see 'Explanation').

concurred that the activation of the Solidarity clause follow a request of the member state in need of help.[263]

As for 'financial provisions', draft Article 22 proposed that external action's administrative and non-military operating expenditure be charged to the Union budget, whereas expenditure arising from operations having military and defence implications be carried by the participating states. In other words, the member states were set to retain their sovereignty in defence expenditure. Similarly, the national capitals were to be left in charge of the implementation of the CSDP and the Petersberg tasks via the Council's unanimity clause. Indeed, only four conventioneers suggested that such Council decisions be taken by qualified majority.[264]

With regard to the new office of Union Minister for Foreign Affairs (UMFA), the Praesidium proposals were extremely cautious. First, under draft Article 30(4), the Minister could only 'propose the use of both national resources and Union instruments, together with the Commission where appropriate' whenever the Council was to decide on the implementation of the CSDP. Second, under draft Article 17(2), the Minister would act under the Council's authority, and in close and constant contact with the PSC. Third, if a member state were to express its resolve to participate in structured cooperation at a later stage, the Minister would attend the restricted Council deliberations, with the Council deciding on the member state's request. In other words, the proposed powers for the UMFA were to resemble those wielded by a general manager of a multi-national company.

[263] This group included the government representatives of Austria, Belgium (both members), Finland (both members), Luxembourg (both members), France, Ireland, and the UK; national MPs from Belgium (two), Finland (three), Greece (three), Luxembourg (two); and one German MEP.
[264] These were Italian MEP Cristiana Muscardini; Austrian MP Caspar Einem; German MP Jürgen Meyer; and Romanian MP Adrian Severin.

Actually, very few conventioneers suggested that the UMFA be endowed with much executive power. One exception was the French government representative, who suggested that the Minister be responsible for the drawing of the budgetary estimates regarding the financing of the CFSP; and be granted executive power over expenditure concerning the CFSP.[265] On the other hand, fourteen conventioneers from Britain, Denmark, Finland, Ireland, Latvia, Poland, Portugal, Slovakia, and Sweden objected to the proposed title of UMFA and to the powers attached to that office. For example, Gormley suggested that the Commissioner for External Relations (not the UMFA) act under the authority of the Council and the Commission when coordinating the Petersberg tasks,[266] whereas Queiró suggested that the External Relations Representative should not even have the right to propose the use of both national resources and Union instruments when the Council decided on the implementation of the CSDP.[267] Meanwhile, UK Liberal MEP Andrew Duff and nineteen other conventioneers supported the merger of the pillars under the double-hatted Minister for Foreign Affairs/Secretary of the Union, 'to protect explicitly the prerogatives of the Commission'.[268]

Many of these proposed amendments did not feature, *neither* in the revised drafts that the Convention Secretariat published in late-May 2003 (which again proved unsatisfactory to sixty-seven Conventioneers),[269] *nor* in the final draft of the Constitutional Treaty. Indeed, Magnette and Nicolaïdis attribute this obduracy, to the Praesidium's tacit support of the Franco-German plan to launch Europe on autonomous

[265] Fiche d'Amendement, 'Proposition d'amendement à l'Article 22, Deposeé par Monsieur de Villepin', 1.
[266] Amendment Form, 'Suggestion for amendment of Article: 17, Chapter 1. B', by Mr John Gormley', 1.
[267] Fiche Amendement, 'Titre V: Proposition d'amendement à l'Article: 30, Deposée par Monsieur Luís Queiró', 2.
[268] Amendment Form, 'Title V: Suggestion for amendment of Article: 30, by Members: Andrew Duff, Mr Lamberto Dini, et. al.', 3.
[269] These members tabled another 79 amendment proposals.

foreign policy initiatives and military operations because Giscard's nomination for Chair of the Convention had been championed by the French President Jacques Chirac and German counterpart Chancellor Gerhard Schröder.[270]

4.4.4 CSDP in the wider transatlantic context

The establishment of ESDP as a potential alternative to NATO seemed about to materialize in mid-February 2003, when Belgium, France, and Germany released a joint statement in the context of the debate inside NATO, over whether to provide military assistance to Turkey, in anticipation of possible aggression from Iraq. On that occasion, Belgium, France, Germany, and Luxembourg opposed the activation of Article 4 of the Washington Treaty in the Atlantic Council without an explicit UN resolution that sanctioned military action in Iraq, in the context of America's post-9/11 war on terrorism.[271] The sequel to the formation of this 'coalition of the unwilling' was the calling of a quadripartite meeting by Belgian Prime Minister Guy Verhofstadt on 29 April 2003, at the end of which, the leaders of Belgium, France, Germany, and Luxembourg proposed the creation of a European Union of Security and Defence (EUSD), which was to have an EU operational planning unit at Tereuven (near Brussels) as

> a nucleus of a collective capability which, instead of national means, [the contracting Parties] would make available to the EU for operational planning and command of EU-led operations without recourse to NATO assets and capabilities.[272]

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[270] P. Magnette & K. Nicolaïdis, 'The European Convention: Bargaining in the Shadow of Rhetoric', in *West European Politics* (April 2004), 8, at: http://users.ox.ac.uk/~ssfc0041/magnettenicolaidis.pdf (accessed on 27 September 2015). Convention Secretariat published the second draft of said Articles in late-May 2003.

[271] 'Joint statement of Belgium, France and Germany on Iraq' (Brussels, 16 February 2003), in *Chaillot Papers No 67: From Copenhagen to Brussels. European defence core documents*, vol. IV, compiled by A. Missiroli (Institute for Securities Studies, Paris, 2003), document 53, 347.

[272] 'Meeting of the Heads of State and Government of Germany, France, Luxembourg and Belgium on European defence', in *Chaillot Papers No 67*, document 13, 80.

Aside from the establishment of this cell, the summit Declaration proposed that the states joining the EUSD would, *inter alia*:

- establish a mutual defence pact (with non-participating members having the choice of joining, or being left out);
- systematically aim at harmonizing their positions on security and defence;
- consolidate their efforts both on military capability and on investment procurement.

Finally, the four leaders suggested that the Constitutional Treaty include a general clause on solidarity and common security, which would bind all EU member states, and allow for a response to risks of any sort that threatened the Union.[273] This proposal came six weeks after the Berlin Plus arrangements had been finalized, under which NATO handed over its 'Operation Allied Harmony' in the Former Yugoslav Republic of Macedonia to the Union's 'Operation Concordia', under the deputy Supreme Allied Commander Europe (SACEUR). In other words, the EUSD proposal was read by Atlanticists as a mutual defence mechanism that could replace Article 5 of the Washington Treaty.

The combined effect of the EUSD proposal, and the terms of the CSDP that were being fleshed out at the Convention provoked another intense debate between Europeanists, Atlanticists, and neutrals. To begin with, both projects were unacceptable to the UK government, because London feared that a small group of self-selected member states could by-pass decision making 'in an EU of 25.'[274] Indeed, the UK government still regarded: (1) the institutional arrangements agreed at Amsterdam and Nice; (2) the Union's treaty-based links with NATO; and (3) the Berlin Plus accord, as

[273] Ibid., 77–78.
[274] 'British non-paper "Food for Thought"' (Rome, 29 August 2003), in *Chaillot Papers*, document 27, 207.

essential for the enhancement of the CSDP. And in view of Britain's post-9/11 more global approach to security, the test against which London was ready to evaluate the Union's institutional development was in terms of whether that development would increase the Union's capacity for more rapid and effective action, while preserving Britain's special relationship with NATO.[275]

Other factors that raised variance between 'included' and 'excluded' with regard to the proposed structured cooperation mechanism were:

- the accession of up to nine new member states that possessed armed forces of questionable military value, and which the Council could easily exclude from structured cooperation, on the grounds that their military capabilities did not fulfil 'higher criteria';
- the fact that prior to the launching of the US-led attack on Iraq in March 2003, EU and NATO members like Denmark and Portugal, and all ten CEECs concurred with the UK (and Italy, the Netherlands and Spain), that the transatlantic relationship should not succumb to Saddam Hussein's presumed attempts at threatening world security;[276]
- the fact that draft Treaty Articles 40(2) and III-214 were deemed highly invasive by the four EU neutrals, who feared that such articles could involve them in military operations that fell outside the remit of their domestic constitutions.[277]

[275] 'Franco-British Declaration: Strengthening European Cooperation in Security and Defence' (London, 24 November 2003), in *Chaillot Papers No 67*, document 41, 281–282.
[276] '[Eight] European Leaders call for Europe and the United States to stand united' (30 January, 2003); and 'Statement of the Vilnius Group countries in response to the presentation by the US Secretary of State to the UN Security Council concerning Iraq' (5 February 2003), in *Chaillot Papers No 67*, documents 50 and 51, 343–345.
[277] 'Letter dated 4 December 2003 – IGC 2003 – European Security and Defence Policy', by the Foreign Affairs Ministers of Austria (Benita Ferrero-Waldner), Finland (Erkki Tuomioja), Ireland (Brian Cowan), and Sweden (Laila Freivalds), in *Chaillot Papers No 67*, document 75, 437–438.

In other words, the quandary that the Italian Presidency had to resolve by December 2003 was *how* to render flexible (and by how much), a text that could eventually be endorsed by the twenty-five heads of state or government at the end of the 2003 IGC.

4.4.5 The 2003 IGC

The Italian Presidency's main task was to crack the stand-off between the Franco-German defence Euro-zone, and the quadripartite EUSD proposal; and the British-led position, which essentially called for the deletion of the mutual defence clause, and the re-drafting of structured cooperation. Besides, the twenty-five national governments had to figure out *how* the CSDP could *differ* from Washington's security and defence policies, yet at the same time show solidarity with the US, especially in the wake of the rift created between Atlanticists and Europeanists during the Iraqi crisis.

Actually, several factors favoured a quick *rapprochement* between both parties. On the one hand, Paris was eager to resume its defence partnership with London because President Chirac acknowledged that a CSDP without the UK would be a pale shadow of what it could be with the British on board. On the other, Prime Minister Tony Blair did not want Britain to be side-lined, as long as the CSDP remained compatible with NATO.[278] As for Chancellor Schröder, Britain's return to the negotiating table meant that the European integration process – a cornerstone in German foreign policy – was back on track. Indeed, at the Rome meeting for Defence Ministers on 29 August 2003, divisive misconceptions were dispelled when Chirac and Schröder agreed that autonomous European operations be undertaken only when the US did not want to join in; and that

[278] 'EU Constitution Project Newsletter', in *Federal Trust for Education and Research*, vol. I, 8 (December 2003) at: fedtrust.co.uk/wp-content/uploads/2014/12/News12_03.pdf (accessed on 22 March 2015), 8.

structured cooperation be open to all EU countries. Thus, Blair dropped his opposition to the establishment of an EU operational planning cell,[279] and in concurrence with the Naples Foreign Ministers IGC Conclave of November 2003, the three leaders agreed to: (1) expand the EU Military Staff; (2) invite NATO to establish a liaison arrangement with the EU Military Staff; and (3) create an EU operational planning cell at NATO's Supreme Headquarters Allied Powers Europe.[280] Furthermore, they concurred that:

> [w]here NATO as a whole is not engaged, the EU, in undertaking an operation, will choose whether or not to have recourse to NATO assets and capabilities, taking into account in particular the Alliance's role, capacities and involvement in the region in question. That process will be conducted through the "Berlin plus" arrangements.[281]

In other words, the UK had succeeded in defending NATO's pre-eminence in European security and defence. As for the conduct of EU-led operations, France, Germany, and the UK agreed that 'the main option for this will be national HQs, which can be multi-nationalised'.[282] In other words, national sovereignty in defence matters was to be preserved, without precluding transnational cooperation.

Meanwhile, the Italian Presidency proposed aligning, '*mutatis mutandis* the structured cooperation provisions more clearly with the more general provisions on enhanced cooperation in CFSP.' As for the mutual defence clause, the Presidency acknowledged that the revised text was not to prejudice certain members' existing commitments under NATO. With regard to the solidarity clause, the Presidency proposed

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[279] Howorth, 7.
[280] 'Joint paper by France, Germany and the United Kingdom: European Defence: NATO/EU consultation, planning and operations' (Naples, 29 November 2003), in *Chaillot Papers No 67*, document 42, 283–284.
[281] Ibid., 283. This text is identical to European Council Presidency Document, 'European Defence: NATO/EU Consultation, Planning, and Operations', Brussels, 12 December 2003, in *Chaillot Papers No 67*, document 45d, 322.
[282] *Chaillot Papers No 67*, document 42, 284.

that decisions on defence be taken by unanimity.[283] Thus, the Presidency tabled new drafts on what was to become known as 'permanent structured cooperation', characterized by:

- the rejection of the proposal, under draft Treaty Article III-213, to list the participating countries in a separate Protocol;
- the removal of the exclusive requirement for participants to 'fulfil higher military capability criteria';
- the chance for any member state to join, and to leave, the permanent structured cooperation, following a Council decision taken by a qualified majority of the members of the Council representing the participating member states.[284]

Furthermore, the first sentence of draft Treaty Article 40(7) on the establishment of closer cooperation in anticipation of a European Council decision on the adoption of a common defence policy; and Article III-214 on mutual defence, disappeared altogether.[285] And the mandatory requirement to 'give' aid and assistance to a member state which fell 'victim of armed aggression on its territory', was downscaled to one in which 'the other Member States shall have towards it an obligation of aid and assistance', without prejudice to 'the specific character of the security and defence policy of certain Member States',[286] especially the neutrals, for whom 'provisions containing formal binding security

[283] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Naples, Ministerial Conclave: Presidency Proposal', CIG 52/1/03, REV 1, PRESID 10, Brussels, 25 November 2003, 8, 13.
[284] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Intergovernmental Conference (12–13 December 2003): Addendum 1 to Presidency proposal', CIG 60/03, ADD 1, PRESID 14, Brussels, 9 December 2003, Article III-213, paragraphs 2–5, 31–32.
[285] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Defence', CIG 57/03, PRESID 13, Brussels, 2 December 2003, 3.
[286] CIG 60/03, ADD 1, PRESID 14, 'Protocol on permanent structured cooperation established by Articles I-40(6) and III-213 of the Constitution', 33.

guarantees would be inconsistent with [their] constitutional commitments.'[287] On the other hand, certain members' commitment to 'work in close cooperation' with NATO was replaced by a more forceful pro-Atlanticist clause, which stated that '[c]ommitments and cooperation in this area shall be consistent with commitments under NATO, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.'[288] Equally important was the inclusion of a draft Protocol on permanent structured cooperation, whose qualifying criteria were restricted to:

- the development of Europe's defence capabilities (including research and development, and armaments acquisition); and
- the commitment, open to all member states, to supply by 2007, either at national level, or as a component of multinational force groups, fully operational combat formations which could be sustained for an initial period of 30 days, extendable to at least 120 days.[289]

Finally, the Council, acting unanimously, was to authorize the conduct of military operations.

The Italian Presidency secured the national governments' consensus on these proposed amendments *before* the convening of the European Council of 12–13 December 2003. Nevertheless, that summit broke up because consensus was not reached on the re-definition of QMV in the Council, since Poland and Spain were determined to defend

[287] *Chaillot Papers No 67*, document 75, 437–438.
[288] CIG 60/03, ADD 1, PRESID 14, Article I-40(7), paragraph 2, 33.
[289] Ibid., 'Protocol on permanent structured cooperation established by Articles I-40(6) and III-213 of the Constitution', Article 1, 34–35.

their advantageous weighted votes in the Council obtained under Nice;[290] and the downsizing of the EP and the Commission College.[291] However, the terrorist attack in Madrid of 11 March 2004 underscored the need to strengthen the Union's effectiveness; whereas the almost concurrent changes in government in Spain and Poland made it possible for the new incumbents to soften slightly their position. And as shall be seen in Chapter 9, these developments helped the Irish Presidency to engage in a series of bilateral meetings until consensus on all pending issues was reached in time for the European Council of 17–18 June 2004.[292]

The Constitutional Treaty was signed on 29 October 2004. However, for it to take effect, the member states, plus Bulgaria and Romania, had to ratify it. Much of the analytical discourse related to this process features in subsequent chapters. Here, it suffices to recall that the French and Dutch 'no' votes in the national referenda of May and June 2005, put the ratification process on hold for another two years, during which the national capitals and the European Council addressed the citizens' concerns.

Judging from post-referenda Eurobarometer surveys, the CSDP *did not* figure prominently among the reasons for the French and Dutch rejection of the Constitution. But if the CSDP was perceived by these voters as another step toward a more federal Europe, then it could be argued that the 32 per cent of the Dutch who rejected the Constitution did so because of their perceived loss of national sovereignty (19 per cent); and their being against the European project (13 per cent). On the other hand, these same

[290] See pages 271–275.
[291] See pages 147–148, et passim.
[292] Conference of the Representatives of the Governments of the Member States, 'Meeting of Heads of State or Government, Brussels, 17/18 June 2004', CIG 81/04, PRESID 23, Brussels, 16 June 2004.

factors accounted for 11 per cent of the French 'no' vote.[293] However, one must recall that during the Convention, no less than twenty-nine conventioneers and eleven national MPs and academics from sixteen countries had submitted four contributions to the Convention, in which they repudiated the slippage of sovereignty from the member states to the EU, and urged the Convention to recognize that the national model was preferable to the establishment of a European superstate.[294] Indeed, eighteen of these forty Eurosceptics were British MEPs and MPs, with some even calling the establishment of a UMFA 'a major step away from intergovernmentalism and democratic accountability.'[295]

Very much aware of this attitude, one of the proposals that the German Presidency tabled in June 2007 in its bid to garner support for the Reform Treaty, read as follows:

> The *TEU* and the *Treaty on the Functioning of the Union* will not have a constitutional character. The terminology used throughout the Treaties will reflect this change: the term "Constitution" will not be used, the "Union Minister for Foreign Affairs" will be called High Representative of the Union for Foreign Affairs and Security Policy and the denominations "law" and "framework law" will be abandoned.[296]

Eventually, the first draft of the Reform Treaty published on 23 July 2007 by the Portuguese Presidency left unchanged the wording of the articles on the CSDP as agreed under the Italian Presidency, except that the title of UMFA was replaced by that of 'High Representative of the Union for Foreign Affairs and Security Policy'. These drafts remained unchanged when the EU Foreign Ministers met in Luxembourg on 15 October

[293] European Commission, *Flash Eurobarometer 172: The European Constitution: post-referendum survey in The Netherlands*, June 2005, 15; and *Flash Eurobarometer 171: The European Constitution: Post-referendum survey in France*, June 2005, 17.
[294] See European Convention, CONV 773/03, CONTRIB 347, Brussels, 30 May 2003; CONV 781/03, CONTRIB 352, Brussels 3 June 2003; CONV 807/03, CONTRIB 364, Brussels, 16 June 2003; and CONV 808/03, CONTRIB 365, Brussels, 16 June 2003.
[295] Amendment Form, 'Suggestion for amendment of Article 19 (Title IV): by Mr David Heathcoat-Amory', 1.
[296] Council of the European Union, 'Amendment of the Treaties on which the Union is founded', 11222/07, POLGEN 75, Brussels, 26 June 2007, 6; and Council of the European Union, 'Pushing the treaty reform process', 10659/07, POLGEN 67, Brussels, 14 June, 2007, 3, 5.

for a final check, which paved the way for the signing of the Lisbon Treaty in December 2007. All seemed set for the Treaty to be ratified before the EP elections of June 2009, were it not for the Irish 'no' vote of 12 June 2008, which delayed the ratification process until December 2009.[297]

4.5 Conclusion

This thematic study shows that despite Laeken's call for the EU to be more involved in foreign affairs, security and defence, the intergovernmental underpinnings in this policy area were not removed. Indeed, as the Convention got underway, several factors put the ESDP to the test. Foremost was France's recurrent pursuit of maximalist *finalité* based on the Elysée's vision that the Union have its own foreign (and defence) policy, which would enable it to act as a counterweight to US hegemonic power. In other words, France deemed a European security and defence essential to stability within the international system, in order for the EU to be(come) one pole in a post-Wall, multi-polar world, and a credible alternative locus of power. And when in summer 2002, Chancellor Schröder made a winning pre-election announcement that Germany would not take part in US-led military action in Iraq,[298] President Chirac won an important ally, and together they could press for differentiated integration based on the *Kern Europas* principle, which would sanction the exclusion of the weaker member states from structured cooperation. On the other hand, the Atlanticist member states were resolved to defend NATO's lead role in Europe, rather than adopt a surrogate mutual defence clause under the EU Treaties. Furthermore, the neutrals were determined to defend their right to partake of UN-

[297] See pages 150–153.
[298] R. Dover, *Europeanization of British Defence Policy* (Burlington, VT & Aldershot, 2007), 98.

mandated Petersberg tasks that were not in breach of their national constitution. Thus, Atlanticists and neutrals, albeit for different reasons, wanted to retain their respective security and defence options open, while preventing the other members from establishing core groups from which they would be excluded a priori.

Despite objections from many quarters, structured cooperation did make its way into the Treaties, but not before the EU leaders agreed to amend the divisive character of the CSDP by scrapping the Franco-German plan for a two-tier CSDP, after realizing that inclusiveness and flexibility were indispensable cohesive requisites for a polity with twenty-seven or more veto points. Thus, the alternative under Lisbon was an elective mechanism, under which the member states would be free to opt in (and out) of permanent structured cooperation. In the end, this new mechanism endowed the Union with the instruments for setting up from among its members, a variety of high-intensity operational combat formations for UN-mandated missions worldwide.[299] Furthermore, Lisbon guaranteed the member states' sovereignty since the engagement of the Union's military capacity remained in the hands of the Council members. Indeed, the wording of Article 42(4) TEU made it crystal clear that the Petersberg operations be authorized by a unanimous vote in Council 'on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State.' And according to Articles 42(1) and 43(1), the EU is not to be involved in any other type of military intervention, other than the Petersberg tasks. Furthermore, the offer of mutual assistance under the solidarity clause[300] is subordinate to the request of the political authorities of 'a Member State [which is] the object of a terrorist attack or the victim of a natural or man-

[299] *Lisbon Treaty*, 'Protocol on Permanent Structured Cooperation established by Article 42 of the Treaty on European Union', Article 1(b).
[300] *Lisbon Treaty*, Article 222(2) TFEU.

made disaster', meaning that even in an emergency situation, Lisbon continues to respect the sovereignty of each member state. Indeed, the EU leaders returned the CSDP squarely in the hands of the Council after deleting the provision which had granted the EP the right to be regularly consulted on the main aspects and basic choices of the CSDP; and its right to be kept informed on how it evolved.[301] Compare this with US Constitution, Article I, Section 8, which assigns eighteen federal competences to the US Congress, including, *inter alia*, the right to provide for the common defence and general welfare of the US, declare war, raise armies, and provide and maintain a navy. Thus, by way of comparison, the Union's current CSDP falls short of what supranationalists and integrationists had wished for. But then, the obduracy of the member states as unitary actors in the post-Convention IGCs was such that the most viable alternative to a communitarized CSDP was the adoption of a flexible mechanism that every EU country could claim to own, irrespective of its political calibre or defence capabilities or preferences. Indeed, the idea that none of the member states be arbitrarily excluded from the Union's common policies or its institutional framework is a recurrent theme that the next chapter is about to reveal.

[301] Compare *Constitutional Treaty*, Article I-41(8), with *Lisbon Treaty*, Article 42 TEU.

CHAPTER 5

SUPRANATIONALIST AND SOVEREIGNIST TENSIONS IN THE UNION'S CONSTITUTION-MAKING

5.1 Introduction

Since its inception, European integration has been characterized by EU member states agreeing to pool their sovereignty in a number of policy areas over time, in anticipation of mutual economic and political gain. And for this to materialize, the High Contracting Parties agree to set up common institutions in order to implement such policies at the supranational level. However, a cursory look at the history of European integration reveals that the Union's constitution-making process has not been a clearly defined linear progression, or the product of a classical constitutional moment as in the case of the four comparators. Thus, its vertical and horizontal evolution has come to depend on the maturation of milestone events, or economic shifts, which constantly prompt the member states to revise the Treaties in their resolve to enhance the proper functioning of the Euro-polity. Two such milestones were identified in Chapter 4, namely: Schuman's call for the normalization of Franco-German relations, which led to the establishment of the ECSC; and the establishment of a deeper economic *and* political union under the Maastricht accords.

In section two below, it is argued that the ECSC Treaty established an unprecedented supranational system of government centred upon the High Authority, which France, Germany, Italy, and the Benelux countries copied on establishing the Common Market in 1957. Section three posits that the fortunes of the European project ultimately depend upon if, and when, the national leaders agree to champion the polity's

further deepening and widening. For example, a nationalist leader like French President Charles de Gaulle was resolved to contrast the High Authority's federalist thrust for as long as he remained in office, whereas Germany's economic and political resurgence under Chancellor Willy Brandt convinced the Elysée to push for the deepening of the EC in order to contain German leadership within a wider Europe. Likewise, the onset of the neo-liberal economic order and globalization motivated the member states to go for a deeper and wider union, which determined: (1) the expansion of the Commission's competences in an increasing number of policy areas; and (2) an overcrowding problem in the composition of the EU executive as the Union widened on a pan-continental scale. In view of these developments, the thematic study in this chapter deals with the EU leaders' post-Amsterdam attempt to improve the Commission's effectiveness by downsizing it. This reform process is reviewed in the light of the Convention's support of such institutional change; and the decisions taken during the 2003 IGC and subsequent European Councils. Finally, this thematic study reviews how the European *demoi* that were called upon to ratify the Constitutional and Lisbon Treaties, used their vote to block certain changes to the Treaties, such as the downsizing of the College of the Commission line-up.

5.2 'Ever closer union'

When the European project was launched, the founding fathers assumed that once the ECSC Six were to reap the advantages of an integrated market in coal and steel, they would seek integration in other economic sectors. Actually, in a memorandum on the establishment of a European customs union, Dutch Foreign Minister Jan-Willem Beyen

concluded that because of the post-war globalizing process, it was not possible 'to maintain and gradually improve the standard of living in Europe […] without raising and improving European productivity, which cannot be achieved in a Europe divided into a number of limited markets as a result of trade barriers and subject to monetary instability.'[302] Hence Beyen's call for the establishment of a customs union with an automatic timetable for the removal of internal trade barriers, and the installation of supranational institutions that would have the power to take collective decisions.

Beyen's preference for supranationalism was inspired by the Netherlands' positive experience of the Benelux customs union;[303] whereas the common market plan suited the French design to anchor Germany's economy within a wider European common market.[304] Meanwhile, Europe's experience of a six-month shortage of petroleum supplies in the wake of the Suez Crisis of 1956 convinced the Six to seek transnational cooperation in the development of atomic energy. Thus the Rome Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) were signed on 25 March 1957, and ratified by the national parliaments of the Six by the end of that year.

The treaties that launched the three European Communities were the first in a series of intergovernmental accords for the Six.[305] However, clearly federalist objectives were inferred in the Preamble to the EEC Treaty and Article 2, according to which the High Contracting Parties were resolved:

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[302] 'The Beyen Plan for Economic Integration', in Harryvan & van der Harst, 72.
[303] W. Asbeek Brusse, 'Liberalization, Convertibility, and the Common Market', in Dinan, *Origins and Evolution of the European Union*, 100–101.
[304] See R. Marjolin, *Architects of European Unity: Memoirs 1911–1986* (London, 1989); and Asbeek Brusse, in Dinan, *Origins and Evolution of the European* Union, 105.
[305] See Dehousse & Magnette, 20.

> to lay the foundations of an ever closer union among the peoples of Europe [by] progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between its Member States.

And in order to achieve this objective, the Six established, under Articles 155–158 EEC, the European Commission, a nine-member supranational institution modelled on the Luxembourg-based High Authority, in which France, Germany, and Italy appointed two Commissioners each, whereas Belgium, Luxembourg, and the Netherlands appointed one each. Eventually, other big countries that joined the EC, namely the UK (1973), and Spain (1986), appointed two Commissioners each under these provisions.

5.3 The Commission's changing configuration in a widening EU

When the EEC started functioning, the Commission was meant to be(come) the motor of European integration. Indeed, it was designed, *inter alia*, to be:

- the EC's bureaucratic arm responsible for proposing new laws and policies in eight common policy areas (see below, Table 5.1); and
- the executive, responsible for overseeing the implementation of EC policies in, and across, the member states.[306]

However, the ulterior development of the Commission's remit depended on whether the EC/EU leaders would agree to deepen (and widen) the scope of the European project. Actually, the Community's evolution came to be characterized by a stop-go process, which came to depend on who governs at the constituent-state level. For example, the federalist trajectory that the Communities had taken during the Monnet Presidency of the High Authority, and Walter Hallstein's Presidency of the EEC Commission, was put on

[306] *Rome Treaty* [EEC], Article 155.

Table 5.1: Original EEC Commission Portfolios (1958–2004)

Portfolio	Commission Term/s
1. Commission President [1]	since 1958
2. Agriculture [2]	since 1958
3. Competition	since 1958
4. Internal Market	since 1958
5. Social Affairs	since 1958
6. Transport	since 1958
7. Trade/External Trade	1958–63; 1967–70; 1985–93
External Economic Affairs, Commercial Policy	1993–95
Trade [3]	1999–2004
8. Economic Affairs	1958–67
Economic & Financial Affairs [4]	1967–85; 1989–99
Economic Affairs, Regional Policy	1985–89
9. Overseas Countries & Territories	1958–67
External Relations/Affairs	1963–2004

Source: D. Dinan, *Encyclopedia of the European Union* (Houndmills & London, 2000), 61– 64.

1. President Jacques Delors was responsible for the Monetary Affairs portfolio between January 1985 and January 1995, and co-managed it with Henning Christophersen between January 1993 and January 1995.
2. Inclusive of Fisheries between January 1977 and January 1981; and Rural Development from January 1989.
3. No specific portfolio for 'Trade' was assigned during in-between periods.
4. This portfolio included Structural Funds between January 1989 and January 1993; and Monetary Affairs/Policy between January 1993 and September 1999. After September 1999, the policies falling under this portfolio were subsumed under other portfolios.

Other policy areas featured intermittently under the portfolios for Competition, the Internal Market, Social Affairs, and Transport.

hold by French President Charles de Gaulle who objected, *inter alia*, to the transfer of greater budgetary powers to unelected members of supranational institutions like the High Authority, the Commission, or the Common Assembly.[307] Indeed, the 'Empty Chair' crisis of 1965–66, determined Hallstein's resignation in July 1967.[308] On the other hand, Germany's economic resurgence, and Chancellor Willy Brandt's political assertiveness convinced de Gaulle's successor Georges Pompidou that the EC's geopolitical symmetry could be restored if Brandt's *Ostpolitik* were countervailed by

[307] A. Moravcsik, *The Choice for Europe*, 177, 193.
[308] Dinan, *Encyclopedia of the European Union*, 61–62, 261–262.

Britain's membership of the EEC.[309] Thus, at The Hague summit of December 1969, the six EC leaders favoured enlargement; and agreed to pursue economic and monetary union.[310] Indeed, this federalist thrust was to reach a historical peak between 1985 and 1991 with the adoption of the Single European Act (SEA) and the Maastricht accords during the Delors Commission Presidencies, which enjoyed the pivotal support of German Chancellor Helmut Kohl, French President François Mitterand, and Spanish Prime Minister Felipe Gonzales.[311] But as national veto points within the EC/EU doubled, the crafting of *ad hoc* piecemeal accords and mechanisms outside the Treaties often proved more effective than full-scale treaty reform whenever the integrationists resolved to forge ahead with the Community's deepening in specific policy areas independently of the sovereignists. Thus in June 1985, France, Germany and the Benelux signed the Schengen accord, an intergovernmental agreement outside the Rome Treaty, under which the contracting parties were committed to eliminating border controls in order to facilitate unrestricted freedom of movement of persons, which the signatories deemed necessary for the completion of the single market. Furthermore, Schengen included enhanced cooperation in the fight against drugs and arms trafficking, terrorism, fiscal fraud, and illegal immigration, whereas the SEA's deregulatory remit (which Commission President Delors feared would be more advantageous to entrepreneurs, rather than employees),[312] motivated the member states, bar Britain, to draw the Charter on the Fundamental Rights of Workers in December 1989. Then followed: the inclusion

[309] Moravcsik, *The Choice for Europe*, 27, 238, 244, 250.
[310] K. Dyson & K. Featherstone, *The Road to Maastricht: Negotiating Economic and Monetary Union* (Oxford & New York, 1999), 106–107. See page 159.
[311] Nicoll & Salmon, 221–224, 226–228, 273–275, 279–280.
[312] C. Rumford, *The European Union: A Political Sociology* (Malden, MA & Oxford, 2002), 16, 38–39; and E. Szyszczak, 'Will Competition Destroy the European Social Model', in Xuereb (2008), 25–33.

Table 5.2: Assimilation of Extra-treaty policies in EU Constitutional framework

Policies and Initiatives	Date of agreement or coming in force	Treaty of assimilation
1. Economic and Monetary Union		
Snake in the tunnel	April 1972	
European Monetary System & exchange rate mechanism	March 1979	
monetary union under Pillar I (with opt-outs)	December 1991	**Maastricht**
Stability and Growth Pact (European Council Resolution)	June 1997	
2. Foreign Policy, Security and Defence		
European political cooperation	December 1969	
Correspondance européenne (telex link)	1973	
brought into treaty framework	July 1987	**SEA**
included under Pillar II	November 1993	**Maastricht**
Petersberg tasks (peace-keeping operations)	June 1992	
included under Pillar II	May 1999	**Amsterdam**
European Security and Defence Policy	December 1999	
included under Pillar II	February 2003	**Nice**
3. Justice & Home Affairs		
Naples Convention (cross-border customs cooperation)	September 1967	
Trevi Working Group (anti-terrorism)	December 1975	
Schengen Agreement	June 1985	
Ad-hoc Working Group on Immigration	September 1986	
Schengen II, and Dublin Convention on Asylum	June 1990	
Naples II	December 1997	
Europol Convention	October 1998	
included under Pillar III (in stages, with opt-outs)	May 1999/Feb. 2003	**Amsterdam/Nice**
Removal of three-pillar architecture	December 2009	**Lisbon**
4. Fundamental Rights		
Charter of Fundamental Social Rights of Workers	December 1989	
Protocol [14] on Social Policy	December 1991	**Amsterdam**
Copenhagen criteria (point 1, democracy, human, minority rights)	June 1993	
EU Charter of Fundamental Rights	December 2000	
EU Charter of Fundamental Rights brought under Treaty framework	December 2009	**Lisbon**

Sources: The *Treaties of the European Union* (and various secondary sources).

of EMU under Maastricht Pillar I; and the incorporation of extra-Treaty agencies, like the

Trevi Group,[313] and the Ad Hoc Working Group on Immigration (AWGI) under Pillar III. Furthermore, the unexpected demise of Soviet communism, and shift to the West of the post-Socialist states solicited the incorporation of extra-Treaty agencies and institutions like the Western European Union (WEU); European political cooperation (EPC); and *Correspondance Européenne* (COREU), under Pillar II. And once the post-Wall widening process turned into a pan-continental phenomenon, the need for firmer guarantees regarding: democratic rule; and human, and minority rights, prompted the promulgation of the 1993 Copenhagen criteria, and the adoption of a more comprehensive compendium of rights and freedoms, which the Nice Council drew under the EU Charter of Fundamental Rights (see above, Table 5.2).

In view of the foregoing, the Commission's competences increased as certain policy areas were *either* transferred to the supranational order (e.g. monetary policy), *or* featured as shared competences (e.g. political cooperation). Actually, this policy migration had begun in 1967, with the coming into effect of the Merger Treaty of April 1965, when a single Commission replaced the High Authority of the ECSC, and the Commissions of the EEC and EURATOM. In fact, when the integrated Commission started functioning on 6 July 1967, six policy areas, namely, Research and Technology; Energy; Industrial Affairs; Information Service; the Budget; and Development Aid, were added to the original portfolios of the pre-Merger Commission. By September 1999, another forty-six policy areas were added. This expansion included overlaps. For example, the portfolio for Overseas Countries & Territories (1958–67); and North–South Relations (1985–89) were incorporated in the portfolio for External Relations/Affairs.

[313] The Trevi Group was established in 1975 to combat terrorism, drug trafficking, organized crime, and illegal immigration.

Table 5.3: Evolution of Commission Portfolios (1967–2004)

Portfolios under Seven General Policy Areas	Commission Term/s
A. Research & Education, Culture & Information Society	
1. Research & Technology/Technological Affairs	1967–77
2. Research, Science & Education	1973–77
3. Education and Training	1985–93
4. Science, Research & Development	1989–99
5. Audio-visual & Cultural Affairs	1989–99
6. Education, Training & Youth	1995–99
7. Education & Culture	1999–2004
8. Enterprise & Information Society	1999–2004
9. Research	1999–2004
B. Economic Sectors, Investments, & Industrial Relations	
1. Energy	1967–2004
2. Industrial Affairs/Relations	1967–81; 1985–99
3. Employment	1977–2004
4. Fisheries	1977–2004
5. Industrial Innovation	1981–85
6. Tourism	1981–85; 1995–99
7. Credit & Investment	1985–93
8. Small Businesses	1985–89; 1995–99
9. Telecommunications & Information Technology	1989–99
C. External Relations, Foreign Policy, Security & Defence	
1. Enlargement	1970–73; 1977–85; 1993–95; 1999–2004
2. Mediterranean Policy	1981–95
3. North–South Relations	1985–89
4. Relations with Latin America	1989–93
5. Common Foreign & Security Policy	1993–95
6. Relations with European States not in EU	1995–99
7. Relations with OECD & WTO	1995–99
D. Inter-institutional & Administrative Affairs	
1. Information Service	1967–70
2. Relations with EP	1973–2004
3. Personnel & Administration	1981–85; 1989–99
4. Statistical Office	1981–85
5. Institutional Questions, People's Europe	1985–89; 1993–95
6. Relations with Committee of the Regions	1993–99
7. Translation	1995–99
8. Treaty, & Administrative Reform	1995–2004

E. Economic & Monetary Union	
1. Budget	1967–2004
2. Financial Control	1970–99
3. Financial Institutions	1973–77; 1985–93
4. Taxation	1973–81; 1989–99
5. Monetary Affairs/Policy	1985–2004
6. Customs	1993–99
7. Commercial Policy	1993–99
8. Financial Services	1995–99
F. Justice, Home Affairs & Environmental Issues	
1. Environment	1973–2004
2. Consumer Affairs/ Protection	1977–81; 1985–2004
3. Nuclear Safety	1993–95
4. Immigration	1995–99
5. Fraud Prevention	1995–99
6. Justice & Home Affairs	1995–2004
G. Development & Aid	
1. Development Aid/Cooperation	1967–95
2. Regional Policy	1973–89; 1995–2004
3. Coordination of Structural Funds	1985–89
4. Cohesion Fund	1993–99
5. Development & Humanitarian Aid/Office	1993–2004

Source: D. Dinan, *Encyclopedia of the European Union* (Houndmills & London, 2000), 61– 64.

And *ad hoc* portfolios, like the ones for Financial Control and Financial Institutions, were merged under Economic and Financial Affairs in January 1989, in concurrence with the three-stage Delors Plan regarding the introduction of the EMU. Other policy areas, like Research, Education, Culture, Youth, and Information Technology, were relocated under various portfolios, whereas Enlargement featured intermittently, since the widening process did not always top the Commission agenda (see above, Tables 5.1 and 5.3). Furthermore, the long wave of EU accession applications after 1989 implied that membership of the Commission was bound to double, as each candidate country aspired to be represented in the College by at least one national on joining the Union. Indeed,

once Austria, Finland and Sweden acceded to the Union on 1 January 1995, the Commission comprised twenty members, which were already too many, as Commission President Jacques Santer found out when trying to allocate responsibilities without upsetting the national sensibilities of his fellow College colleagues.[314] Thus, the 1996–97 IGC was expected to prioritize institutional reform *before* the Union enlarged to over twenty member states.

During the course of this IGC, the British government offered to relinquish its second Commissioner, on condition that the other large states would do the same. But this was not an easy concession for Rome and Madrid, for whom fielding two Commissioners was a matter of prestige, since this provision singled out Italy and Spain as members on a par with France, Germany, and the UK. Eventually, a compromise was reached that if more than two or less than six other countries were to join the Union, the Commission would have one representative from each member state.[315] Furthermore, the Amsterdam Council agreed that at least one year before membership of the Union exceeded twenty, another IGC be convened 'in order to carry out a comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions.'[316] However, Madrid insisted that Spain would only surrender its second Commissioner in return for changes in the reweighting of votes in the Council, which changes were duly effected to Spain's advantage at Nice in December 2000.[317]

Other decisions taken by the Nice Council regarded: the redistribution of seats in a wider EP; and the downsizing of the Commission such that every member state would

[314] Bache, et al., 175.
[315] Ibid., 175; 177.
[316] *Amsterdam Treaty*, 'Protocol on the institutions with the prospect of enlargement of the European Union', Article 2.
[317] See pages 260, 272.

each have one representative in the College of Commissioners as from 1 January 2005.[318] Furthermore, the 'Protocol on the enlargement of the European Union' provided a roadmap for the downsizing of the Commission, which established that from the date on which the first Commission assumed duties *after* the date of accession of the twenty-seventh state, the number of Commissioners be less than the number of EU states according to four principles, namely that:

1. the Commission members be chosen according to a rotation system based on the principle of equality;
2. the member states be treated equally with regard to the determination of the sequence of, and the time spent by, their nationals as members of the Commission;
3. the difference between the total number of terms of office held by nationals of any given pair of member states would never be more than one;
4. the composition of each successive College would reflect the demographic range of all the member states.[319]

But contrary to what this same Protocol prescribed *re*: the composition of the EP from the start of the sixth legislature (2004–09); and the reweighting of the votes in the Council as from January 2005, it did not lay down a precise formula by which one could determine the number of Commissioners in a Union comprising twenty-seven states or more. Indeed, it is to whether the national capitals were ready and willing to downsize the College to less than the number of EU states that this chapter now turns.

[318] *Nice Treaty*, 'Protocol on the enlargement of the European Union', Articles 2, 3, 4(1) and 4(4).
[319] Ibid., Articles 2, 3, 4(2)(3).

5.4 Thematic study: institutional reform and popular input: the European Commission in the post-Nice era

5.4.1 The opening gambits

At the start of the Prodi Commission Presidency in September 1999, twenty Commissioners from fifteen member states were in charge of an equal number of portfolios. After 1 May 2004, ten of these portfolios were destined to be co-managed for the last five months of that Commission's term by ten other members coming from each of the ten new member states. After 21 November 2004, France, Germany, Italy, Spain, and the UK were to relinquish their second Commissioner according to the Nice Protocol on EU enlargement, following which, the twenty-five portfolios styled by in-coming President José Manuel Barroso were to be managed by one Commissioner from every member state. During the course of the Convention, it was generally acknowledged that overcrowding in the Commission was likely to complicate EU policy coordination.[320] Furthermore, between February 2003 and December 2009, six other countries applied for EU membership; hence the Convention's resolve to find an equitable formula for the downsizing of the College.

5.4.2 A contentious die is cast

The Convention proceedings on the reform of the Commission were influenced *a priori* by the Nice protocol on EU enlargement. So at first, the Convention focused more on *how* to enhance the legitimacy and transparency of the Union's institutions, rather than tabling suggestions regarding the size of the College of Commissioners. Thus, in the

[320] European Convention, 'Contribution by Dr. Alfred Sant, member of the Convention; Dr. George Vella, alternate member of the Convention:–"General comments on the Draft Constitutional Treaty"', CONV 763/03, CONTRIB 340, Brussels, 26 May 2003, 2.

preliminary debate on the Commission, forty-seven conventioneers from twenty participating countries,[321] proposed, *inter alia*, that the Commission President be elected by the EP.[322] Furthermore, two Socialist MEPs proposed that the composition of the College be based on EP election results;[323] whereas German MEP Elmar Brok suggested that every Commissioner be elected by the EP, *after* undergoing a parliamentary hearing.[324] On the other hand, the government representatives of Cyprus and Slovenia stressed that the recognition of the principle of equality of the member states was fundamental;[325] whereas according to their Greek counterpart, 'the Treaty must not define the number of Commissioners.'[326] But perhaps the most pragmatic proposal came from Finnish MP Riitta Korhonen, who suggested that

> [i]f in the future the Commission is composed of fewer members than there are Member States, the Council chairmanships should be allocated to those Member States without Commissioners. This would offset the public appearance of powerlessness of those Member States.[327]

On its part, the Praesidium indicated its preference for a Commission composed of 'two "levels" of Commissioners', wherein the right to vote on decisions of the College be restricted 'to only the higher level.' And with regard to the suggestion 'that voting in the

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[321] These included the government representatives of Belgium (both), Cyprus (1), the Czech Republic (1), Germany (both), Greece (1), Hungary (1), Luxembourg (1), the Netherlands (1), and the UK (1); 20 national MPs from nine member states; seven national MPs from four candidate countries; 17 MEPs; and two Commission representatives.

[322] European Convention, 'Contribution[s] from certain members of the Convention', CONV 177/02, CONTRIB 59; and CONV 189/02, CONTRIB 64, Brussels, 8 July 2002, and 12 July 2002 respectively.

[323] European Convention, 'Contribution from Ms Pervenche Berès and Mr Klaus Hänsch, member of the Convention', CONV 63/02, CONTRIB 32, Brussels, 23 May 2002, 9.

[324] European Convention, 'Contribution by Mr Brok, member of the Convention – "Constitution of the European Union"', CONV 325/02, CONTRIB, 111, Brussels, 8 October 2002, 46.

[325] European Convention, 'Contribution from a member [Matjaž Nahtigal] of the Convention', CONV 19/02, CONTRIB 4, Brussels, 5 April 2002, 2; and 'Contribution from Mr Michael Attalides, member of the Convention', CONV 102/02, CONTRIB 45, Brussels, 14 June 2002, 9.

[326] European Convention, 'Contribution from Professor P.C. Ioakimidis, alternate member of the Convention: "Answers to the questions of the Laeken Declaration"', CONV 113/02, CONTRIB 48, Brussels, 18 June 2002, 27.

[327] European Convention, 'Contribution from Riitta Korhonen, alternate member of the Convention', CONV 83/02, CONTRIB 39, Brussels, 30 May 2002, 2.

College on certain matters [...] requires broader majorities', the Praesidium's counter-argument was that 'such an approach might undermine, rather than promote, courageous decision-making in the common interest of the Union, and only reinforce the erroneous impression of a College composed of national representatives.'[328]

At this stage, many national capitals realized that their right of having their appointee in every line-up of the Commission was seriously at stake. Consequently, the government representatives of sixteen small-, and medium-sized countries tabled a joint contribution in which they declared that since the equality of the member states was a core principle which had to be respected in the reform of the Union's institutions, they 'could not accept any arrangements which sought to establish a hierarchy of Member States, or to differentiate between them in terms of their entitlement to involvement in the operation of the institutions.' And while they acknowledged that demographic factors were relevant both to citizens' representation in the EP, and to voting weights in the Council, they could not support any further reliance on such factors; hence their call for the retention of guaranteed equality between member states in the composition and operation of the Commission.[329]

Despite this strong call for equality, Praesidium draft Articles 18–18a proposed that the Commission comprise an inner core of fourteen College Commissioners to be selected by the Commission President-elect, 'after taking account of European political and geographical balance', with non-voting Associate Commissioners possibly being

[328] European Convention, 'The Functioning of the Institutions', CONV 477/03, Brussels, 10 January 2003, 8, 9.
[329] European Convention, 'Reforming the Institutions: Principles and Premises', CONV 646/03, CONTRIB 288, Brussels, 28 March 2003, 4, 6. The 16 states were: Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, Malta, Portugal, Slovakia, Slovenia, and Sweden.

called upon to help in the Commission's decisions.[330] This proposal was acceptable to twenty-seven conventioneers only (see below, Table 5.4). Furthermore, there were some idiosyncratic departures from the Praesidium proposal. For instance, the Austrian MEP Maria Berger proposed that the College be twenty-strong,[331] whereas the two Maltese government representatives tabled an amendment for a twenty-five-member College.[332] But perhaps the most interesting, yet controversial, proposal came from French centre-right MP Pierre Lequiller, who argued that the Commissioners of smaller countries like Malta or Belgium should not have the same weight as a Commissioner from Germany. Indeed, he classified member states, actual and future, according to demographics as follows:

1. the most populous six (France, Germany, Italy, Poland, Spain, and the UK);
2. eight medium-sized countries (Austria, Belgium, the Czech Republic, Greece, Hungary, the Netherlands, Portugal, and Sweden);
3. eleven small states (Cyprus, Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Luxembourg, Malta, Slovakia, and Slovenia).

Then, he argued that the 'big six' only would be entitled to one national each in every Commission, with the eight medium-sized countries being represented by four Commissioners, and the eleven small states by another four. In other words, in Lequiller's fourteen-member Commission, the medium-sized countries would have their appointee in one out of every two Commission terms, whereas the small states would have theirs in one out of three. And to justify this proposal, Lequiller pointed out that the

[330] European Convention, 'Institutions – draft articles for Title IV of Part I of the Constitution', CONV 691/03, Brussels, 23 April 2003, 6.
[331] Amendment Form, 'Suggestions for Amendment of Article 18, By Ms Maria Berger'.
[332] Amendment Form, 'Suggestion for amendment of Article 18, By Prof Peter Serracino Inglott, Member, Mr John Inguanez, Alternate'.

Table 5.4: Delegates by country/EU committee in favour of downsized Commission

Country (or EU Committee)	15-Member College of Commissioners (Praesidium proposal)	Unspecified reduced size of College after accession of 27th member state
Austria	3	1
Belgium	3	-
Cyprus	-	1
Czech Republic	1	1
Denmark	3	4
Estonia	-	5
Finland	-	5
France	2	-
Hungary	-	1
Germany	3	-
Ireland	-	3
Latvia	-	5
Lithuania	-	1
Luxembourg	3	-
The Netherlands	1	-
Portugal	-	4
Romania	2	-
Slovakia	-	1
Spain	1	1
Sweden	-	6
Turkey	1	-
UK	3	-
European Social Partners	1	-
Totals	**27**	**39**

Source: Amendments to Article 18 of Draft Constitution submitted by various delegates.

presence of a Maltese or Luxembourg Commissioner would still over-represent Malta or Luxembourg in the ratio of 68:1 *vis-à-vis* their German counterpart. Finally, in order that the rotation system would be more equitable, he proposed that the mandate of the Commission be for two and a half years rather than five.[333]

[333] European Convention, 'Contribution from Mr Pierre Lequiller, member of the Convention –"Proposal for a balanced and effective composition of the Commission"', CONV 837/03, CONTRIB 373, Brussels, 27 May 2003, 2–3.

Table 5.5: Conventioneers (by country and status) in favour of every Member State having one representative each in the College of the Commission.

Country	European Commission Reps	European Parliament Reps	National Government Reps	National Parliament Reps	EU Committees/ Ombudsman Observers	Total
Austria	-	1	1	2	1	5
Belgium	-	-	-	-	-	0
Denmark	-	2	-	2	-	4
Finland	-	2	-	5	-	7
France	1	-	-	-	1	2
Germany	-	2	-	-	1	3
Greece	-	-	2	3	-	5
Ireland	1	1	-	4	-	6
Italy	1	2	-	1	-	4
Luxembourg	-	-	2	4	-	6
Netherlands	-	1	1	2	-	4
Portugal	1	3	2	4	1	11
Spain	-	-	-	1	-	1
Sweden	-	-	-	4	-	4
UK	-	4	-	2	-	6
Bulgaria			2	2		4
Cyprus			1	4		5
Czech Republic			2	3		5
Estonia			1	4		5
Hungary			2	4		6
Latvia			1	4		5
Lithuania			1	4		5
Malta			2	4		6
Poland			2	4		6
Romania			2	4		6
Slovakia			2	3		5
Slovenia			2	4		6
Turkey			2	3		5
Totals	**4**	**18**	**30**	**81**	**4**	**137**

Sources: CONV 819/03, CONTRIB 372, Brussels, 27 June 2003, submitted by Mr Bonde, member of the Convention, Annex, 2–5.
Various amendments to Article 18 of draft Constitution.

Objectively speaking, Lequiller's proposal could be construed as a practical solution to the Commission's overcrowding. By way of comparison, little does it matter that the overwhelming majority of the constituent states of the US are not represented in the Federal Cabinet. But in a Union consisting of distinct *demoi*, it is difficult for, say,

Nicosia, Tallinn, and Ljubljana to agree on the nomination of one 'common' Commissioner from among their midst. In fact, 137 Convention members from all participating countries, bar Belgium, objected to the loss of 'their' Commissioner. The national MPs constituted the most numerous sub-set that opposed the Praesidium proposal, with eighty-one delegates against, followed by twenty-two national government representatives from all the thirteen candidate countries, and eight national government representatives from five member states (see above, Table 5.5). On the other hand, thirty-nine delegates from fourteen participating countries agreed to a downsized College *after* the accession of the twenty-seventh state (see above, Table 5.4), whereas six conventioneers, declared that there be no fixed number, but that the College include as many members as deemed necessary for the proper functioning of the Commission.[334]

But perhaps the most revealing point which underscored the Praesidium's alienation from the Convention's general objection to the Commission's downsizing was the fact that seven Praesidium members were in favour of each EU country retaining its Commissioner. These were the two Commission Representatives (Michel Barnier and António Vitorino); the Representative of the National Parliaments (John Bruton, Irish MP); the two Representatives of the Greek Presidency (Giorgos Katiforis and Giorgos Papandreou); one Representative of the Spanish Presidency (Ana Palacio); and the Representative of the candidate countries (Alojz Peterle, Slovenian MP),[335] whereas the Representative of the Danish Presidency (Henning Christophersen) opposed the idea of

[334] These were French MEPs Olivier Duhamel and Pervenche Berès; UK MEPs Timothy Kirkhope and the Earl of Stockton; German MEP Joachim Würmeling; and Romanian MP Adrian Severin.

[335] Amendment Forms, 'Suggestion for amendment of Article 18 By Mr Barnier, Mr Vitorino, et al.'; 'Suggestion for amendment of Article: 18 – Suggestion for Part I, By Mr Georgios Papandreou and Mr Georgios Katiforis'; and 'Proposition d'amendement à l'Article: 18 (Titre IV de la Partie I) Deposeé par Madame Palacio'. John Bruton and Alojz Peterle signed the 'Contribution submitted by Mr Bonde: member of the Convention: "Every Member State shall have one representative each in the Commission" supported by 118 signatures', CONV 819/03, CONTRIB 372, Brussels, 27 June 2003, 2, 4.

having Associate Commissioners, but agreed that the Commission be reduced, once Union membership reached twenty-seven.[336] On the other hand, the members who did not object to the Praesidium proposal were: the second Representative of the Spanish Presidency (Alfonso Dastis); and the two EP Representatives (German MEP Klaus Hänsch, and Spanish MEP Iñigo Méndez de Vigo). In other words, the Praesidium was split on the composition, competences, and status of the post-enlargement College. And when all the dissenting conventioneers were counted, no less than 197 delegates opposed the Praesidium proposal. Nevertheless, in its final draft of the Constitutional Treaty, the Convention Presidency replaced the principle of permanent equality by a two-tier formation, wherein an inner College of fifteen Commissioners was to wield more decisional power than their non-voting colleagues.[337]

This constitution-making process was criticized for its undemocratic unravelling by the Maltese government representative Peter Serracino Inglott, who stated that:

> the product of [the conventioneers'] deliberations emerged almost exactly according to Giscard's holy recipe. Consensus was first and silently reached by all of us to sheepishly accept his personal, not to say idiosyncratic way of defining consensus. We all agreed that consensus was to be deemed in the bag just whenever he said so.[338]

Indeed, Magnett and Nicolaïdis attribute this 'forceful leadership' to the fact that Giscard's nomination for Chair of the Convention enjoyed the pivotal backing of France, Germany and the UK; hence his 'big country bias'.[339] Indeed, none of the 'big five' were co-signatories to the contribution on the equality of the member states tabled by the government representatives of the sixteen small- and medium-sized states.

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[336] Amendment Form, 'Suggestions for amendment of Article: 18, Part I – Title IV, By Mr: Henning Christophersen, Poul Schlüter, et al'.
[337] *Official Journal of the European Union*, 'Draft Treaty Establishing a Constitution for Europe', Brussels, 18 July 2003, Article 25(3), 14.
[338] P. Serracino Inglott, 'Giscard and his Fellowship: a Dwarf's eye view of our quest for a Constitutional Treaty', in *The Jean Monnet Seminar Series*, ed. P.G. Xuereb (Malta, 2004), 1–2.
[339] Magnett & Nicolaïdis, 2, 8.

5.4.3 Enter (and exit) the Commission

Giscard submitted Parts I and II of the Draft Treaty to the Thessaloniki Council on 20 June 2003; and once the Convention finished its mandate, a formal IGC on the final revision of the Draft Treaty started on 29 September 2003.

Twelve days before the commencement of this IGC, the Commission published its Opinion on the Draft Treaty, wherein it argued that 'having a Commission made up of one Member from each Member State with different voting rights [was] complicated, muddled and inoperable [and threatened] the basis of collegiality, which is equality for the Members of the Commission.'[340] As for the members without voting rights, the Commission argued that if these Commissioners were to manage a portfolio, 'one cannot see how they could effectively exercise their responsibilities without being able to participate to the collective decision. And if they do not have a portfolio, one wonders what their role within the College could be.'[341] Consequently, the Commission argued that each College member ought to have equal rights and obligations. As for overcrowding, the report favoured the decentralization of decision-making via the restructuring of the College into 'Groups of Commissioners'. Under this formula the most important issues would be decided by all the members of the Commission, whereas the more sectorial decisions would be taken by the proposed Groups of Commissioners.[342] This was the Commission's proposal for keeping all College members in the game.

[340] Commission of the European Communities, 'A Constitution for the Union: Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the Member States' governments convened to revise the Treaties', COM(2003), 548 final, Brussels, 17 September 2003, Point 2, 5.
[341] Ibid.
[342] Ibid., 6.

The IGC discussions regarding the Commission line-up were characterized by lack of consensus as the sixteen small- and medium-sized countries resisted the forfeiture of their Commissioner. Nevertheless, the Italian Presidency reiterated that the Commission needed to function effectively; and that 'the Convention text provides a good basis for meeting this objective.'[343] In other words, the big countries were set upon imposing the formula for a downsized Commission upon the smaller states. Furthermore, they declined to adopt the Commission proposal for the decentralization of decision-making.[344] But rather than settling for a fifteen-member College as originally proposed by the Praesidium, the EU leaders came to the agreement that, as from 2009, the Commission would

> consist of a number of members, including its President and the Union Minister for Foreign Affairs, corresponding to two thirds of the number of member states, unless the European Council, acting unanimously, decide[d] to alter this number.[345]

In other words, in a Union comprising twenty-seven states, the College would include eighteen Commissioners, meaning that the nationals of nine states would have to wait for their turn according to a system of equal rotation in order to be represented in the College of the Commission.

5.4.4 The people(s) speak

One of the challenges that most EU leaders felt they needed to address was how to legitimize the Constitutional Treaty in the absence of a sovereign *demos*. Thus, about ten member-state governments decided to hold a national referendum, with the Spaniards

[343] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Naples Ministerial Conclave: Presidency proposal', CIG 52/03, PRESID 10, Brussels, 25 November 2003, 4.
[344] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Preparation of the IGC ministerial meeting on 14 October 2003: questionnaires', CIG 6/03, Brussels, 7 October 2003, 2.
[345] *Treaty establishing a Constitution for Europe*, Article I-26(6).

voting first in February 2005, who endorsed the Treaty by 76.7 per cent of the votes cast.[346] But a low turnout rate of 42.3 per cent, betrayed a sense of popular detachment from the constitution-making process.[347] Three months later, the French and Dutch electorates used the referendum as a protest vote against their respective national government and political parties, who were blamed for the low performance of their domestic economies; a deteriorating employment situation; the liberal nature of the Constitutional Treaty; and retrenchment in social Europe. Furthermore, 5 per cent of French, and 19 per cent of Dutch 'no' voters felt uneasy about the loss of national sovereignty, whereas the perceived loss of national identity by 3 per cent of the Dutch could be explained by the rise in immigration, which kindled inter-ethnic tension in the wake of the murder of Theo van Gogh on 2 November 2004 by a Muslim-Dutch citizen, following the release of his film that focused on the restraints inflicted upon womanhood in traditionalistic Islamic societies.[348] Finally, some voters were uneasy with the course of integration, especially since accession talks with Ankara were scheduled to start in October 2005. In fact, 6 per cent of French, and 3 percent of Dutch 'no' voters declared that they opposed Turkey joining the Union.[349]

Interestingly, these issues proved more worrying for the French and Dutch, than the periodic absence of their representative from the College of the Commission. Consequently, the EU leaders focused on eliminating those treaty provisions that were

[346] J.-C. Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge, 2006), 8–9.
[347] European Commission, *Flash Eurobarometer 168: The European Constitution Post-referendum survey in Spain* (March, 2005), '1.1.2. Reasons for abstention', 8.
[348] European Commission, *Flash Eurobarometer 171: The European Constitution Post-referendum survey in France* (June, 2005), '2.3. What motivated people to vote No', 17; *Flash Eurobarometer 172: The European Constitution Post-referendum survey in The Netherlands* (June, 2005), '2.3. The motivations of the « No » vote', 15; and C. Pollacco, *The Mediterranean: The European Union's 'Near Abroad'* (Malta, 2006), 167.
[349] *Flash Eurobarometer 171*; and *172.*

perceived by Europeans as *either* too federalist, *or* simply unacceptable, whereas the articles related to the Commission and its Presidency remained untouched.[350] Having said that, the popular vote was unavoidable in Ireland, and when it was held on 12 June 2008, the Irish rejected the Lisbon Treaty by 53.4 per cent of the vote.

5.4.5 The tail wagging the dog?

According to two different post-referendum surveys, the main reason for the Irish 'no' vote was their lack of information, knowledge and understanding of the Lisbon Treaty. Other contentious issues included the periodic loss of the Irish representative in the College of the Commission line-up; the perceived loss, or diminution, of political (and military) neutrality; and the fear that the adoption of Lisbon would legalize gay marriage, abortion, and euthanasia.[351]

Actually, some of these fears were unfounded. For example, Articles 31 and 42 TEU clearly stated that the EU countries could not be forced to get involved in foreign policy initiatives or security and defence operations that were in breach of their domestic constitution, whereas Protocol 35 protected Ireland's rejection of abortion. On the other hand, the periodical exclusion of their appointee from the College of the Commission proved too sensitive an issue for many Irish voters. Nevertheless, the EU leaders urged the other member states to continue with their ratification process, in order to put pressure on Dublin to reconsider its position. And in late-October 2008, a six-member Delegation

[350] Council of the European Union, 'Amendment of the Treaties on which the Union is founded', 11222/07, POLGEN 75, Brussels, 26 June 2007, Annex 1, 'Amendments to the EU Treaty', 26. Compare *European Constitution*, Articles I-26 and I-27, with *Lisbon Treaty*, Articles 17 and 18 TEU.

[351] European Commission, *Flash Eurobarometer 245: Post-referendum survey in Ireland. Preliminary results* (18 June 2008), 3, 8; and *Millward Brown IMS, Post Lisbon Treaty Referendum Research Findings* (September 2008), ii–iii.

of the EP Constitutional Affairs Committee[352] went to Dublin to discuss the impasse provoked by the Irish vote with the *Dáil* Sub-Committee on Ireland's future in the EU.

During the hearing, the Head of the EP Delegation Jo Leinen explained to Irish MPs, in the presence of five Irish MEPs,[353] that the member states needed a better basis for stronger policies and institutions in the EU to find solutions to their challenges.[354] Leinen was referring to the global financial crisis of 2008 that had thrown the European, and global economy into recession, thus inferring that the crisis could not be overcome if member states stalled the Union's constitutional development. Meanwhile, German MEP Elmar Brok countered Irish fears regarding the loss of sovereignty by pointing out that the current cooperation of the EP with the national parliaments (via the subsidiarity principle) would experience an increase in powers by virtue of Article 12 TEU.[355] As to the allegation that the EU was putting pressure on Ireland to hold a second referendum, British MEP Richard Corbett argued that

> [i]f there is just one 'No' vote, it is neither unreasonable nor undemocratic to ask the one whether it is willing to reconsider. […] If Ireland were to come up with a list of desires and demands to, perhaps, clarify or interpret the treaty, or whether, and if these issues could be debated, then Ireland would be shown to be trying to find a solution for all of us. We all need that solution.[356]

Meanwhile, the once robust Irish economy was slipping into recession, as tax revenues that had been heavily dependent on the domestic housing market for several years in a row, began to decline during 2008, as Ireland experienced a significant increase in

[352] The Committee members were: the Chair of the EP Constitutional Affairs Committee, Jo Leinen (German – PES); the President of the EP, Enrique Barón Crespo (Spanish – PES); Elmar Brok (German – EPP & ED); Robert Corbett (British – PES); Monica Frassoni (Italian – G/EFA); and György Schöpflin (Hungarian – EPP & ED).
[353] The Irish MEPs were: Brian Crowley and Eoin Ryan (both from the UEN); Colm Burke and Gay Mitchell (both from the EPP & ED); and Proinsias de Rossa (PES).
[354] European Parliament Press Service, 'European Parliament Constitutional Affairs Committee consults Irish Parliament', 3 November 2008, 1.
[355] Ibid.
[356] Ibid., 2.

unemployment.[357] On the other hand, Dublin was aware that the European Council was about to approve a European Economic Recovery Plan to the tune of €200 billion, or 1.5 per cent of the Union's GDP,[358] which could partly cover the Irish banks' liabilities and recapitalization schemes.

Actually, the crafting of an agreement that could make it possible for the Irish to endorse Lisbon was desirable by both parties. To begin with, the Constitutional Affairs Committee pointed out in the EP that if the Treaty were not ratified *before* the EP elections of June 2009, the composition of the 2009–2014 Parliament would continue to be governed by the Nice provisions. And for as long as the institutional order depended on the Nice Protocol on EU enlargement, the number of Commissioners was to be less than the number of EU states after November 2009, whereas the Lisbon Treaty postponed the downsizing of the Commission to 2014.[359] On its part, the Irish government was anxious to seek a bargain that would placate the concerns of the Irish people in areas regarding:

1. the maintenance of Ireland's neutrality;
2. the safeguards under the Irish Constitution as regards the right to life, education and the family;
3. the preservation of Ireland's system of taxation; and

[357] European Commission Representation in Ireland, 'Ireland's economic crisis: how did it happen and what is being done about it?', at: ec.europa.eu/Ireland/key-eu-policy-areas/economy/irelands-economic-crisis/index_en.htm (accessed on 24 August 2014).
[358] Commission of the European Communities, 'Communication from the Commission to the European Council: A European Economic Recovery Plan', COM(2008) 800 final, Brussels, 26 November 2008.
[359] European Parliament Press Service, 'Ratify Lisbon Treaty before June 2009 European elections, says Constitutional Affairs Committee', 18 November 2008, 1.

4. the confirmation of the Union's commitment to a social Europe, regional cohesion, and more subsidiarity in the running of non-economic services and the common commercial policy.

Indeed, Taoiseach Brian Cowan presented these concerns to the European Councils of December 2008 and June 2009, at which the EU leaders agreed to give the necessary legal guarantees regarding the said concerns which included, *inter alia*, the invariance in the Commission line-up, on condition that Dublin ratified Lisbon 'by the end of the term of the current Commission.'[360] With these guarantees, the EU leaders secured Ireland's ratification of the Treaty via the second referendum of 2 October 2009, when 67.1 per cent of Irish voters endorsed Lisbon.[361]

Actually, the Irish people's insistence upon the preservation of their Commissioner proved that some (not to say many) member states seemed loath to break loose from their nationalist moorings.[362] Indeed, the Belgian MP Karel De Gucht had stated toward the Convention's conclusive phase that member states:

> refuse to give up 'their' Commissioner even in the face of a dramatic EU expansion eastwards and a concomitant overcrowded Commission. What should be an exercise in composing a supranational body based mainly on merit but qualified with some method of political and geographical balance is turned into an exercise making the Commission an intergovernmental body composed on the same principle as composition of the Council of Ministers.[363]

[360] Council of the European Union, 'Brussels European Council 11 and 12 December 2008: Presidency Conclusions', 17271/1/08 REV 1, CONCL 5, Brussels, 13 February 2009, Points 3 and 4, 2–3; and Council of the European Union, 'Brussels European Council 18/19 June 2009: Presidency Conclusions', 11225/2/09, REV 2, CONCL 2, 2–4; and Annex 1, 'Decision of the Heads of State or Government of the 27 Member States of the EU, Meeting within the European Council, on the Concerns of the Irish People on the Treaty of Lisbon', 17–18; and Annex 3, 'National Declaration by Ireland', 22–23.
[361] J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge, 2010), 56–60.
[362] European Parliament Press Service, 'MEPs debate the French Presidency with President Sarkozy', 16 December 2008, 5.
[363] European Convention, 'Contribution by Mr K. De Gucht, member of the Convention: "The European Commission: Countdown or extinction?"', CONV 705/03, CONTRIB 313, Brussels, 28 April 2003, 5.

Evidently, a Habermas-style post-national citizenship had not materialized after almost sixty years of European integration.

5.5 Conclusion

The narrative in the first part of this chapter suggests that the Union's constitution-making process is characterized by tensions between Brussels and the national capitals, because the latter tend to agree to transfer domestic competences to the supranational order, not necessarily because EU governments and constituent *demoi* are invariably committed to the federalist *telos*, but because watershed events like the onset of neo-liberalism, globalization, or the demise of Soviet communism, urge EU leaders to seek supranational solutions so that the constituent states might defend, or enhance, their national and mutual interests.

This thematic study tends to confirm this Janus-like character of Europeans *vis-à-vis* EU constitution-making. For example, the firm prospects of enlargement in the post-Amsterdam era triggered the need to explore *how* to enhance the efficiency of the Union's soon-to-be overcrowded institutions *without* undermining the representativeness of its constituent states. Thus at Nice, the big five were ready to forfeit one of their two Commissioners, as long as the weighting of votes in the Council were revised to reflect more equitably their demographic calibre *vis-à-vis* the smaller member states. And at Laeken, the leaders of the big countries wanted to believe that Europeans would accept *their* formula for a downsized College of Commissioners; and that Europeans would abandon the 'one state, one Commissioner' predicament, albeit 'qualified with some method of political and geopolitical balance'. Indeed, the big countries refused to take

heed of what the overwhelming majority of conventioneers and participating countries were saying, namely that the representative parity of the nation states in the EU executive was non-negotiable. This lack of convergence of wills and communication between Europe's political class and its *demoi* was aptly wrapped up by Jo Shaw, who remarked that the EU leaders had failed

> to break out of a vicious circle in which the more they [thought] they [were] doing to increase the democratic legitimacy of the EU polity and its treaty basis, the more they [were] perceived within the confines of national politics as illegitimately meddling in the arena of national popular sovereignty.[364]

Indeed, this thematic study shows that most Europeans are not yet ready to embrace a fully-fledged federal order because the roots of their respective nation state are still strong, and because Europeans seem to lack a shared *telos* as to what the Union stands for. This may be construed from the Eurobarometer surveys related to the post-Nice ratification process, according to which, the French and Dutch voters turned down the Constitution because they deemed that the deepening process was going too far, too fast. And since they did not mention the loss of their representative in every Commission line-up among the main reasons for rejecting the Constitution, the EU leaders failed to address this issue during the 'period of reflection' and 2007 IGC; nor could they foresee that the Irish would reject Lisbon.

To conclude, the French, Dutch, and Irish recourse to the popular vote implies that ordinary citizens possess a powerful instrument, which occasionally impinges upon the Union's constitution-making process. Indeed, the nationalistic ethos of the Irish prevailed over the nation-blind vision of a downsized and possibly more effective Commission after nine years of debate at various political levels. Furthermore, Ireland's

[364] J. Shaw, 'The Constitutional Development of Citizenship in the EU Context: With or Without the Treaty of Lisbon', in Xuereb (2008), 71.

retention of her appointee in every Commission line-up constitutes a firm guarantee for prospective small or medium-sized member states who are thus assured that they will be entitled to having their national in the College of the Commission like any big EU country.

CHAPTER 6

ENLARGEMENT OF THE EU AND THE POLITICAL ECONOMY OF CONFEDERATION

6.1 Introduction

According to Moravcsik, theories of political economy explain international cooperation 'as an effort to arrange mutually beneficial policy coordination among countries whose domestic policies have an impact on one another'; and that 'cooperation is a means for governments to restructure the pattern of economic policy externalities [...] to their mutual benefit.'[365] This insight aptly describes the rational choices of the ECSC member states as they founded the other European Communities, some of whom (e.g. Belgium and France) were about to lose their colonial markets. Indeed, the main objectives of the EEC Treaty were: the establishment of a common market through the approximation of the member states' national economic policies, so that they would (re)gain market access beyond their borders; and the removal of existing obstacles in order to guarantee transnational economic expansion, balanced trade and fair competition, which were expected to translate into an improved standard of living for Europeans. What the founding fathers *did not* foresee back then, was that of all the trading blocs established across Europe between 1949 and 1960, the EEC was destined to prevail and develop into a pan-European economic *and* political union.

In view of the foregoing, section two recounts how the initial success of the Common Market motivated the Six to draw a plan for the realization of an economic and monetary union (EMU) by 1980. Sections three and four examine how the international

[365] Moravcsik, *The Choice for Europe*, 35.

currency instability caused by the débâcle of Bretton Woods, and the energy crises of the 1970s put the EMU project on hold; and how the 'oil shock' of 1979 and concurrent adoption of neo-liberal policies by the member states persuaded the EC leaders to re-launch EMU, and agree to the completion of the single market by the end of 1992. In section five, it is argued that since the member states continued to enjoy exclusive competence in domestic economic policy, EMU as crafted at Maastricht was flawed, because it had *neither* a financial equalization system like those of Germany, Canada, and Switzerland, *nor* adequate stability mechanisms that could help the EU countries overcome financial difficulties whenever they incurred excessive sovereign debts. Indeed, the thematic study revolves around the member states' post-Nice sovereignist resistance to the completion of EMU because besides searching 'mutually beneficial policy coordination', the member states tend to defend their non-negotiable sovereign policy choices by way of opt-outs and other means, thus giving rise to what Helen and William Wallace describe as 'differentiated integration'.[366]

6.2 EMU: the opening gambits

The EEC Treaty was designed to bring about what Jacob Viner called integration through 'trade diversion', that is an increase in intra-Community trade at the expense of a reduction of trade between the EEC and the outside world.[367] Indeed, the creation of the Common Market triggered a capital-goods boom, as entrepreneurs anticipated EC politicians' initiatives to reinforce trade diversion. Thus, for fear of losing markets, US capital investment in the EEC registered a 235-per cent increase during 1958–62

[366] H. & W. Wallace, *Flying Together in a Larger and More Diverse Union* (The Hague, 1995).
[367] J. Viner, *The Customs Union Issue* (New York, 1950).

compared to the previous quinquennium,[368] and by 1967, the EEC overtook the US to become the world's largest trading bloc.[369]

The EEC Treaty did not make provisions for the creation of an economic and monetary union. However, Article 104 indicated that the High Contracting Parties were agreed to consider their monetary policies as a matter of common concern, whereas Article 105 provided for the establishment of a Monetary Committee composed of appointed senior officials from the member states' finance ministries and national central banks. This Committee was to report to the Council of Economic and Finance Ministers (Ecofin) on the Community's monetary and financial policies. And in accordance with Articles 106 and 107, the Committee of Central Bank Governors was established on 8 May 1964 to hold consultations concerning the monetary policy of the participating national central banks.[370] Nonetheless, it was at The Hague summit of December 1969, that the EC leaders agreed that in concomitance with the re-activation of the first enlargement negotiations, and plans for the creation of a system of 'own resources' for the Community budget, a roadmap be drawn by the Luxembourg Prime Minister Pierre Werner with a view to creating an economic and monetary union.[371]

According to Werner, EMU could be achieved within ten years, provided the political will of the member states to realize it was present.[372] But in order to ensure

[368] G.M. Taber, *Patterns and Prospects of Common Market Trade* (London, 1974), 11.
[369] See Eurostat DG, *Europe in Figures* (Luxembourg, 1988), '15. Gross Domestic Product'; and A.S. Milward, *Politics and Economics in the History of the European Union* (London & New York, 2005), 1–2.
[370] H. James, 'The Potential of a Caterpillar: or The Origins of European Monetary Integration', Paper for Yale Economic History Seminar, March 28, 2011, 26.
[371] The Commission had published its first memorandum on monetary union in 1962. See, European Commission, 'Memorandum of the Commission on the Action Programme of the Community for the Second Stage', COM(62) 300 final, Brussels, 24 October 1962, 63 –67.
[372] *Bulletin of the European Communities*, 'European Commission Report to the Council and the Commission on the realization by stages of Economic and Monetary Union in the Community', Supplement 11, 8 October 1970, 14.

EMU's cohesion, transfers of responsibility from the national, to the Community level were inevitable. This meant, *inter alia*, that the Community system for central banks be modelled on the US Federal Reserve System,[373] and that the EP become the centre of decisions upon economic policy. Furthermore, the harmonized management of national budgets was deemed an 'essential feature of cohesion in the union.'[374] In fact, Werner posited that

> [t]hese transfers of responsibility represent a process of fundamental political significance which implies the progressive development of political cooperation. Economic and monetary union thus appears as a leaven for the development of political union, which in the long run it cannot do without.[375]

But before proceeding with this analysis, the quest for EMU must be reviewed within the parameters of America's post-war ascendancy in global monetary policy; and the economic and monetary policy preferences of the Community's big three agenda setters, namely France, Germany, and the UK. To begin with, the US-led Bretton Woods fixed exchange rate system continued to bolster the world's financial markets, international trade, and post-war economic recovery until the Nixon administration allowed the dollar to float freely in August 1971.[376] Consequently, other currencies experienced volatility, with many economies suffering high rates of inflation. For example in Europe, each dollar depreciation triggered inflows of capital into the German economy, and capital outflows from its weak-currency partners, thus putting pressure on the Bundesbank to appreciate the Deutschmark. In fact, the German currency soon gained an unrivalled reputation as a 'hard' currency, whereas rising capital mobility undermined the other

[373] Ibid., 13.
[374] Ibid., 11.
[375] Ibid., 12.
[376] A. Best, et al., *International History of the Twentieth Century* (London & New York, 2004), 205, 231, 271, 342.

member states' freedom to set their own exchange rates and maintain parities or low interest rates.[377]

On their side, the French argued that if EC currencies were coordinated, dollar depreciation would be less likely to trigger depreciation among the weaker currencies, and capital flows would be less likely to prefer Germany.[378] This rationale crystallized as the asymmetry between the French and German economies became ever more pronounced in favour of the latter.[379] In other words, France aimed at redirecting Germany's economic strength to European objectives, and at challenging US monetary supremacy exerted via the World Bank and the IMF.[380]

France and Germany also held divergent views as to how to control monetary and fiscal policies. On the one hand, Paris championed the idea of a *gouvernement économique*, to stress that political leadership retain control over monetary policy. This emphasis on public power was entrenched in the French republican tradition, which found its expression in the convention that EC policy fell within the presidential 'reserved domain'.[381] On the other, Bonn had depoliticized monetary policy in 1957 by granting substantial independence to the Bundesbank, and removing domestic monetary policy-making from inter-party wrangling and the electoral cycle.[382] Furthermore, the Bundesbank's 'sound money' policy was generally shared by the State, the German public and business leaders, all of whom feared a repeat of the hyperinflations of 1922–

[377] M. Levitt & C. Lord, *The Political Economy of Monetary Union* (Houndmills & New York, 2000), 20.
[378] Dyson & Featherstone, 65.
[379] Euromonitor Publications, *Western European Economic Handbook* (London, 1987), 161, 165.
[380] T.E. Vadney, *The World Since 1945*, 2nd edn. (Harmondsworth, 1992), 66–68.
[381] Dyson & Featherstone, 31, 68.
[382] Levitt & Lord, 35.

23 and 1945–48; hence the Bundesbank's mandate to fight inflation, even if that meant countervailing Bonn.[383]

As for the UK, British economists tended to favour market-based policy solutions, and a cautious approach to most EC policy ventures. This outlook was ingrained in British classical and neo-classical economics, which championed unilateral decision-making, rather than policy application within the constraints of supranational institutions and undertakings. This way of thinking stemmed from the City of London's global, rather than solely European orientation.[384] Thus, the creation of a supranational European central bank was unpopular with most UK prime ministers, for whom the ability to run an independent monetary, economic and fiscal policy lay at the heart of what constituted a sovereign state.[385]

6.3 Post-Bretton Woods concerns and the *relance* of EMU

In the 1970s, German officials in Bonn and Frankfurt were concerned that monetary union would encourage weak-currency countries to run deficits, which would force the Bundesbank to shoulder a high inflation rate. Thus in October 1972, the Federal cabinet agreed that Germany accept constraints on its monetary policy only if other EC countries agreed to macroeconomic convergence, low inflation, and capital liberalization. Meanwhile, international currency instability determined by the prolonged energy crises of the 1970s foiled Werner's 1980 deadline. Indeed, by 1976, nine exchange-rate

[383] C. Randlesome, 'The Business Culture in the West Germany', in *Business Cultures in Europe*, C. Randlesome, et al. (Oxford, 1990), 20–22.
[384] C. Randlesome, 'The Business Culture in the United Kingdom', in Randlesome, et al., 179.
[385] See Moravcsik, *The Choice for Europe*, 419.

adjustments occurred, with the Bundesbank bolstering the weaker currencies on several occasions.[386]

Actually, the first initiative to redress the terminal crisis of Bretton Woods was taken in April 1972, outside the EC institutional framework during a meeting of central bank governors at the Bank for International Settlements (BIS). The ensuing Basle Agreement saw the creation of the 'snake in the tunnel' exchange rate arrangement, which permitted participating currencies to deviate within bands of ± 2.25 per cent.[387] This agreement suited the member states because it avoided domestic opposition to monetary policy being transferred from the national, to the Community level. Eventually, an intergovernmental advisory Economic Policy Committee was instituted under Council Decision 74/122/EEC in February 1974 to oversee the coordination of the member states' economic and budgetary policies.

Things were about to take another turn when the erratic economic policies of the Carter administration, and the 'oil shock' of 1979, convinced French President Valéry Giscard d'Estaing to back Chancellor Helmut Schmidt's plan for the pooling of national currency reserves in order to attenuate intra-EC exchange rate instability.[388] The outcome of this German proposal was the launching in March 1979, of the European Monetary System (EMS), under which the participating states were to run their money supplies as a single bloc, with the creation of the European currency unit (ECU) as its virtual currency. Meanwhile, the UK opted not to join the Exchange Rate Mechanism (ERM), since Treasury officials had cautioned Prime Minister James Callaghan that a fixed sterling–

[386] Ibid., 248, 294.
[387] Ibid., 293; and E. Thiel, 'Changing patterns of monetary interdependence', in *The Dynamics of European Integration*, ed. W. Wallace (London & New York, 1990), 73.
[388] J.R. Gillingham, *European Integration 1950–2003: Superstate or New Market Economy?* (Cambridge, 2003), 103–104.

Deutschmark exchange rate would negatively affect Britain's economic growth and provoke a rise in unemployment.[389] In other words, the ERM relied upon a voluntary system of self-enforced rules agreed by unanimity within the EC's multilevel institutional framework, namely the Ecofin, the Monetary Committee, the Economic Policy Committee, and the Committee of Central Bank Governors meetings.[390]

Other factors were set to re-launch the EMU project. To begin with, many domestic governments chose to abandon Keynesian demand-management policies in favour of monetarist-oriented supply-side policies based on the privatization and deregulation of the economy in order to boost investment and technological innovation. This strategy was deemed necessary by the national capitals to fight unemployment, and to reverse the member states' diminishing R&D position in the global competition with Japan and the US.[391] Thus, Britain and Germany eliminated capital controls in 1979 and 1981 respectively, whereas France did so in 1984, as the Elysée realized that the adoption of a deregulatory stability-oriented economic policy would facilitate the franc's realignment with the EMS parity grid. Likewise, the Benelux liberalized their banking sector in 1984–85, in their bid to halt multinational banks and firms from seeking cheaper capital elsewhere.[392] Furthermore, French President François Mitterand found an ally in Helmut Kohl who, after assuming the leadership of the CDU in June 1973, had raised the issue of European integration with reference to the establishment of a single market, intra-EC freedom of movement, and the need for streamlined decision-making to achieve

[389] British Information Services, Policy and Reference Division, 48/78, *Economic Policy: European Monetary System*, 'Mr. James Callaghan, Prime Minister in the House of Commons on December 6, 1978', 2 at: aei.pitt.edu/1424/1/Brussels_dec_1978. pdf (accessed on 1 July 2015).
[390] Levitt & Lord, 38.
[391] Rodríguez-Pose, 15, 114–118, 127–135.
[392] Moravcsik, *The Choice for Europe*, 346, 410.

it.[393] Thus, the transformation of a still highly regulated customs union into a single market became the shared desideratum for EC leaders.

Equally important for this *relance* was the appointment of former French Economics and Finance Minister Jacques Delors as Commission President, who according to George Ross was 'central in the 1983 realignment of the European Monetary System […], which was the turning point for French politics that led to new strategies within the context of European integration'.[394] Furthermore, Delos exploited the fact that the national capitals were putting in place deregulatory policies which were congenial to the completion of the internal market. This explains why in less than three years from assuming the Presidency, Delors managed to garner the support of the EC leaders for the completion of the internal market, and succeeded in inserting a commitment to EMU in the Preamble to the SEA. Furthermore, as the SEA was being ratified by the member states, peak business groups in Germany, France and the UK strongly supported monetary integration. For example, Daimler-Benz President Edzard Reuter, and the Confederation of British Industry anticipated that the single currency would be beneficial to business. And in France, the bigger businesses (e.g. aerospace), and the export sector dependent on the dollar exchange rate supported EMU, on condition that the single currency be set at a competitive rate *vis-à-vis* the dollar.[395] Thus at the Hanover Council of June 1988, the European Council decided to appoint a committee to report on 'concrete steps' leading towards monetary union.[396]

[393] Ibid., 327.
[394] G. Ross, 'Jacques Delors', in Dinan, *Encyclopedia of the European Union*, 125.
[395] Moravcsik, *The Choice for Europe*, 332, 409, 421.
[396] 'European Council in Hannover 27 and 28 June 1988, Conclusions of the Presidency', SN 2683/4/88, point 5, para. 3.

This committee was intentionally composed of the central bank governors of the Twelve, with Delors as Chair. The idea was to link EMU to a forum of non-state, rather than political actors. However, Delors was aware that Bundesbank President Karl-Otto Pöhl would reject any proposal that denied a central monetary body substantial autonomy and an anti-inflationary mandate.[397] Thus the *Delors Report* suggested that

> The domestic and international monetary policy-making of the Community should be organized in a federal form, in what might be called a *European System of Central Banks* (ESCB). This system would have to be given the full status of an autonomous Community institution. [Furthermore] centralized and collective decisions would be taken on the supply of money and credit as well as on other instruments of monetary policy, including interest rates.[398]

And in order to veil this deliberate reference to a federal institutional model, Delors tactfully steered the Committee away from positing any challenge to national sovereignty. Thus, whereas EMU was to 'represent the final result of the process of progressive economic integration in Europe', the Report stressed that

> [e]ven after attaining economic and monetary union, the Community would continue to consist of individual nations with differing economic, social, cultural and political characteristics. The existence and preservation of this *plurality* would require a degree of autonomy in economic decision-making to remain with individual member countries and a balance to be struck between national and Community competences.[399]

However, such decisions were to be placed within an agreed macroeconomic framework, and be subject to binding procedures and rules. Finally, the Report suggested that the first stage (of three) toward EMU start on 1 July 1990, when the Directive for the full liberalization of capital movement was to take effect. But the Report was rather vague on the passage to Stage 2; and from Stage 2 to the irrevocable fixing of exchange rates

[397] Moravcsik, *The Choice for Europe*, 464.
[398] Committee for the Study of Economic and Monetary Union, *Report on economic and monetary union in the European Community*, Commission Working Document, 17 April 1989, 21, 15 (respectively, points 24 and 32).
[399] Ibid., 13 (point 17).

(Stage 3).[400] Actually, Delors had crafted a plan which would be acceptable at the Madrid Council of June 1989, in that monetary union was supposed to respect the member states' autonomy in economic decision-making and other public policy areas, such as internal and external security, justice, social security, and education.[401]

6.4 On the road to Maastricht

After Madrid, Chancellor Kohl was: aware that the surrender of the Deutschmark was widely unpopular with the Germans;[402] and under the impression that if monetary union were to materialize, it would be a long-term goal.[403] Meanwhile, the unexpected dissolution of the Soviet Union; and the demise of the Cold War, forced Paris and Bonn to revise their respective foreign policies. For a start, the Elysée realized that the end of the Cold War meant the 'removal of international constraints on German sovereignty that had been in place for the previous four decades, and had given Paris important advantages in its bilateral relations with Bonn.'[404] Furthermore, it was in France's interest to forge a politically stronger Europe in order to countervail Washington's sole leadership in a post-Soviet era that was then unfolding; and to ensure that the Franco-German relationship survived potentially dangerous geopolitical shocks in post-Wall Europe. Therefore, President Mitterand named monetary union as France's price to reconcile sceptical sections of the French public with German reunification in order to prevent the German Question from turning into a controversial issue west of the Rhine, and beyond

[400] Ibid., point 43 (page 28); and point 57 (pages 34–35).
[401] Ibid., 19, point 30, para. 2 (page 19).
[402] Moravcsik, *The Choice for Europe*, 403.
[403] Levitt & Lord, 48.
[404] See M.J. Baun, 'The Maastricht Treaty As High Politics: Germany, France, and European Integration', in *Political Science Quarterly*, vol. 110, No. 4 (1995–6), 610.

the Oder-Neisse line.[405] Hence Mitterand and Kohl's calling of two parallel IGCs – one on EMU, the other on political union – in their joint letter to the Irish Presidency of the EC in April 1990.[406] From that moment on, the Commission receded in the background, as tougher intergovernmental bargaining tactics prevailed in the IGCs. Thus, at successive European Council summits and in-between bilateral and multi-lateral intergovernmental meetings: Mitterand focused on locking Germany's economic and political power within a more centralized institutional framework; Kohl wanted that the proposed ESCB and ECB be independent of the national capitals and the member states' electoral cycles; and Britain kept defending its monetary and fiscal sovereignty.[407] And in order to keep the British in play until the very end, Kohl accepted a seven-year timetable for Delors's three-stage plan at the Luxembourg Council of June 1991, under which there was to be no imposition, no arbitrary exclusion, and no veto on any member state, once EMU reached its final stage. In this way, Kohl was being supportive of Whitehall's strategy, that if the Bundesbank's strict regulatory criteria for economic and monetary convergence were deemed unacceptable to Whitehall, Britain could opt out of EMU.[408] Eventually, the Maastricht accords copied Delors's three-stage plan; and stipulated five 'convergence criteria' that the member states were expected to implement by 1999 at the latest, before they could adopted the single currency. These were:

1. a budget deficit of not more than 3 per cent of GDP;

[405] Ibid., 611, 615, 620.
[406] 'Letter by the German federal chancellor Helmut Kohl and French president François Mitterand to the Irish Presidency of the EC', 19 April 1990, point 2, para. 2, at: www. ellopos.net/politics/Mitterand-kohl.htm (accessed on 1 July 2015).
[407] 'Conclusions of the Presidency, European Council. Rome, 27 and 28 October 1990', SN 304/90 REV 2, 5–8.
[408] Dyson & Featherstone, 422, 613.

2. a government debt of not more than 60 per cent of GDP;[409]
3. a level of inflation not greater than 1.5 per cent above the average level achieved by the three member countries with the lowest levels of inflation;
4. a record of respecting the normal fluctuation margins of the ERM;
5. interest rates that were no more than 2 per cent above the average level of the three states with the lowest levels.[410]

Furthermore, Maastricht laid down an autonomous statute for the ECB.[411] Indeed, Bonn and Frankfurt had insisted that the single currency copy the characteristics of the Deutschmark, and Frankfurt's 'sound money' policy so that the Germans would accept it. On the other hand, Britain chose to opt out of monetary union.[412]

6.5 The structural weaknesses of EMU

As twelve member states were implementing the necessary reforms in order to comply with the Maastricht convergence criteria, the debate turned on *how* the future euro area member states would ensure durable budget discipline after Stage 3. This stemmed from the fact that the national governments had preserved their sovereignty in economic and budgetary affairs. Furthermore, no financial equalization mechanisms had been included in the Maastricht accords. In other words, EMU's viability rested upon the assumption that the budgetary position of each member state be close to balance or in surplus. Indeed, Germany was particularly sensitive to this issue. Thus, in December 1996, the European Council crafted the Stability and Growth Pact (SGP), under which:

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[409] *Maastricht Treaty*, Protocol 5, Article 1.
[410] Ibid., Protocol 6, Articles 1, 3, and 4. None of these reference values were mentioned in the *Delors Report*.
[411] Ibid., Protocol 3, Chapter III.
[412] Ibid., Protocol 11.

- each member state would commit itself to aim for a medium-term budgetary position of close to balance or in surplus;
- member states adopting the single currency would be required, by secondary legislation, to present **stability programmes** which would specify their medium-term budgetary objectives, together with an adjustment path for the budget surplus or deficit ratio and expected path for the government debt ratio; whereas
- non-euro area member states would submit **convergence programmes** containing information similar to that of the stability programmes.[413]

Furthermore, the EU leaders agreed, *inter alia*, that the member states would keep their budget deficits to less than 3 per cent of GDP; and that if a member persistently ran a deficit in excess of said reference value, it would incur a fine.[414] Eventually, these proposals were adopted on 7 July 1997, by virtue of Council Regulations (EC) 1466/97 and 1467/97.

Stage 3 was completed in January 1999, when the euro was introduced as an electronic currency, and the ECB took over responsibility for the euro area's monetary policy. Undoubtedly, the implementation of the Delors Plan represented a high water-mark in the history of European integration, as twelve sovereign states voluntarily replaced their national currencies with a single currency.[415] And although the creation of the euro was an economic project, it was not only the logical sequel to the single market project and a crowning point of economic integration, but also a political act because a currency symbolizes the power of the sovereign who guarantees it.

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[413] European Council, 'Dublin European Council, 13 and 14 December 1996: Presidency Conclusions', DOC/96/8, Annex I, Ecofin Council, points 21–23.
[414] Ibid., point 35.
[415] The 12 euro area member states were Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain.

However, a careful analysis of the provisions governing EMU and post-Maastricht developments in this policy area reveals that there were several factors which tainted the aura of this union. To begin with, not all member states had chosen to adopt the euro. Indeed, following the rejection of Maastricht in the Danish referendum of June 1992, Denmark was granted an opt-out clause similar to the one negotiated by Britain in 1991. And Sweden did not proceed to Stage 3 after the Swedes rejected the adoption of the single currency in the referendum of September 2003. Furthermore, the member states retained their sovereignty in other key areas, like the budget, taxation, social policy, and employment. In other words, whereas monetary policy had been centralized for the euro area countries, the economic and fiscal arm of EMU remained in the hands of the national governments.

6.6 Thematic study: post-Nice sovereignist resistance to the completion of EMU

6.6.1 The Union's economic governance under examination

At Laeken, the EU leaders concurred that 'in coordinating the economic, financial and fiscal environment, the basic issue should continue to be proper operation of the internal market and the single currency, without this jeopardising the Member States' individuality.'[416] In other words, the Convention was expected to craft a mechanism that would render EMU more effective *without* diminishing the member states' sovereignty in economic governance. Thus, in mid-June 2002, the Praesidium established WG VI on 'economic governance', with German MEP Klaus Hänsch as chair. Six other MEPs, one representative of the Commission, two observers from the ESP, and one observer from the ESC represented the EU institutions. Twenty-five other committee members

[416] 'Laeken Declaration on the Future of the European Union', 21.

represented the national governments and domestic parliaments of twenty-one participating countries.[417] The mandate of this WG was to explore, *inter alia*, whether '[t]he introduction of the single currency implie[d] a more thorough-going economic and financial cooperation', and if so, what forms such cooperation could take.[418] Furthermore, the committee members were asked to consider whether:

1. certain aspects of economic policy competence could be communitarized;
2. the SGP and the excessive deficit procedure (EDP) operated effectively, and suggest how they could be improved;
3. economic policy coordination, and the coordination of social and employment issues could be enhanced;
4. the introduction of the euro justified the introduction of fiscal harmonization;
5. the accountability and governance of EMU were credible and legitimate;
6. the Eurogroup created in 1997 as an informal body was to be formalized;
7. the international representation of the euro area could be improved.[419]

During the consultations which preceded the publication of the first draft of the WG's Final Report, twenty-four group members, plus eleven other conventioneers from outside WG VI, tabled fifty-nine contributions. Another nine contributions were tabled as the WG revised successive drafts prior to the publication of its Final Report in October 2002.[420]

[417] European Convention, 'Composition of the Working Groups', CONV 77/1/02, REV 1, Brussels, 14 June 2002, 7. The countries that were not represented, neither at the national, nor at the European level were Bulgaria, Cyprus, Denmark, Lithuania, Malta, and Slovakia.
[418] European Convention, 'Mandate of the Working Group on Economic Governance', CONV 76/02, Brussels, 30 May 2002, 2.
[419] Ibid., 2–4.
[420] Analysis is based on the first set of 59 contributions.

To begin with, the transfer of economic policy from the national-, to the Union level was backed by only two members.[421] On the other hand, the Commission, the government representatives of Estonia, France, Germany, Ireland, Latvia, Luxembourg, the Netherlands, and Poland, and four other delegates defended the member states' right to remain in charge of economic policy.[422]

As for point 2, seven delegates concurred that the SGP was a valuable mechanism of budgetary coordination, and instrumental in maintaining price stability.[423] On the other hand, five Left-wingers suggested that the SGP rules needed to be relaxed in order to stimulate investment, employment, and sustainable growth,[424] whereas the Polish and Irish government representatives, and Socialist MEPs Linda McAvan and Anne van Lancker suggested that national budget deficits be evaluated on the basis of their economic cycle, rather than on the projections of one financial year because in their view, the automatic application of the EDP's stringent measures could compromise economic growth and have negative effects on national employment levels.

With regard to point 3, many delegates favoured the strengthening of economic policy coordination. Thus, all three observers of the ESC joined the Dutch, Latvian, and Polish government representatives, British MEP Linda McAvan, and ESP observer Emilio Gabaglio, to point out that the open method of coordination (OMC) as defined by

[421] These were the Italian MPs Marco Follini (Democratic Centre Union), and Valdo Spini (Left Democrats). See WG VI, *Working documents 1* and *2*, Brussels 17 June 2002, 1–3 (in both documents).
[422] WG VI, *Working document 3 rev.*, Brussels, 19 June 2002, 2, 13, 19, 22, 28, 48, 50, 53, 59, 63; *Working document 7*, Brussels, 8 July 2002, 28, 78; and *Working document 9*, Brussels, 16 July 2002 (unpaged document), 'Contribution de Pierre Moscovici, Représentant des autorités français aux travaux du group "Gouvernance économique', first page.
[423] These were the government representatives of: Luxembourg, the Netherlands, and Poland; the Finnish MEP Piia-Noora Kauppi, and German MEP Sylvia-Yvonne Kaufmann; the Finnish MP Riitta Korhonen; and ESP observer Georges Jacobs. WG VI, *Working document 3 rev.*, 12, 19, 29, 37–38, 45–46, 48, 61.
[424] These were: the government representatives of Greece and Romania; the Belgian MEP Anne van Lancker, and German MEP Sylvia-Yvonne Kaufmann; and Italian MP Valdo Spini. WG VI, *Working document 3 rev.*, 33, 37, 58, 62, 65.

the Lisbon Council in March 2000, provided the member states with the opportunity to learn from each other in terms of policy coordination and implementation. And in their view, the intergovernmental and voluntary nature of OMC provided every member with the flexibility to respond to its domestic circumstances.[425]

Meanwhile, the debate on the introduction of some form of fiscal harmonization (point 4) split the delegates into two camps. On one side, the British Liberal MEP Andrew Duff, ten Socialist MEPs, and four other WG members from the Czech Republic, Estonia, Greece, and Germany concurred upon the establishment of an EU budget, which would replace the existing 'own resources' mechanism with a financial equalization system similar to that of federal states.[426] On the other, the Commission, eleven delegates from as many countries, and the ESP observer defended the unanimity rule for taxation. Furthermore, the Commission, and the government representatives of Estonia, France, Germany, the Netherlands, and Poland favoured fiscal coordination, especially in the euro area in order to enhance competition within the internal market, and enhance the free movement of goods, labour, services, and capital.[427]

As for the accountability and legitimacy of EMU, nine WG members, and nine Socialist MEPs concurred that the EP should:

[425] European Convention, 'Resolution adopted by the Economic and Social Committee', CONV 323/02, CONTRIB 110, Brussels, 7 October 2002, 7.
[426] European Convention, 'Contribution from Mr Andrew Duff, member of the Convention', CONV 57/02, CONTRIB 28, Brussels, 21 May 2002, 5; 'Contribution from certain members of the Convention', CONV 189/02, CONTRIB 64, Brussels, 12 July 2002, 6; WG VI, *Working document 3 rev.*, 24–25, 42, 68; and *Working document 7*, 36, 56.
[427] WG VI, *Working document 3 rev.*, 25–26, 28; *Working document 7*, 17–18, 24, 29, 36; and *Working document 9*, 'Contribution de Pierre Moscovici...', third page.

- be more involved in EMU policies, and empowered to approve new members of the ECB Executive Board;[428]
- give its opinion, and have a consultative role in the debates concerning the member states' Broad Economic Policy Guidelines (BEPGs);[429]
- have a greater say in its role as an arm of the Union's budgetary authority.[430]

Likewise, six WG members[431] and the Commission suggested that the latter have the right to propose initiatives for the BEPGs, rather than just table recommendations that could be easily overruled by the Council. Furthermore, the Greek government representative Giorgos Katiforis, the German MEP Sylvia-Yvonne Kaufmann, and the Czech MP Josef Zieleniec suggested that there be a political authority with competence in the monetary area.

As for point 6, the general sentiment was for the Eurogroup to maintain its informal character. On the other hand, the Commission and four WG members favoured the establishment of a euro area Ecofin Council.[432] As for the euro area's single external representation (point 7), the Commission enjoyed modest trust among a handful of delegates.

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[428] CONV 189/02, 4; WG VI, *Working document 3 rev.*, 3; *Working document 7*; *Working document 9*, 'Contribution de M. Gabaglio', first page; 'Contribution de Mme Kaufmann', second page; and 'Contribution de Mme van Lancker', first, and second page.

[429] WG VI, *Working document 3 rev*., 3, 53; and *Working document 9*, 'Document from the Commission: Comments on Point 11: Policy assignment and adequate legitimacy and accountability', third page; 'M. Jacques Santer, Membre de la Convention Européenne: Points 11 à 13 du Mandat du mai 2002 (CONV 76/02)', first page; 'Contribution by Georges Jacobs, President of UNICE, regarding points 11–13 of the mandate of the WG on economic governance', first page; and 'Contribution of Mr. De Bruijn', first page.

[430] CONV 189/02, 6.

[431] These were the three ESC observers; the German and Belgian MEPs Sylvia-Yvonne Kaufmann and Anne van Lancker respectively; and the Luxembourg government representative Jacques Santer.

[432] These were the French and Luxembourg government representatives; the German MEP Sylvia-Yvonne Kaufmann, and the ESP observer Emilio Gabaglio.

Hänsch submitted the Final Report of WG VI on 21 October 2002, which suggested, *inter alia*, that:

1. the Union's economic and social objectives be included in the Constitution;
2. the competence for monetary policy within the eurozone remain with the Community;
3. the tasks, mandate, and Statute of the ECB remain unchanged;
4. member states preserve their exclusive competence for economic policy;
5. without prejudice to point 4, the commitment by the member states to decisions taken within the economic policy coordination framework at European level be strengthened;
6. the pursuit of monetary and budgetary stability as the basis for sound economic growth be of utmost common concern;
7. the Commission be vested with the right to make a formal proposal, rather than a recommendation on the BEPGs; and have the power to issue 'first warnings' on excessive deficits directly to the member states concerned;
8. no measures be taken which prevented the possibility of informal discussions amongst the Eurogroup finance ministers, the ECB, and the Commission.[433]

6.6.2 The Praesidium proposes, and the Convention disposes

The Secretariat of the Convention tabled the first amendments to Part II of the Constitution in mid-March 2003. Eventually, the Praesidium published: (1) its draft

[433] European Convention, 'Final report of Working Group VI on Economic Governance', CONV 357/02, WG VI 17, Brussels, 21 October 2002, 2–8.

articles on EMU on 27 May 2003; and (2) a revised version of said drafts on 12 June 2003.[434] The articles which concern this chapter are:

- draft Articles 66–67, on the general policies, objectives, and guiding principles of EMU;
- draft Article 68, on sustained convergence of the member states' economic performance on the basis of the BEPGs formulated by the Council, on a recommendation from the Commission;
- draft Article 69, on the granting of financial assistance to a member state that ran into budgetary difficulties caused by exceptional occurrences beyond its control;
- draft Articles 70–71, on the prohibition of overdraft facilities; and any measure or provision not based on prudential considerations, in favour of Union or national institutions, bodies, or other public authorities;
- draft Article 72, on rules regarding the joint execution of transnational projects;
- draft Article 73, on the reference values that constitute an excessive government deficit; and the procedure by which a member state that incurred such deficit would need to follow to correct it;
- draft Articles 74–80, on the competences and working of the ESCB;[435]
- draft Articles 82–83, on the institutional provisions and responsibilities concerning the ECB's Governing Council and the Executive Board;

[434] European Convention, 'Part Two of the Constitution – Report by the working party of experts nominated by the Legal Services of the European Parliament, the Council and the Commission', CONV 618/03, Brussels, 17 March 2003, 32; and 'Draft Constitution, Volume II – Draft text of Parts Two, Three and Four', CONV 725/03, VOLUME II, Brussels, 27 May 2003, 49–59; and 'Draft Constitution, Volume II – Draft revised text of Parts Two, Three and Four', CONV 802/03, VOLUME II, Brussels, 12 June 2003, 48–59.

[435] Draft Article 81, on the adoption of common positions on monetary measures within international fora by euro area member states; and on the Union's unified representation within such fora, was subsumed under draft Article 85c. Compare CONV 725/03, 57, with CONV 802/03, 56, 59.

- draft Article 84, on the establishment, and the role of the Economic Financial Committee in the 'coordination of the policies of Member States to the full extent needed for the functioning of the internal market';
- draft Article 85, on the Commission's right: (1) to forward to the Council or a member state, recommendations or proposals, subsequent to a member state's non-compliance with agreed BEPGs; and (2) to issue recommendations regarding the reduction of a member state's excessive government deficit;
- draft Articles 85a–c, on provisions aimed at enhancing coordination of the economic policies and budgetary discipline of the euro area member states.[436]

These drafts copied (with minor amendments) the corresponding Maastricht articles,[437] whereas the Protocols on: 'excessive deficit procedure'; the 'Statute of the ESCB and the ECB'; and the 'convergence criteria', were reproduced practically intact. However, some novelties were dictated by the eurozone countries' call for the crafting of additional provisions in order to serve their interest. Thus, the proposals on: enhanced coordination of the economic policies and budgetary discipline of euro area member states (draft Article 85a); the institutional nature of the Eurogroup (draft Article 85b); the euro area members' adoption of common positions at international financial fora, including their external representation (draft Article 85c); and the protocol on the status of the Eurogroup, were new in content and form.

All in all, the twenty-three draft articles under review triggered 118 suggestions for amendment by ninety-one delegates from the Commission; the ESC; the ESP; the

[436] Ibid.
[437] Compare Praesidium draft Articles 66–85c, with *Maastricht Treaty*, Articles 3a, and 102a–109d.

CoR; and all the participating countries, except Bulgaria and the Czech Republic.[438] Eight articles namely:

- draft Articles 66–67, on the general objectives and principles of EMU;
- draft Article 68, on multilateral surveillance procedures regarding the member states' and the Union's BEPGs;
- draft Article 73, on EDP rules and regulations;
- draft Article 74, on the objectives of the ESCB;
- draft Article 76, on the rules for amendment of the Statute of the ESCB;
- draft Article 85b, on the institutional status of the Eurogroup;
- draft Article 85c, on the euro area members' adoption of common positions, and common external representation,

triggered ninety-two amendment proposals. The remaining fifteen draft articles prompted twenty-six amendment proposals only, meaning that in this case the Convention was rather in sync with the provisions crafted at Maastricht. Therefore, the focus will be on the more contested set of amendment proposals.

To begin with, under draft Articles 66–67, the Praesidium had nested EMU within the parameters of 'an open market economy with free competition', and excluded any reference to EMU's social dimension. Thus, twenty-nine delegates (of whom twenty-five were Left-wingers) suggested that the 'open market economy' principle be substituted by 'an open social market economy' principle.[439] Draft Article 74(1) provoked a similar reaction because price stability figured as the ECB's sole objective, to which twenty

[438] The articles on 'Transitional provisions' for the adoption of the euro have been excluded from this analysis.
[439] These delegates represented eleven member states and two candidate countries, the ESC, the ESP, and the CoR.

(prevalently Socialist) delegates from thirteen countries suggested that 'economic growth and the development of employment' be considered as equally important objectives.[440]

Meanwhile, the divergences between supranationalists and intergovernmentalists came to the fore when the Convention discussed procedures related to economic policy coordination. In fact, the Praesidium draft *did not* empower the Commission with the right of proposal as suggested by WG VI in matters related to:

- the formulation and setting of the Union's and the member states' BEPGs (draft Article 68(2));
- the right to address a warning to the member states that failed to comply with said guidelines (draft Article 68(4));
- the adoption of Council decisions and recommendations concerning a member state's failure to implement remedial measures when trying to redress its excessive government deficit (draft Article73(7)).

Consequently, thirty-four conventioneers tabled several suggestions for amendment, in which they posited that the right of proposal in such matters would strengthen the Commission's role in the multilateral surveillance of the member states' economic politics.[441] And to the Praesidium proposal that '[a] European law or framework law may lay down detailed rules for the multilateral surveillance procedure', the three observers from the ESC, and sixteen other delegates (eight of whom were the government representatives of Finland, France, Germany, the Netherlands, and Sweden) suggested

[440] Fiche Amendement, 'Proposition d'amendement à l'Article: III–74 (partie III), Deposée par Mme Pervenche Berès, Olivier Duhamel, et al.', 1.

[441] These delegates represented eleven member states and four candidate countries; the Commission; the ESC; the ESP; and the CoR. Almost half of them (16) were Socialists. See for example, Amendment Forms, 'Suggestion for amendment of Article 68 (2, 4, 6), by Messrs G.M. de Vries, T.J.A.M. de Bruijn', 1; and 'Suggestion for amendment of Article: III–68 by Danuta Hübner', 2.

that a *European law of the Council* lay down such rules, because in their view, the implementation of the BEPGs concerned national economic policies. Indeed, some delegates argued that it was 'inappropriate to give the European Parliament a role such as the one entailed by the ordinary legislative procedure.'[442] Likewise, another transnational group of forty-two delegates objected to draft Article 74(6), under which EU legislation would confer upon the ECB 'specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions'.[443] Objections were also raised by the EPP delegates to draft Article 76(5), on the introduction of the ordinary legislative procedure for the amendment of eleven articles, or parts thereof, of the Statute of the ESCB.[444] In other words, the transfer of more competences to the supranational level was widely deemed inappropriate.

As for the Eurogroup's status within the Union's institutional framework, seven Socialist delegates favoured its formalization in the Treaty text,[445] whereas twenty-nine (prevalently EPP) delegates from sixteen countries favoured the retention of the Eurogroup's informal character. On the other hand the British government representative Peter Hain was rather sceptical about the matter. Indeed, he argued that

> [i]t is difficult to believe that creating a greater distinction between ins and outs will promote effective economic governance in the Union [since] the key challenge facing the Union is to enhance structural reform, and this proposal will do nothing to help meet this challenge.[446]

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[442] See for example, the two Amendment Forms, 'Suggestion for amendment of Article 68 (ex-Article 99), part III of the Constitution' by the six members of the Finnish delegation, 2 (in both documents).
[443] These 42 delegates represented twelve member states and eight candidate countries.
[444] Amendment Form, 'Suggestion for amendment of Article III–76, para 5: by Brok, Azevedo, Akcam, et al.', 1–2.
[445] Fiche Amendement, 'Proposition d'amendement à l'article: III–81 bis (Nouveau), deposée par Mme Pervenche Berès, Olivier Duhamel, Ben Fayot, Vytenis Andriukaitis, Elena Paciotti, Jacques Floch, Franc Horvat', 1.
[446] Amendment Form, 'Suggestion for amendment of Article: 85b (new) by Mr Hain', 1.

With regard to the single representation of the euro area in the international monetary system, Praesidium Article 85c acknowledged the necessity for the euro area members to coordinate their actions with the Commission in the adoption of common positions. Indeed, this proposal was backed by a transnational group of twenty-one Left-wingers and twenty-six EPP delegates. Besides, the EPP group suggested that euro area countries coordinate their actions through the Council.[447] As for who was to defend and promote the eurozone's common position on monetary matters, the Praesidium took a non-committal stand, to which, the EPP group, six Socialist delegates from France, Luxembourg, Italy, and Slovenia, plus one observer from the ESP reacted by suggesting that the Commission be charged with that task.

But despite these calls for substantive reform from many quarters, the Praesidium limited itself to a handful of changes, which concerned the Commission's right of proposal in matters related to the adoption of European decisions or regulations by the Council on:

- 'laying down the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products' (solidarity clause);
- the harmonization and technical specifications of euro coins;
- the euro area's unified representation within the international financial fora.[448]

Furthermore, the Praesidium recognized that the economic policy guidelines of euro area member states be 'compatible with those for the whole of the Union';[449] and that the ECB be consulted about, rather than associated with, the adoption of a European decision

[447] Amendment Form, 'Suggestion for amendment of Article III–85c by Brok, Azevedo, et al.', 1.
[448] Compare *Draft Treaty* Articles III–72(1); III–78 (2); and III–90(3), with Praesidium Articles III–69(1); III–75(2); and III–85c(2), in CONV 802/03, 49, 54, 59.
[449] *Draft Treaty*, Article 88(1)(a).

establishing common positions within international financial fora for euro area 'ins' and 'outs'.[450] Finally, the procedures on the meetings of euro area finance ministers were included in a new protocol on the Eurogroup.

6.6.3 The 2003 IGC

According to British Liberal MEP Andrew Duff, the Convention chose not to touch the core treaty provisions of EMU, thus missing the opportunity to remedy the weaknesses of the Maastricht system, for fear of interfering so early in the life of the euro.[451] However, the debate on EMU during the 2003 IGC was characterized by the sovereignists' bid to claw back the few powers that the Draft Treaty had transferred to the Union's supranational institutions. In fact, the British, Czech, Danish, Finnish, and Spanish delegations tabled proposals for the Council to:

1. reclaim the power to lay down the rules on the multilateral surveillance procedure related to the coordination of the BEPGs, rather than share it with the EP;
2. have the power to confer specific tasks concerning policies related to the prudential supervision of credit upon the ECB;
3. decide that an excessive deficit exists on the basis of a Commission recommendation, rather than a Commission proposal;
4. be the addressee of a Commission's opinion on the existence of an excessive deficit, rather than the addressee being the member state concerned.[452]

[450] Compare *Draft Treaty*, Article III–90(1), with Praesidium Article III–85c(1).
[451] See, A. Duff, *On Governing Europe* (London, 2012), 18.
[452] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Non-institutional issues; including amendments in the economic and financial field', CIG 37/03, PRESID 3, Brussels, 24 October 2003, 7–8.

Eventually, the EU leaders agreed to restore the Council's right to 'act unanimously after consulting the European Central Bank and the European Parliament' with regard to point 2.[453] Another amendment concerned the appointment of the ECB Executive Board 'by the European Council, acting by a qualified majority', rather than by common accord.[454]

6.6.4 The structural weaknesses of EMU confirmed

The revised provisions governing EMU came into force on 1 December 2009, after a troubled ratification process characterized by the French and Dutch rejection of the Constitution in 2005; and the Irish rejection of Lisbon in 2008. Interestingly, EMU had not been singled out as a major reason for these setbacks.[455] Thus, it did not beg further amendment during the 2007 IGC. Indeed, its architects, especially the Germans, continued to believe that if the EU countries:

- adhered to the conditions of the SGP;
- stayed within the parameters of the reference values regarding the member states' planned, or actual, government deficit;
- regarded their economic policies as a matter of common concern, and coordinated them with the Council,

the Union's economic governance would be guaranteed. Of a different opinion was the former Director-General of the WTO Pascal Lamy, who described EMU as 'actually

[453] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Meeting of Focal Points (Dublin, 4 May 2004) working document', CIG 73/04, PRESID 16, Brussels, 29 April 2004, Article III–77(6), (Annex 14), 38.
[454] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Naples Ministerial Conclave: Presidency proposal', CIG 52/03, ADD 1, PRESID 10, Brussels 25 November 2003, Article III–84(2)(b), (Annex 10), 14 (compare to *Draft Treaty* Article 84(2)(b)).
[455] See pages 122–123, 150, 152–153, 247–248.

highly monetary and hardly economic at all',[456] and during the Convention, Italian MP Marco Follini had remarked that a 'closely integrated economic and monetary area, like Europe's would be incompatible in the long run with the current high levels of fiscal and budgetary sovereignty that the member states continue to enjoy.'[457]

Actually, the onset of the international financial crisis of 2008, and its escalation from a liquidity crisis for many banks across Europe, into the sovereign debt crises and economic recession across the Union, lay bare the fact that the Union lacked an adequate system to govern its political economy. Indeed, two *ad hoc* instruments were hastily created in May 2010, in an attempt to address the sovereign debt crises. On the one hand, Council Regulation (EU) 407/2010 established the European Financial Stabilization Mechanism (EFSM) by stretching the meaning of Article 122(2) TFEU, which allowed financial assistance to be granted to any EU state which found itself 'in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.' Consequently, under this mechanism the Commission was allowed to borrow up to €60 billion; make use of EU budget guarantees and the Union's borrowing capacity to raise loans under the joint and several liabilities of all member states; and to secure additional loans from the IMF.[458] On the other, the intergovernmental European Financial Stability Fund (EFSF) was created outside the legal framework of the EU as a €440-billion temporary loan vehicle to safeguard the euro area's financial stability by providing loans guaranteed by all Eurogroup countries. Both

[456] As quoted in Duff, 17.
[457] WG VI, *Working document 1*, 1.
[458] Duff, 27.

instruments provided financial assistance in the form of bailouts and bridge loans to Greece, Ireland, and Portugal.[459]

Actually, the extension of the crisis to the weaker domestic economies prioritized the reinforcement of policy coordination to the point that six weeks before the eurozone states and the IMF agreed the terms of the first bailout for Greece in 2010, the Eurogroup reaffirmed 'their willingness to take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole'.[460] Furthermore, the Eurogroup concurred, *inter alia*, that:

- any disbursement on the bilateral loans be decided by the euro area member states by unanimity, subject to strong conditionality, and based on an assessment by the Commission and the ECB;
- surveillance of economic, and budgetary risks, and the instruments for their prevention, including the EDP, be strengthened;
- a robust legal framework for crisis resolution that respected the principle of the member states' own budgetary responsibility be established.[461]

6.6.5 Enter the European Council: the ESM and fiscal compact Treaties

In view of these demands, the European Council agreed to establish a permanent crisis mechanism to safeguard the euro area's financial stability. Consequently, in October 2010, European Council President Herman Van Rompuy received the mandate 'to

[459] Ibid., and European Commission, 'European Financial Stabilization Mechanism (EFSM)', 1–2 at: ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm (accessed on 9 August 2015). These facilities were distinct from the pre-existing Balance-of-Payments (BoP) assistance that the EU may grant to non- euro countries under Article 143 TFEU; and *Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payment*. See A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford, 2015), Chapter 8.
[460] 'Statement by the Heads of State and Government of the Euro Area', Brussels, 25 March 2010, 1.
[461] Ibid., 1, 2.

undertake consultations with the members of the European Council on a limited treaty change to that effect, not modifying article 125 TFEU ("no bail-out" clause).'[462]

The establishment of this mechanism entailed the revision of Article 136 TFEU, on the 'provisions specific to Member States whose currency is the euro'. In order to do this, the EU leaders resorted to the simplified revision procedure under Article 48(6) TEU, which empowers the European Council to 'act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area', on condition that such decision be approved by the member states, in accordance with their respective constitutional requirements. Indeed, the draft European Council Decision to add a third paragraph to Article 136 TFEU, to the effect that

> [t]he Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole [and that] [t]he granting of any required financial assistance under the mechanism will be made subject to strict conditionality,

was agreed in December 2010.[463] Furthermore, the European Council planned that institutional consultations under the simplified revision procedure be carried out in time to allow the Decision to be formally adopted in March 2011, whereas the national approval procedure was expected to be completed by the end of 2012, so that the Decision would enter into force on 1 January 2013. In other words, the establishment of the European Stability Mechanism (ESM) depended on the addendum to Article 136 TFEU being ratified by *all* the EU countries, even though the ESM concerned the euro area members only.

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[462] European Council, 'European Council 28–29 October 2010: Conclusions', EUCO 25/1/10 REV 1, CO EUR 18 CONCL 4, Brussels, 30 November 2010, 2.
[463] European Council, 'European Council 16–17 December 2010: Conclusions', EUCO 30/1/10 REV 1, CO EUR 21 CONCL 5, Brussels, 25 January 2011, Annex I, 6.

As this process got underway, the European Council focused on crafting the mechanism that was to act as a permanent firewall for the eurozone countries that encountered financial difficulty, or whose financial sector became a stability threat in need of recapitalization. To begin with, the EU leaders concurred that the provision of financial support be made subject to:

- 'strict policy conditionality under a macro-economic adjustment programme […] with adequate policy conditionality commensurate with the severity of the underlying imbalances in the beneficiary Member State'; and
- 'a rigorous analysis of public-debt sustainability, which will be conducted by the Commission together with the IMF and in liaison with the ECB.'[464]

In other words, financial assistance was conditional upon a pledge by the government of a beneficiary state to: re-establish sound and sustainable public finances; and correct its excessive deficit according to the reference values under Protocol No. 12, by implementing agreed structural reform programmes defined in EU law. Eventually, the then seventeen eurozone countries plus Latvia, signed the *Treaty establishing the European Stability Mechanism* (ESM) on 2 February 2012. But two months earlier, ECB President Mario Draghi, had told the EP that EMU needed 'a new fiscal compact – a fundamental restatement of the fiscal rules together with the mutual fiscal commitments that euro area governments have made', in order to ensure that such commitments 'become fully credible, individually and collectively.'[465]

[464] European Council, 'European Council 24/25 March 2011: Conclusions', EUCO 10/1/11 REV 1, CO EUR 6 CONCL 3, Brussels, 20 April 2011, 21, 25.
[465] European Parliament, 'Hearing before the Plenary of the European Parliament on the occasion of the adoption of the Resolution on the ECB's 2010 Annual Report: Introductory statement by Mario Draghi, President of the ECB', Brussels, 1 December 2011, at:
https://www.ecb.europa.eu/press/key/date/2011/html/sp111201.en.html (accessed on 31 August 2015).

Draghi's proposal was deemed controversial by the British Prime Minister David Cameron during the European Council of December 2011, who *did* acknowledge the appropriateness of fiscal union most especially for the euro area member states, but made it crystal clear that for Britain, the single market was sacred turf, and that no eurozone activity was to intrude upon it. Furthermore, he called for a general opt-out for the City of London from EU financial regulation.[466]

In the light of the foregoing, President Van Rompuy and twenty-five national leaders decided to outflank Britain by agreeing to drafting an intergovernmental fiscal compact intended to strengthen the eurozone's fiscal discipline by obliging, *inter alia*, the signatory states to transpose the 'balanced budget rule' into their legal systems through binding and permanent provisions, preferably constitutional, that would be subject to ECJ jurisdiction under Article 273 TFEU. And once this and other provisions were agreed, all the EU countries, except Britain and the Czech Republic, signed the *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* (TSCG) on 2 March 2012.

6.6.6 A triple ratification process

The ESM and the TSCG were deemed complementary in fostering closer economic policy coordination via the contracting parties' commitment to fiscal responsibility. But the granting of financial assistance was conditional upon: (1) the ratification of the ESM Treaty and the TSCG;[467] *and* (2) the ratification of the amendment to Article 136 TFEU. Indeed, this was a unique case in the Union's constitutional development, in which two

[466] See Duff, 38–41.
[467] See paragraph 5, in Preamble to *ESM Treaty*; and penultimate paragraph in Preamble to *TSCG*.

new treaties and the addendum to Article 136 TFEU required three parallel ratification processes. Now, since there was a three-fold chance that these provisions could be rejected by one of the member states, especially where the ratification of international treaties was conditional upon the outcome of a popular vote, the contracting parties decided to avoid the classical unanimity constraint. Thus, the TSCG was to enter into force among the first twelve ratifying euro area countries, and eventually apply to other euro area members 'as from the first day of the month following the deposit of their respective instrument of ratification';[468] whereas the ESM Treaty was to take effect, once the instruments of ratification, approval, or acceptance were 'deposited by signatories whose initial subscriptions represent no less than 90% of the total [capital] subscriptions set forth in Annex II.'[469] On the other hand, since the amendment to Article 136(3) TFEU did not provide for an increase in competences for the EU, and considering that the said article applied solely to euro area member states, certain Eurosceptic governments submitted it to less constraining ratification procedures.

Ireland submitted (with success) the TSCG to a national referendum on 31 May 2012, whereas the other contracting parties completed their internal ratification procedures by December 2012.[470] Meanwhile, the ESM Treaty had entered into force on 27 September 2012: (1) *after* a German cabinet declaration reassured the Constitutional Court that the German Parliament would have veto rights over any increase in Berlin's contribution to the €700-billion ESM; and (2) *before* Estonia, ratified it on 3 October

[468] *Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union*, Article 14 (2) and (3).
[469] *Treaty establishing the European Stability Mechanism*, Article 48(1).
[470] Press, 'Fiscal compact enters into force', 18019/12, PRESSE 551, Brussels, 21 December 2012.

2012.[471] On the other hand, when the legality of the ESM Treaty was challenged by the Irish Independent MP Thomas Pringle, the ECJ confirmed, *inter alia*, that the said Treaty could take effect even though not all the EU countries had ratified the amendment to Article 136 TFEU, because:

- the ESM did not fall within the remit of the exclusive competence of the EU over monetary policy;
- the EU Treaties did not establish a specific competence for the Union to set up the ESM, and hence the operation of the ESM was not an implementation of EU law to which the EU Charter of Fundamental Rights would be applicable;
- the conferral of new tasks on the Commission and ECB were compatible with their powers.[472]

Meanwhile, the TSCG entered into force on 1 January 2013 *after* Finland became the twelfth euro area member state to ratify it in December 2012, whereas all the domestic ratification procedures regarding Article 136(3) TFEU were completed on 3 April 2013, when the ratification instrument was signed by the newly elected Czech President Milos Zeman.[473]

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[471] See Reuters, 'Germany clears last hurdle to ESM bailout fund ratification', at: http://www.reuters.com/article/2012/09/26/us-germany-esm-idUSBRE88P0IF20120926 and 'Constitutional Change through Euro Crisis Law', at: http://eurocrisislaw.eui.eu/country/estonia/topic/esm-treaty/ (both accessed on 31 August 2015).

[472] European Parliament, 'Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs: Article 136 TFEU, ESM, Fiscal Stability Treaty Ratification requirements and present situation in the Member States, rapporteur: Petr Novak', Brussels, 12 December 2013, 6. The last point referred to Article 4(4), under which the Board of Directors' emergency voting procedure would require a qualified majority of 85% of the votes cast, 'where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten the economic and financial sustainability of the euro area.' See also points (f) and (g), under Article 5(6).

[473] European Parliament, 'Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs: Article 136 TFEU, ESM, Fiscal Stability Treaty, rapporteur: Petr Novak', Brussels, 11 June 2013, 4.

6.7 Conclusion

Perhaps the most tangible symbol that represents the Union within and outside its borders is the euro. Likewise, the ECB President's participation in international fora, and his addresses at press conferences and briefing on the performance and objectives of EU monetary policy underscore the undeniable fact that the national central banks of nineteen member states no longer decide upon their country's monetary policy. On the other hand, the substantial level of sovereignty that the member states continue to enjoy in the various fields of economic governance underscores the ambivalent nature of EMU, and sheds a light on the member states' vigilance *vis-à-vis* proposals for the attainment of more convergence of performance in economic policy. Indeed, the findings of this chapter tend to confirm Moravcsik's theory on the nature of international cooperation as this being an attempt to arrange mutually beneficial policy coordination among countries whose domestic policies have become highly interdependent, such that cooperation becomes a means for governments to restructure the pattern of economic policy externalities 'to their mutual benefit.'[474] For example, the national governments deemed it opportune to restructure economic policy along neo-liberal lines so that the EC/EU would regain competitiveness on the global markets. Indeed, the completion of the single market could materialize because the EC leaders, the Commission President Delors, and the business and industrial elites concurred that the domestic economies be deregulated, whereas the TEU was the result of France's exploitation of post-Wall events, to the effect that Germany and eighteen other member states have accepted to transfer their sovereignty in monetary policy to a supranational ECB.[475] Likewise, the global financial

[474] See page 157.
[475] See pages 97, 167–168, 170.

crisis of 2008 pushed the member states, bar Britain and the Czech Republic, to seek a higher level of fiscal discipline and convergence, in order to forestall the recurrence of excessive government deficits. In other words, the political economy of European integration has been propelled by the tenets of rational choice theory, rather than the sharing of a symbiotic federalist *telos* among EU constitution-makers. This is because the Union continues to consist essentially of individual nations with different economic, social, cultural, and political characteristics. In fact, an analysis of the Union's post-SEA treaty reform process reveals that whenever certain member states come to realize that the communitarization of a particular policy contrasts with their national interest, unanimous agreement fails to materialize. This explains why during the Maastricht IGC, Britain pressed for an opt-out with regard to monetary union, with Denmark obtaining a similar provision in 1992. Indeed, differentiated integration has since become a recurrent feature of EU treaty reform, with opt-outs often being effective defenders of national sovereignty in certain policy areas.

In the light of the foregoing, the Laeken Declaration recommended that the coordination of the economic arm of EMU respect the member states' individuality.[476] In fact, during the Convention, none of the twenty-eight government representatives called for the total transfer of economic policy from the national-, to the Union level, whereas the majority of the participating countries defended, *inter alia*, the unanimity rule for taxation; and could only agree to fiscal coordination, rather than full economic union. Furthermore, five government representatives insisted that, since the implementation of the BEPGs concerned national economic policies, the (supranational) EP was to be excluded from laying down detailed rules for the multilateral surveillance procedure; and

[476] See page 171.

that such rules would be determined by a European law of the (intergovernmental) Council.[477] In other words, the sovereignist rationale prevailed over the federalist, in matters economic.

As for monetary policy, the member states (and the Praesidium) chose not to propose significant changes to the yet untested provisions agreed at Maastricht, except for the inclusion of enhanced governance procedures and more budgetary discipline for euro area countries. Thus, EMU as agreed under Lisbon came to be an awkward policy set, in which, on one side, nineteen member states have transferred their sovereignty in monetary policy to the EU, while on the other, the twenty-eight member states retain a high level of fiscal sovereignty.

The shortcomings of EMU came to the fore during the financial crisis of 2008, to which the member states made amends via the crafting of two intergovernmental treaties (the ESM and the fiscal compact), which proved instrumental in helping a number of euro area member states redress their excessive government deficits and recapitalize their banking sector. However, these extra-Treaty accords have heightened differentiation, in that they have created more subsets among the member states. For a start, the ESM was designed to facilitate financial support to euro area countries, with the possibility for current non-euro members like Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, and Sweden to partake of the ESM, once they adopt the euro. But this would still leave Britain and Denmark out of the ESM by virtue of their opt-outs from the single currency, whereas the Swedes have rejected the euro in the referendum of 2003, even though they are expected to adopt it according to their Treaty of Accession. Furthermore, recent polls show that a majority of Czechs and Poles are against the replacement of their

[477] See page 183.

national currency with the euro,[478] whereas the governments of the Czech Republic, Hungary and Poland are not particularly eager to transfer their competence in monetary policy to the Union level. Likewise, the provisions of the fiscal compact do not apply across the Union, since the Eurosceptic governments of Britain and the Czech Republic have not signed it, whereas Croatia still has to ratify it. Thus, although EMU has been the main pillar of the Union's core policy set since Maastricht, it remains incomplete.

[478] European Commission, *Flash Eurobarometer 418: Introduction of the euro in the member states that have not yet adopted the common currency* (Brussels, May 2015), 65.

CHAPTER 7

AN EVOLVING INSTITUTIONAL FRAMEWORK AND A DUBIOUS CONSTITUTIONAL LEGITIMACY

7.1 Introduction

As explained in Chapter 2, the US, Switzerland, and Germany were confederal polities *before* they hammered out their respective federal charter. Indeed, the US became a *de jure* federal state in 1789, but more so after the Civil War. Similarly, Switzerland turned federal after the *Sonderbund* War. Wilhelmine Germany followed suit after the Battle of Sadowa and the Franco-Prussian War, whereas Québec's resistance to British rule forced the Imperial government to countervail Francophone nationalism with the installation of a federal order. In other words, the more powerful states or powers imposed federal settlements, which the weaker sub-units were obliged to accept. On the other hand, Union's further deepening cannot be achieved by forceful means because it is assumed that the democratic notion of legitimacy rests upon the people's consent to power structures and processes.[479] Furthermore, liberal-democratic theory posits that popular consent depends on trust, which Margaret Levy defines as a 'holding word for a variety of phenomena that enable individuals to take risks in dealing with others, solve collective action problems, or act in ways that seem contrary to actions of self-interest.'[480] Indeed, trust is very important for the Union's survival, considering that it currently depends on the ability (or otherwise) of twenty-eight member states to focus *also* on the collective European interest, besides the national interest.

[479] See Delanty & Rumford, 80.
[480] As quoted by M. Cini, 'Trust in Europe', in *The Value(s) of a Constitution for Europe*, ed. P.G. Xuereb (Malta, 2004), 59.

Weiler argues that this teleological paradigm shift requires 'an adjustment period in which the political boundaries of the new polity become socially accepted as appropriate for the larger democratic rules by which the minority will accept a new majority.'[481] Only thus would the Euro-polity 'recoup the loss of democracy inherent in the process of integration.'[482] And Chryssochoou subordinates this 'community-building' process to the creation of a 'composite citizen body' or transnational *demos*, 'whose members share an active interest in the democratic governance of the larger polity and who can identify with the central institutions of governance';[483] hence the establishment of EU citizenship under Article 8 TEU. But for this to become truly meaningful, EU citizenship cannot stand solely on its legal status or a set of rights, but must incorporate also a set of political values and principles that one associates with democratic governance.

In view of the foregoing, the aim of this chapter is to investigate how Europe's political leaders, civil society organizations, and EU citizens addressed the so-called 'democratic deficit' in their bid to render the Union more democratic and legitimate as augured in the Nice and Laeken declarations on the future of the EU. In section two, it is argued that Europeans began to lose trust in the European project when the EC's technocratic government failed to countervail the Community-wide recession and social unrest provoked by the oil crisis of 1973. Section three recounts how the transfer of new competences from the national, to the Union's institutions and agencies heightened the legitimacy crisis, as Europeans felt progressively divested of their sovereignty. In section

[481] Weiler, *The Constitution of Europe*, 83.
[482] Ibid., 84.
[483] D.N. Chryssochoou, 'Democracy and the Democratic Deficit', in *European Union Politics*, ed. M. Cini (Oxford, 2003), 373.

four, it is argued that the concomitant substitution of the Union's ordo-liberal economic regime by the single market's neo-liberal rationale, and the post-SEA reduction of the national parliaments' powers *vis-à-vis* the Union's executive and legislative arms seem to have heightened further the democratic deficit. Consequently, Europeans tend to perceive a remote Brussels as incapable of promoting their material interest or policy preferences. Section five deals with the Europeans' identity dilemma characterized by several national identities that although carrying elements of a common European identity, are not strong enough to bring about the 'nationhood–citizenship' paradigm shift that would legitimize the Union. This four-point analysis leads us to the thematic study in this chapter, which deals with the tackling of the legitimacy crisis in the post-Nice era, and the inclusion of a transnational direct-democratic tool, namely the European citizens' initiative (ECI), in the EU Treaties.

7.2 The nature of the legitimacy crisis

According to Birch, political authority is wielded by identifiable and fallible persons over their fellow citizens.[484] Indeed, in a liberal-democratic polity, citizens have the right to query whether the political system is legitimate or not, or whether the state or government is entitled to be obeyed. This stems from the knowledge that legitimacy is reckoned as a shared expectation among actors, such that the actions of the governing elite are accepted voluntarily by the people because the actions of the former conform to a pre-established distribution of asymmetrical power(s) under a constitutional agreement.[485] Furthermore,

[484] A.H. Birch, *Concepts and Theories of Modern Democracy*, 2nd edn. (London & New York, 2001), 57.
[485] D. Robertson, *Routledge Dictionary of Politics* (New York, 2003), 278–279; and P.C. Schmitter, 'What is there to Legitimize in the European Union… and How might this be Accomplished?' *Harvard Jean Monnet Working Paper* (2001), 6/01, *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, 1.

Easton posits that the level of legitimacy is higher, the more this power arrangement conforms to the citizens' own moral principles and sense of what is politically right and proper.[486] Furthermore, he describes the diffuse support of a constitutional order as a 'feeling of belonging together' or 'we feeling'.[487] In other words, mutual trust is nurtured by the positive experiences that citizens come to enjoy of their gubernatorial authorities over time.[488]

Chapters 4 and 5 illustrated that the European Communities derived their legitimacy from their constitutive nation states. In fact, the founding Treaties were agreed at specially convened IGCs, and approved by the national parliaments of the founder states, rather than their respective *demoi*. Initially, the constitutional separation of EC citizens from EC governance was tolerated because integration was directly linked to the economic and political benefits it purported to deliver to the member-state citizens. However, whenever integration failed to deliver the anticipated benefits, the social legitimacy and popular support of the European project was bound to ebb. Indeed, the first legitimacy crisis of the EEC occurred in the wake of the 1973 oil crisis, which led to the realization that the Common Market was not resilient enough to guarantee Community-wide economic growth and employment.[489] Furthermore, the general perception that another (pan-continental) war was improbable thanks to *détente* discounted the urgency of further integration as a requisite for peace and stability. These factors, and the fact that the first enlargement negotiations were seen as secretive, 'stage-

[486] D. Easton, 'A Re-Assessment of the Concept of Political Support', *British Journal of Political Science* (1975), 5(4), 451.
[487] D. Easton, *A Systems Analysis of Political Life* (New York, 1965), 185.
[488] See Cini, 'Trust in Europe', in Xuereb (2004), 55–70.
[489] Rodríguez-Pose, 113–135.

managed', and skewed to suit French national interests,[490] soon scotched the teleological legitimacy of the EC institutions. Indeed, when in December 1974, the EC Heads of State and Government asked the Belgian Prime Minister Leo Tindemans to prepare a report on European union and institutional reform, he concluded that a strenuous effort was necessary

> by the European institutions and by governments to improve the way in which our common activity is presented to public opinion and to link the daily decisions of the institutions to the motivations behind the construction of Europe and to the idea of society which is inherent in it [because] [n]o-one wants to see a technocratic Europe. European Union must be experienced by the citizen in his daily life.[491]

In other words, union was feasible if the European institutions took firm decisions to enhance and guarantee the social, civil and political rights of EC citizens, and if the EP were granted the right of initiative. Tindemans also posited that democracy could be strengthened if the Union's institutions 'ha[d] legitimacy conferred upon them by the will of our peoples', starting with a directly elected Parliament, which would 'reinforce the democratic legitimacy of the whole European institutional apparatus'.[492] And assuming that the end game was the *rapprochement* between the European *demoi*, Tindemans concluded that the Community's 'advantages and its gradual achievement must be perceived by everyone so that effort and sacrifices are freely accepted'.[493] Actually, this *telos* concurs with: Easton's idea of 'affective support'; and Weiler's concept of social legitimacy, which 'occurs when the government process displays a commitment to, and

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[490] Booker & North, 167–195; and P. Alcott, 'The Democratic Basis of the European Communities, the European Parliament and the Westminster Parliament', *Common Market Law Review*, 11(2), 298–326.
[491] *Bulletin of the European Communities*, 'Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council', Supplement 1/76, 'Conclusion', paragraph 2, in Chapter IV, 'A citizen's Europe'; and '3. A positive solidarity', paragraph 1, under 'A. Europe Today', in Chapter I, 'A Common vision of Europe'.
[492] Ibid., '3. A positive solidarity', paragraph 1, under 'A. Europe Today', in Chapter I, 'A Common vision of Europe'; and 'A. The Parliament', paragraph 1, in Chapter V, 'Strengthening the Institutions'.
[493] Ibid., Chapter IV, 'A citizen's Europe', paragraph 1.

actively guarantees, values that are part of the general political culture, such as justice, freedom and general welfare.'[494]

The *Tindemans Report* underscored the gulf between legitimacy in its formal and social sense, whereas in 1947, Arendt had posited that if Europe were in search of a shared political future, success was conditional on whether Europeans felt that they played a role in constructing and shaping it.[495] Arguably, the major flaw in the so-called 'Monnet method' lay in the inability of the constitutional arrangements of integration under that method to renew the Euro-polity's legitimacy, particularly after Maastricht, when Europe's federalist aspirations and the globalization process called for enhanced post-national governance rules. Actually, the major challenge then seemed to be *how* to apply a state-based, normative type of legitimacy to an ever-evolving and expanding non-state polity,[496] in recognition of the fact that '[t]he politicisation of integration and its expansion into sensitive political space necessitates renewed attention to questions of community-building and the affinitive dimension of integration.'[497] In other words, the shift of the derivation of EU authority from the national, to Europe's transnational *demoi* had become essential for the legitimization of the polity so that Europeans could feel that they were the co-sovereigns of the common weal.

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[494] Weiler, *The Constitution of Europe*, 80.
[495] As reported by I. Ward, in 'Identity and Democracy in the New Europe', in Bañkowski & Scott, 205–206.
[496] See T. Banchoff & M.P. Smith, 'Introduction: Conceptualizing legitimacy in a contested polity', in *Legitimacy and the European Union: The Contested Polity*, ed. T. Banchoff & M.P. Smith (London & New York, 1999), 1–23.
[497] B. Laffan, 'The Politics of Identity', *Journal of Common Market Studies* (1996), 34(1), 83.

7.3 Top-down governance and constitutional (il)legitimacy

Federalism involves the ability of citizens to belong simultaneously to at least two communities, namely the community of the polity in search of a federal settlement, and the community of polities constituting a union. But the founding fathers of the EC were aware that there was no such thing as a European *demos*, and that Europeans could not see themselves as 'citizens' of a Euro-polity. Thus, Monnet designed a top-down administrative governance system in which the High Authority's unelected College members were national nominees who were formally precluded from seeking or taking instructions 'from any Government or from any other body [when pursuing] the general interests of the Community'. [498] And with its exclusive rights to initiate legislation in the coal–steel pool and set the Community agenda, this College wielded executive power like the cabinet in a parliamentary regime.[499] Furthermore, the ECJ was vested with the power to provide a uniform interpretation of EC law throughout the member states; ensure that such law was being enforced; provide rulings on EC law; and protect individual rights.[500] The Paris and Rome Treaties also made provisions for the creation of a Common Assembly (or Parliament), which however did not (and still does not) determine the composition of a European government.

Some analysts defend the EC/EU's allegedly non-democratic independent agencies on grounds of effectiveness and trustworthiness. For example, Majone argues that the Euro-polity is essentially a 'regulatory state', which should not seek redistribution or value-allocative outcomes in the manner of the welfare state. Thus, in order to be more responsive to diffuse interests, some decisions ought to be insulated

[498] *Paris Treaty*, Article 9.
[499] Ibid., Article 13.
[500] Ibid., Articles 31, 33–44; and *Rome Treaty* [EEC], Articles, 164, 169–182.

from undue politicization in order to avoid negative repercussions on output.[501] And in separate studies, Grevi and Magnette note that the real issue is the *nature* of EU democracy, rather than the absence of democracy. Indeed, EU citizens elect their domestic governments, who negotiate on their behalf in Brussels and decide who should form the EU executive. Europeans freely elect their MEPs, and the EP has the power to approve (or reject) the Commissioners nominated by the member states *before* they assume office according to Lisbon Article 17(6) TEU. Furthermore, Grevi argues that decision-making at the European level does not escape the control of elected politicians, since EU legislation is subject to the double approval of the EP and Council.[502] As for the fact that active citizenship is limited to a set of civic groups, lobbies, associations and Brussels-based European umbrella organizations, Magnette posits that since popular participation and decision making in many established democracies are typically replaced by expertise, efficacy and technocratic decision, the crucial question is whether top-down governance garners enough legitimacy according to recognized normative and empirical standards that are deemed appropriate to multilevel governance in the EU.[503]

7.4 Political elitism, neo-liberalism, and the 'democratic deficit'

Without doubt, the decisions taken at the supranational level by Europe's political and economic elites have had a great impact on the lives of EU citizens, to the extent that these decisions have seriously put to the test the legitimacy of the European project. For example, the post-war social equilibrium based on job stability, workers' rights

[501] G. Majone, 'The Rise of the Regulatory State in Europe', *West European Politics* (1994), 17(3), 77–101.
[502] G. Grevi, 'Beyond Europe's democratic deficit: overcoming cultural failure', The European Policy Centre, 25 May 2002, 2, as quoted in Longo, 178.
[503] P. Magnette, 'European Governance and Civil Participation, 5; and Magnette, *What is the European Union?* 167–188.

legislation, and the welfare state were seriously challenged by the 1973 oil crisis, and compromised further with the implementation of the single market programme, when the stable and relatively well-paid jobs created in the post-war years started being replaced by part-time and temporary jobs, or low-paid marginal jobs. Indeed, flexibility and deregulation in the post-SEA job market 'brought about a profound reshuffling for the worse of the social structure that had been established during the [previous] industrial era.'[504] Concurrently, the fiscal policy rules of monetary union forced governments to restrict their public expenditure, thus threatening national welfare programmes that were meant to support, *inter alia*, low-income citizens and the unemployed.[505] On top of that, the EC/EU leaders' post-Wall quest for political union heightened the core problematic, as the symbiotic interface between European citizens and EU institutions grew fainter; hence the heightening of the democratic deficit.

Other reasons account for this gradual de-legitimization. First, EU decisions are made by executive actors. Indeed, member-state governments can ignore their parliaments when making decisions at European Council meetings. Furthermore, as competences shift to the Commission and the Council of Ministers, the national parliaments witness a corresponding reduction of their statutory authority, especially when EU legislation is passed by QMV. Second, most national mainstream political parties are pro-integration. This leaves the Eurosceptics feeling relatively helpless in the face of a pro-Europe 'cartel' in national and European electoral arenas. Third, EP elections are still fought on domestic issues, rather than EU policy agenda, whereas member-state voters cannot 'throw the scoundrels out' because the EP does not function

[504] Rodríguez-Pose, 130, 133; and Rumford, 126–136, 148–150.
[505] Hix & Høyland, 118.

as any other domestic parliament. And in the double absence of EU-wide political parties and government, political citizens and political debate tend to remain national. Thus, Europeans remain deprived of the 'policy learning' process, whereby their 'original opposition to a particular policy proposal can evolve into qualified support as [Europeans may come to] understand the costs, benefits, and tradeoffs involved in the adoption of new policies.'[506] Fourth, globalization has undermined the ability of national governments to incorporate business actors into corporatist models of interest intermediation in the national systems, because big companies tend to approach market regulators privately to influence policy making on neo-liberal lines.[507] Consequently, EU citizens have become less convinced that the Brussels-based civil society is sufficient to legitimize EU governance. Also, they tend to 'perceive themselves as the objects, rather than the subjects of profound social forces'.[508] In other words, the decisions made at the European level do not always correspond to the voters' aspirations for economic prosperity.[509] Fifth, the Union's technocratic decision-making mechanisms remain too different from the domestic elements and more political modes of decision making. This is aggravated further by linguistic and cultural diversity, which renders political communication a daunting endeavour. Consequently, it is not surprising that Europeans find it difficult to understand and relate knowledgeably to the Union's governance system. Thus the 'cultural' citizen tends to remain national, despite the establishment of a *de jure* EU citizenship.

[506] Ibid., 135.
[507] Ibid., 179; and Rumford, 100–102.
[508] G. Grevi, as quoted in Longo, 162; and Rumford, 90–91.
[509] D. Fuchs, 'Cultural diversity, European identity and legitimacy of the EU: A theoretical framework', in Fuchs & Klingemann, 32; and O. Ruchet, 'Cultural diversity, European identity and legitimacy of the EU: A review of the debate', in Fuchs & Klingemann, 10.

7.5 The EU *demos*–'European identity' dilemma

The declared objective of the Rome Treaty was 'to lay the foundations of an ever closer union among the peoples of Europe'. In other words, the *telos* of the European project was the integration of the polity's 'peoples', rather than of its states. This implied that the founding fathers augured that 'ever closer union' would determine the formation of a European *demos*.

Under Lisbon, the EU Charter of Fundamental Rights became legally binding upon the Union institutions and upon the member states when implementing EU law,[510] meaning that the Treaties provide a legal framework within which member-state nationals may lay claims to common transnational civil, social and political rights. Furthermore, the Union has expanded into policy areas beyond the economic, and encourages social cohesion; the attainment of common standards of living; and regional development throughout the polity. Therefore, the claimants of rights can appeal to standards other than those obtained under national law. Indeed, EU citizens also have a greater plurality than ever before of certain institutions like the Office of the European Ombudsman, through which citizens may seek remedial action or overturn allegedly unfair national court rulings. Thus, a 'common' or unitary 'legal' citizen has come into existence.

In the light of the foregoing, Weiler posits that if one switches the unit of analysis from the individual as a 'national', to the individual as a 'citizen', one would establish a framework, which would allow the subject of legitimacy of EU governance to be extricated from the particularistic politics of member-state nationalism.[511] And while

[510] See Piris, *The Lisbon Treaty*, 146–166.
[511] J.H.H. Weiler, 'Legitimacy and Democracy of Union Governance,' in *The Politics of European Treaty Reform: The 1996 Intergovernmental Conference and Beyond*, eds. G. Edwards & A. Pijpers (London, 1997), 259–261.

recognizing the divisiveness of culturally diverse societies and nationalistic sentiments, Habermas posits that a European identity must be related to those values that are common to all Europeans, namely constitutional ones, attained via the processes of public critique and democratic deliberation.[512] This republican type of 'constitutional patriotism' combines the US *ius soli* principle with Swiss *Willensnation*, which together endow the state with the people's authorization to enact and enforce constitutional and ordinary law. However, such a paradigm shift is neither easy to achieve, nor self-evident. For example, it became socially acceptable in Switzerland when the double majority of the population and of the cantons approved the revised Constitution of 1874, that is, twenty-seven years *after* the *Sonderbund* War; and in the US, the passage of the Fourteenth Amendment established a pan-American citizenship, ninety-two years *after* the Declaration of Independence. These examples do not imply that Europeans should engage in a civil war to achieve similar results. However, Habermas's assumption that cultural obstacles to a common EU citizenship formation may be overcome is overly simplistic. It suffices to recall that primary responsibility of education remains with the member states, who are not obliged to include, neither a common European dimension in their curricula, nor promote a European consciousness.[513] However, various studies[514] and Eurobarometer surveys attest that all national identities contain elements of European identity, thanks to the 'proliferation by stealth' of symbols of Europeanness, such as: the European passport (since 1985); the flag of the EU (since 1986); various educational programmes aimed at

[512] J. Habermas, 'Citizenship and national identity: some reflections on the future of Europe', *Praxis International* (1992), 12(1), 1–19; and Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA, 1998).
[513] Longo, 157; Delanty & Rumford, 114–115; and Leonard, 232.
[514] See A. Schlenker-Fischer, 'Multiple identities and attitudes towards cultural diversity in Europe: A conceptual and empirical analysis', in Fuchs & Klingemann, 86–122; and Hix & Høyland, 'Public Opinion', 105–129.

fostering a European consciousness (since 1987); EU citizenship (since 1993); the euro (since 1999); the European Health Insurance Card (since 2006); and the EU Charter of Fundamental Rights (since 2009). Furthermore, European citizenship formation received another boost when sixteen member states declared that the EU flag and anthem, the EU motto (Unity in diversity), the euro, and 9 May, 'express the sense of community of the people of the European Union and their allegiance to it.'[515]

Rumford posits that 'European citizenship is a new form of democratic empowerment which derives from a supranational […] authority [and that] broader European rather than narrowly national issues are an increasingly common feature of our political lives.'[516] In other words, the development of a 'civic identity' based on broad consensus around a set of common norms and principles of political democracy, civil, and human rights, and toleration of ethnic and religious diversity *may* constitute the premise for a cosmopolitan post-national culture that complements, rather than replaces Europe's national identities.[517] Indeed, the inclusion of the ECI in the Constitutional Treaty was considered by Europe's pro-democracy NGOs as a versatile tool for participatory democracy which could strengthen the Union's democratic foundations and bring Europe closer to its citizens, while reinforcing Europeans' 'civic identity' and 'we-feeling'. Indeed, it is to the crafting of this initiative; and the proposal for the holding of a Europe-wide referendum on the Constitutional Treaty that this chapter turns.

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[515] *Lisbon Treaty*, 'Declaration [52] by the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Lithuania, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Slovenia and the Slovak Republic on the symbols of the European Union'.
[516] Rumford, 225.
[517] Ibid., 82–123; and 220–227.

7.6 Thematic Study: the Union's legitimacy, and the European citizens' initiative

7.6.1 The opening gambits

In February 2001, the EU leaders admitted to 'the need to improve and monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States',[518] whereas the Laeken Council confirmed that the EU citizens

> want the European institutions to be less unwieldy and rigid and, above all, more efficient and open [because] they feel that deals are all too often cut out of their sight and they want better democratic scrutiny… [Besides,] what citizens understand by "good governance" is opening up fresh opportunities, not imposing further red tape.[519]

This implied that 'the linear model of dispensing policies from above' seemed to have run its course and needed to be replaced by a mechanism 'based on feedback, networks, and involvement from policy creation to implementation at all levels.'[520] In other words, Europe's political elite conceded that any improvement in the Union's governance practices depended also on enabling Europeans to participate actively in the political life of the EU. On the other hand, one must see whether the member-state citizens were actively interested in playing a participative role in European politics, or whether political citizens and political debate were destined to remain confined to the domestic arena.

Actually, seven months before the Convention was launched, the Commission issued a White Paper on European Governance, with public consultation running from 25 July 2001 to 31 March 2002. In its follow-up report, the Commission stated that there had been 260 contributions, 13 per cent of which were from private individuals. This was the

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[518] '[Nice] Declaration on the Future of the Union', No 23, 26 February, 2001, AF/TN/D/en, paragraph 6, 27, at: http://ec.europa.eu/dorie/fileDownload.do;jsessionid=GMGyJK0GzyNyLzhyrHRndCQGh4p8VZqxQHLkF3C096XtL1RLWlrn!-1645751347?docId=864&cardId=864 (accessed on 10 March 2016).

[519] 'Laeken Declaration on the Future of the European Union', 19, 20.

[520] Commission of the European Communities, 'European Governance: A White Paper', COM(2001) 428 final, Brussels, 25 July 2001, 9.

smallest participation rate compared to the responses from the academics (16 per cent); the socio-economic players (22 per cent); organized civil society (22 per cent); and public/political authorities (27 per cent). On a positive note, the Commission noted that the respondents supported the White Paper's definition of good governance, which included five principles, namely, 'openness, participation, accountability, effectiveness, and coherence'. Furthermore, some respondents mentioned other principles, like subsidiarity and democratic legitimacy.[521] But the fact that thirty-five private citizens only reacted to the Commission White Paper demonstrated that Europe's citizens on an individual level were tenuously connected to Laeken's resolve to developing a Europe-wide public area that could enhance the Union's democratic legitimacy and transparency. Indeed, the proposal for the inclusion of the citizens' initiative in the draft Constitutional Treaty was taken up by civil society organizations and other interest groups who decided to approach key Convention members that were known to be committed to the promotion of direct democracy, so that the latter would convince the largest possible number of delegates to espouse the citizens' initiative cause.

The prime mover in this regard was *Mehr Demokratie* (More Democracy), an NGO established in 1988 to promote direct democracy in Germany. Similar NGOs, like the Initiative & Referendum Institute Europe [IRI (Europe)] joined *Mehr Demokratie* to establish Democracy International, a network of 250 NGOs from all the participating countries, in order to campaign for a Constitutional referendum in all EU and candidate

[521] Commission of the European Communities, 'Report from the Commission on European Governance', COM(2002) 705 final, Brussels, 11 December 2002, 3, 24–25.

countries.[522] Thus, IRI (Europe) President Bruno Kaufmann, together with *Mehr Demokratie* spokesman for European Affairs Michael Efler and the support of three MEPs, namely, Heidi Hautala (Finnish), Diana Wallis (British), and Jo Leinen (German), an informal group of twenty-three conventioneers from fifteen participating countries was constituted.[523] Subsequently, Lars Bosselmann of Democracy International, Michael Efler (*Mehr Demokratie*), and ECI Campaign Coordinator Carsten Berg approached a cross-party group of pro-Europe delegates, namely: German MEP Sylvia-Yvonne Kaufmann; French MEP Alain Lamassoure; Austrian MEP and Constitutional Affairs Committee member Johannes Voggenhuber; German MP and long-time advocate of direct democracy Jürgen Meyer; the Spanish Parliament's President of the European Affairs Committee Josep Borrell Fontelles; and Austrian MP and spokesman for European Affairs Caspar Einem, to make the case, *inter alia*, for the inclusion of the citizens' initiative in the draft Constitutional Treaty.[524] And in mid-September 2002, IRI (Europe) organized a conference at which *circa* one hundred delegates from twenty participating countries asked for: (1) the submission of the Constitutional Treaty to the popular vote; (2) the introduction of direct-democracy tools, such as the citizens' initiative; and (3) the approval of subsequent constitutional amendments via referendum.[525]

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[522] J. De Clerck-Sachsse, 'Deliberation and the process of identity formation: Civil society organizations and constitution making in the EU', in Fuchs & Klingemann, 155; and S.-Y. Kaufmann, 'The European Citizens' Initiative: a great responsibility for federalists', at: http://www.federalists.eu/uef/news/the-european-citizens-initiative-a-great-responsibility-for-federalists/ page 1 (accessed on 7 May 2014); and M. Efler, 'Initiative for the European Citizens' Initiative: How the Convention got convinced', at: http://www.citizens-initiative.eu/?page_id=13 (accessed on 7 May 2014).

[523] The countries that were not represented in this group were: Bulgaria, the Czech Republic, Estonia, Greece, Italy, Latvia, Lithuania, Luxembourg, Poland, Romania, Slovakia, Sweden, and Turkey.

[524] Kaufmann, 1.

[525] Democracy International, 'Host of the European Referendum Campaign: A Rollercoaster ride towards democracy. Step one: paving the way', page 1 of 2, at: http://ec.europa.eu/dorie/fileDownload.do;jsessionid=Gt19LQ9hyhFZSp5hlglpnvRYY9GG9GBl9h8CgQlmL2vLdyTJw6Jy!-975318364?docId=86827&cardId=86827 (accessed on 29 September 2015).

At first, these proposals did not garner much support from among the other members of the Convention. For example some delegates feared that the citizens' initiative would make policy-making more complicated by spearheading proposals deemed marginal to the Union's mainstream policy agenda.[526] Likewise the suggestion that 'the fairest and most democratic means of consulting the people would be via referendum based on a dual majority, that is, a majority of citizens, and a majority of states',[527] raised several eyebrows because the shelving of the unanimity clause was generally construed as undesirable by the majority of the national delegations. In fact, this proposal garnered the support of just thirty-eight federalist-leaning Convention members from seventeen participating countries who argued that 'a Europe-wide referendum would create a common European sphere', despite the fact that a European people did not exist.[528] However, the post-referendum options that were being proposed by these delegates in the event that a member state was to reject the Constitutional Treaty could easily undermine the Union's internal coherence that had been painstakingly constructed over the previous five-odd decades. Indeed, they concurred that a dissenting member could: *either* negotiate a special status and hold a second referendum; *or* try to regulate its relationship to the new 'constitutional' EU under a bilateral treaty; *or* leave the Union. In other words, it seemed as though Democracy International's pro-democracy initiatives were destined to be sidelined and forgotten.

[526] De Clerck-Sachsse, in Fuchs & Klingemann, 155, and 165 (footnote 29).
[527] European Convention, 'Contribution submitted by several members, alternate members and observers: "Referendum on the European Constitution"', CONV 658/03, CONTRIB 291, Brussels, 31 March, 2003, 4.
[528] Ibid., 1, 3. The number of signatories by country (respective number in brackets, in descending order) were as follows: France (9), Austria (5), Germany (3), Italy (3), Cyprus (2), Denmark (2), Finland (2), Lithuania (2), the UK (2), Belgium (1), Hungary (1), Ireland (1), Poland (1), Portugal (1), Slovakia (1), Slovenia (1), and Spain (1).

7.6.2 A side entry for the European citizens' initiative

Meanwhile, in its bid to improve the democratic legitimacy and transparency of the Union, the Praesidium introduced the 'principle of participatory democracy' in Part I of the Constitution, wherein draft Article 34 acknowledged that every citizen had the right to participate in the Union's democratic life. Furthermore, the EU institutions were to give the member-state citizens and representative associations the opportunity to air their opinion on Union action, and maintain an open dialogue with representative associations and civil society. As for: (1) the citizens' initiative; and (2) popular input for the total or partial revision of the Constitution, the Praesidium draft remained silent.[529]

The rather general remit of draft Article 34 provoked *circa* fifty amendment proposals ranging from: the deletion of this draft by Eurosceptics like UK MP David Heathcoat-Amory and Danish MEP Jens-Peter Bonde;[530] to the inclusion of the referendum for the ratification of the Constitution; and the inclusion of the European citizens' right of petition, and of legislative initiative.[531] Other members tabled suggestions for amendment that were aimed at enhancing the Union's multi-level governance. For example, the Danish government representative Poul Schlüter favoured the inclusion of a clause, under which the Union would recognize 'the important contribution of the national parliaments to the democratic life of the Union.'[532] The UK government representative Peter Hain emphasized that the Union institutions needed to

[529] European Convention, 'The democratic life of the Union', CONV 650/03, Brussels, 2 April, 2003, Annex I, 5.
[530] Amendment Form, 'Suggestion for Amendment of Article: 34 (part 3). Suggestion for protocol by Mr David Heathcoat-Amory, Mr Bonde'.
[531] See Amendment Forms, 'Suggestion for amendment of Article : 34a. Suggestion for Part III by M. Caspar Einem and Maria Berger'; 'Proposition d'amendement à l'article 34 (bis) déposée par Monsieur: Alain Lamassoure'; and 'Proposition d'amendement à l'article: 34bis, déposée par Messieurs: Borrell (miembro), Carnero y López Garrido (suplentes)'.
[532] Amendment Form, 'Suggestion for amendment of Article 34 (title VI, part I of the Treaty) by Mr Poul Schlüter'.

maintain dialogue not just with the representative associations mentioned in draft Article 34(3), but also with 'local and regional government and civil society,'[533] whereas five Swedish MPs tabled a common amendment proposal on: (1) the respect of participatory democracy 'at Union, state, regional and local level', and (2) the appropriateness of extensive consultations with interested parties in order 'to secure democracy, proportionality, consistency and transparency', whenever the Commission prepared legislative initiatives.[534]

The majority of these proposals were tabled by sole individuals or small national groups. Others mustered transnational support, like the one by UK Liberal MEP Andrew Duff and twenty-two delegates from fifteen participating countries, who urged the Union to recognize and promote 'the involvement of the social partners, management and labour, in economic and social governance.'[535] A similar proposal was forwarded by Belgian Socialist MEP Anne van Lancker and a Socialist group of eleven delegates from nine other member states.[536]

The suggestions for amendment regarding the European citizens' right of petition, and of legislative initiative were most unpopular among the sovereignist-leaning delegates, such as the Praesidium members who represented the national parliaments and the European Council. Likewise, the Commission was not keen on putting at risk its right of initiative in EU legislation, whereas the suggestions for amendment regarding the

[533] Amendment Form, 'Suggestion for amendment of Article: 34 by Mr Hain'.
[534] Amendment Form, 'Suggestion for Amendment of Article 34, by Mrs Lena Hjelm-Wallén and Mr Sven-Olof Petersson, government representatives and Mr Sören Lekberg, Mr Kenneth Kvist and Mr Ingvar Svensson, national parliament representatives'.
[535] Amendment Form, 'Title VI: The democratic life of the Union. Suggestion for amendment of Article 34 by Mr Andrew Duff, Mr Lamberto Dini, et al.'
[536] Fiche Amendement, 'Proposition d'amendement à l'article 34bis, partie I de la Constitution: déposée par Mme Anne van Lancker, M. Olivier Duhamel, M. Caspar Einem, M. Ben Fayot, M. Jürgen Meyer, Mme Linda McAvan, M. Luis Marinho, Mme Pervenche Berès, Mme Maria Berger, M. Carlos Carnero, Mme Elena Paciotti, Mme Helle Thorning-Schmidt'.

ratification of the Constitution via a referendum based on the dual majority principle were generally unpopular because they challenged the unanimity clause that had characterized the Union's constitution-making since its inception. Indeed, as the Convention drew to an end, Democracy International activists continued to receive indications from the Praesidium and other Convention members that the various amendment proposals on direct democracy would not garner consensus.[537] Thus, Democracy International decided to focus on having at least the citizens' initiative included in the Constitution. This was still feasible thanks to their direct contact with certain influential Convention members,[538] and their personal presence at the Convention.

Their key asset was the German MP Jürgen Meyer, who was able to convince seventy-two delegates to back the citizens' initiative proposal.[539] Subsequently, he was entrusted with the task of formulating a proposal that would reassure the Praesidium that the citizens' initiative would bring Europe closer to the people *without* causing much apprehension to the national governments and/or the Commission. Indeed, the first paragraph of Meyer's draft Article 46(4) suggested that the:

> [c]itizens of the Union may request the Commission to submit any appropriate proposal on matters on which they consider that a legal act of the Union is required for the purpose of implementing this Constitution.[540]

In his proposal, Meyer was careful not to specify the number of member-state citizens that would oblige the Commission to submit a legislative proposal in their name, although he did hint that it should not be high. Likewise, he did not commit to the

[537] Kaufmann, 'The European Citizens' Initiative', 2; and M. Efler, 'Initiative for the European Citizens' Initiative: How the Convention got convinced', at: http://www.citizens-initiative.eu/?page_id=13 (accessed on 7 May 2014).
[538] See page 211.
[539] De Clerck-Sachsse, in Fuchs & Klingemann, 155.
[540] Amendment Form, 'Suggestion for amendment of Article: I-46, part I, title VI (CONV 724/03) by Mr: Prof. Dr. Jürgen Meyer, Delegate of the German Bundestag', 1.

provisions that would regulate the specific procedures of the citizens' initiative. And to put the Commission's mind at rest, he suggested (in an accompanying note) that it would be up to the Commission 'to decide whether it will take legislative activity or not.'[541]

Meyer's draft was favourably received by sixty-eight other Convention delegates from all the participating countries, bar Sweden and Estonia. With such a good level of support, Giscard declared that he backed the citizens' initiative.[542] Eventually the Praesidium effected some changes to the Meyer proposal to the effect that:

> [a] significant number of citizens, not less than one million, coming from a significant number of Member States, may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing this Constitution. A European law shall determine the provisions regarding the specific procedures and conditions required for such a citizens' request.[543]

In other words, the Praesidium had decided that as little as 0.2 percent of the total population of the EU would set the ECI in motion. But in the course of the 2003/04 and 2007 IGCs, the Masters of the Treaties failed to agree the formula that would determine 'the minimum number of Member States from which [one million] citizens must come'.[544] Nevertheless, the ECI promised to give EU citizens an unprecedented direct-democratic tool, besides opening a window to transnational bottom-up agenda-setting.

7.6.3 A constitutional 'Sleeping Beauty'

Lisbon Treaty Article 24(1) TFEU left it up to the EU legislator, acting 'in accordance with the ordinary legislative procedure', to set out the procedures and conditions required

[541] Ibid., 1, 2.
[542] Efler.
[543] European Convention, 'Revised Texts', CONV 811/03, Brussels, 12 June 2003, 5.
[544] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Meeting of Heads of State or Government, Brussels, 17/18 June 2004', CIG 81/04, PRESID 23, Brussels, 16 June 2004, Annex 6, 11. Compare with *Constitutional Treaty*, Article I-47(4); and with *Lisbon Treaty* Article 11(4) TEU, and Article 24(1) TFEU.

for the activation of the ECI. Indeed, less than six weeks after the Irish approved Lisbon in their second referendum of October 2009, the Commission published a Green Paper on the citizens' initiative.[545] From that moment on, the legislative debate was characterized by:

- what the EP and the Commission understood by 'a significant number of Member States', under Article 11(4) TEU; and
- how to determine the number of signatures per member state that were necessary to activate the citizens' initiative.

On one side, the EP was in favour of setting the member-states threshold either at one quarter, or one fifth, of all the EU countries.[546] On the other, the Commission proposed setting it at one third. Whichever the percentage, both institutions concurred that the agreed threshold would ensure that the citizens' legislative initiatives would be about issues that reflected the wider European interest, rather than the interest(s) of a restricted group of member states. Thus, both institutions referred to thresholds for the activation of other policies and initiatives that were already in place under the Treaties. For example, EP resolution P6_TA(2009)0389 (paragraph L) of 7 May 2009, stated that:

> Article 76 TFEU [regarding FSJ] indicates that a legislative proposal supported by a quarter of the Member States may be presumed to take sufficient account of the European common interest […] therefore, such a minimum number can be considered to be unchallengeable.

[545] Commission of the European Communities, 'Green Paper on European Citizens' Initiative', COM(2009) 622 final, Brussels, 11 November 2009.

[546] 'European Parliament Report requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the citizens' initiative (2008/2169(INI))', Committee on Constitutional Affairs Rapporteur: Sylvia-Yvonne Kaufmann, A6-0043/2009, 3 February 2009; and proposed Amendment 6, in 'European Parliament Report on the Proposal for the regulation of the European Parliament and of the Council on the citizens' initiative', Committee on Constitutional Affairs Rapporteurs Zita Gurmai and Alain Lamassoure, A7-0350/2010, 2 December, 2010, 8.

On the other hand, the Commission argued that a higher threshold was more representative of the common interest, and observed that a threshold of nine member states would copy the 'provision on enhanced cooperation' under Article 20(2) TEU, as well as the activation of the 'early warning mechanism' under Article 7(2) of the Protocol on the application of the principles of subsidiarity and proportionality.[547] Furthermore, the Commission backed its proposal by referring to similar national thresholds. For example, the number of cantons required for the launching of the Swiss optional referendum is eight out of twenty-three cantons; and in Austria, a citizens' initiative must receive *either* the support of 100,000 voters nation-wide, *or* of one sixth of voters in at least three out of nine *Länder*.[548]

As for the demographic threshold, Lisbon Article 11(4) TEU, stated that one million EU citizens could 'take the initiative of inviting the European Commission […] to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.' What this article *did not* stipulate was *how* to determine the number of signatures for each member state. The main problem here stemmed from the fact that the Union's demographics varied between 82 million people in Germany and Malta's 0.4 million. In other words, a fixed percentage for all the member states seemed inequitable because under such a procedure, it was deemed easier to collect, say, 1,000 signatures in Malta or Luxembourg, than 160,000 signatures in Germany, such that it would be easier to count small states.[549]

[547] Commission of the European Communities, 'Green Paper on the European Citizens' Initiative', 4.
[548] Ibid., 5. See *Swiss Constitution*, Articles 138–140; and *Austrian Constitution*, Article 41(2).
[549] European Commission, 'Proposal for a regulation of the European Parliament and of the Council on the citizens' initiative', COM(2010) 119 final, Brussels, 31 March 2010, 3.

To resolve this issue, the Commission took the cue from the degressive proportionality principle regarding the number of MEPs per member state under Article 14(2) TEU, and by way of analogy suggested that each member state have a minimum threshold of signatures to be obtained by multiplying the number of MEPs allotted to each state by 750.[550] Indeed, this formula gave a proportionately lower number of signatures for the big countries, and a proportionately higher one for the small. Eventually, this procedure, and Parliament's proposal to set the threshold at one quarter of all the member states carried the day, and by 16 February 2011, EU Regulation No 211/2011 on the ECI had gone through all the legislative stages. In due course, the world's first transnational, digital right of initiative mechanism became fully operational on 1 April 2012.

On that day, the Commission received requests for registration of three proposed initiatives, which the Commission denied on the basis of the provisions under Article 4(2) of said Regulation.[551] And by March–April 2014, another forty-six citizen committees were formed to put forward other initiatives, of which only three reached the required number of signatures.[552] Of these three, the Right2Water (or 'Water and sanitation are a human right!) initiative, became the first to obtain an official response from the

[550] Ibid., 5; and Annex I, 'Minimum number of signatories per Member State', 19.
[551] The titles of these proposals were: 'Recommended singing the European Anthem in Esperanto'; 'My voice against nuclear power'; and 'Strengthening citizens' participation in the taking of decisions regarding collective sovereignty'. The Commission stated the reasons for refusal on 30 May 2012. See European Commission, 'The European Citizens' Initiative Office register' at: http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered (accessed on 17 June 2014).
[552] N.M. Lervanti, 'European Citizens' Initiative', in *The Parliament: Politics, Policy and People Magazine*, 17 April 2014, at: https://www.theparliamentmagazine.eu/blog/European-citizens%E2%80%99-initiative (accessed on 16 June 2014).

Commission on 19 March 2014, after the steering committee of this initiative had collected 1.68 million valid signatures.[553]

Considering that it took close to two years for a citizens' initiative to achieve this goal and give EU citizens the same right as the EP and the member states to propose legislative measures, one is bound to question what kind of avenue is being offered to EU citizens to enter the European political arena; and whether it would generate popular interest in how EU policies affect Europeans. To begin with, this exercise involves collecting no less than 2,740 signatures a day, in the knowledge that the average Union citizen may not be fully aware of the existence, let alone the potential, of the citizens' initiative. And according to ECI Campaign Director Carsten Berg, the software for the citizens' initiative needs to be re-designed in a practical and more user-friendly way for the benefit of average citizens and browsers, if a real European public space is to emerge.[554] Furthermore, the European Citizen Action Service (ECAS)[555] estimated the cost of setting up a secure signature acquisition system as falling within the €20,000–€30,000 bracket, which sum, the ECAS deems beyond the means of most individual organizers.[556] Thus, Levanti compares the citizen' initiative to a Cinderella story, 'where citizens are the Cinderella barely scraping by with the hope of someday equating to the influential power of industry professionals, and the majority of the time coming up

[553] B. Fox, 'EU commission to rewrite water laws after citizens' campaign', 20 March 2014, at: http://eurobserver.com/news/123546; and 'Water is a Human Right', at: www.right2water.eu (accessed on 16 June 2014). This initiative aims to make water and sanitation a human right across the Union by 2016. It also calls on the EU executive to exclude water services from internal market rules; to keep them out of any trade agreement that the Commission could negotiate; and to recognize the human right to water.

[554] C. Berg, 'Initiative for the European Citizens' Initiative: Online Collection System Needs to be Urgently Up-dated', 28 October 2012, at: http://www.citizens-initiative.eu/?p=1287 (accessed on 17 June 2014).

[555] This is an NGO that provides support to the general public on citizens' initiatives.

[556] M. Sangsari, 'The European citizens' Initiative: An early assessment of the European Union's new participatory democracy instrument', in *Canada–Europe Transatlantic Dialogue: January 2013 Policy Paper*, 7, at: http://labs.carlton.ca/canadaeurope/wp-content/uploads/sites/9/CETD_Sangsari_ECI_Policy-Paper.pdf (accessed on 7 May 2014).

short.'[557] Indeed, the Regulation's standards, data protection safeguards, elaborate counterchecks and requisites (starting with the steering committees' requirement to have a certified online signature acquisition system), renders the exercise feasible to organizations with substantial financial and human resources.[558] In fact, the Right2Water campaign was a success story because it was backed by the European Federation of Public Service Unions (EPSU), which represents eight million public service workers from 275 Europe-wide trade unions in the energy, water and waste sectors, health and social services, as well as local *and* national administrations.[559] Furthermore, that initiative's vice-President was the Deputy General Secretary of the EPSU, Jan Willem Goudriaan. With such grass roots and professional leadership, this initiative managed to exceed the minimum number of signatures required in thirteen, rather than seven member states, with Germany alone accounting for a stunning 1.2 million signatures, equivalent to 73.6 per cent of the total valid signatures.[560] Having said that, it remains with the Commission to re-write EU legislation on access to drinking water the way it deems fit and according to its competence in the matter.[561]

7.7 Conclusion

This chapter shows that whereas Tindemans had suggested that the Union's democratic credentials could be enhanced if its institutions were to 'have legitimacy conferred upon

[557] Levanti.
[558] With regard to problems related to the verification of statements of support; use of online collection system; certification of gathered data; and other technical issues, see European Commission, 'Meeting of the Expert Group on the Citizens' Initiative: Summary Report', Brussels, 17 September 2013, 3, 4, and 5.
[559] Fox.
[560] 'Water is a Human Right', at: www.right2water.eu.
[561] See European Commission, 'The European Citizens' initiative Official register', at: http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000003 (accessed on 29 September 2015).

them by the will of our peoples', the EU leaders were reticent about the transformation of the Union's top-down constitution-making process into one where popular input could be entertained in order to render the Union more transparent, legitimate and democratic. Indeed, in the Laeken Declaration there was no direct reference to the citizens' initiative, although it *did* acknowledge the citizens' call 'for a clear, open, effective, democratically controlled Community approach.' Thus, direct-democracy activists established personal contact with influential conventioneers who were *either* interested in, *or* strongly committed to, enhancing the Union citizens' political participation rights. Subsequently, a structured dialogue was established on the Convention's sidelines between pro-democracy activists and like-minded MEPs belonging to five transnational political groups. The activists' objective was to win the support of the largest number of delegates for the pan-European referendum idea and the citizens' initiative. And in order to accomplish this task, they sought: the support of big countries like France, Germany and Spain; and the expertise of Austria, Italy, Portugal, Hungary, Latvia, Lithuania, Romania, and Slovakia, who could make valid contributions to the debate because they could refer to their domestic citizens' initiative mechanisms. This collaborative mode between NGO activists and a select group of Europe's political elite was fundamental to the crafting of a series of pro-democracy proposals until one of them was acceptable to the Praesidium and the Masters of the Treaties. In other words, this was a rare instance where civil society organizations harnessed the political support of the Convention and outsider MEPs, in their resolve to press for the establishment of a mechanism for popular input in the Union's legislative process.

In the post-Convention phase, the NGO activists were less central to the crafting of the procedures and conditions required for the activation of the ECI. Indeed, after a five-and-a-half-year delay provoked by the French–Dutch, and Irish rejections of the Constitutional and Lisbon Treaties, the key players were the Commission and the EP, who designed the Regulation on the citizens' initiative by referring to mechanisms that were already in place under the Treaties for the implementation of other policies or initiatives. Actually, this process may be described as 'distributed constitution-making' in space and time characterized by inter-institutional collaboration punctuated by occasional public consultation, as the Regulation progressed from the 'green paper' to its final stage. Such a process was necessary because the EU leaders had endorsed the ECI without having crafted the details which were to regulate its implementation because the Meyer proposal was included in the draft Constitutional Treaty just hours before the Convention drew to its end. Compare this with the crafting of the Protocol on the role of national parliaments in the EU, which features in the thematic study of Chapter 8.[562]

Admittedly, the mechanisms under which the national parliaments were to check and balance the Union's supranational institutions via the application of the principles of subsidiarity and proportionality were more complex than the citizens' initiative because in the case of the Protocol on the national parliaments in the EU, the national governments were all out to safeguard their domestic sovereignty in order to bring to heel the federalist euphoria that had characterized the pre-, and early post-Maastricht days. But this does not infer that the ECI was of little importance or no consequence to the enhancement of the Union's political legitimacy. Actually, it has the potential to improve the Union's input legitimacy, which may lead to better output legitimacy. Furthermore, it

[562] See pages 231–251.

may prove to be an effective bottom-up agenda-setting mechanism. Indeed, this tool may be used to get the Union to improve current legislation, or to invite the Commission to propose new legislation. Arguably, its impact on the Union's quest for legitimacy seems marginal at the moment, because apart from the complexity of the mechanism *per se*, Europeans may not be sufficiently aware of this right.

CHAPTER 8

CONSTITUTIONAL SETTLEMENTS

8.1 Introduction

The EU has developed into a multi-level polity in which the boundaries between politics in the national capitals and Brussels have become blurred. To begin with, the EU now has a legal personality,[563] which empowers it to sign agreements with third countries and international organizations in policy areas where it enjoys exclusive competence. For example, it is a member of the WTO, wherein the Commission is authorized to speak on behalf of all member states, but still has no single seat in the UN. All Union member states are signatories to the 1951 Geneva Convention, which commits them to protecting refugees by making sure that they are not returned to a state where they may suffer inhumane or degrading treatment, torture or death.[564] Yet, the EU still has no common immigration policy; and despite its CFSP, there is a fundamental division between the Union's neutrals and NATO members, with the latter split further between Atlanticists and Europeanists.[565] What is more, the EU executive currently consists of a College of Commissioners whose input depends on decisions taken at European Council level.[566]

In the light of the foregoing, section two posits that the Union's constitution-making process is invariably influenced by a resilient sovereignist concept of statehood. Indeed, sporadic overtures to a deeper EU tend to coincide with transitory moments of geopolitical insecurity, or other factors like the onset of the neo-liberal economic order

[563] *Lisbon Treaty*, Article 47 TEU.
[564] McCormick, *European Union Politics*, 397.
[565] See pages 98–99, 124–126.
[566] E.O. Eriksen, 'Reflexive integration in Europe', in *Making the European Polity: Reflexive Integration in the EU*, ed. E.O. Eriksen (Oxford & New York, 2005), 25 et passim.

and globalization.[567] Furthermore, section two builds upon Chapter 7, in that, in the absence of a European *demos*; and in view of the EU countries' constitutional diversity, it seems practically impossible for the Union to develop into a superstate. Section three focuses on Maastricht's federalist call for the transfer of policy areas falling under Pillars II and III, to EC Pillar I, which provoked a sovereignist counter-call for the defence of national sovereignty. Then, the thematic study focuses on the post-Maastricht events which prompted the firmer definition and adoption of: the Protocol on the application of the principles of subsidiarity and proportionality; and the Protocol on the role of the national parliaments in the EU, in order to empower the domestic governments: (1) to assay legislative proposals, and see whether they encroach upon national and subnational competences; and (2) to possibly stop invasive proposals from becoming EU law.

8.2 The nation-state rationale and Europeans' difficulties with the 'f-word'[568]

When commenting on the nature of the Euro-polity, many observers agree that the Union is more than an intergovernmental governance system, but less than a fully-fledged federation.[569] This ambivalence is mainly due to the fact that Europe's constitution-making process is still conditioned by the ingrained nationalistic identities of its constituent states. Therefore, the federalist *telos* in the European setting remains uncertain; and supranationalism tends to (re)surface only when the sovereignty of the nation states is threatened by extraordinary exogenous circumstances. During such

[567] See pages 85–86, 128, 154, 158.
[568] The 'f-word', as meaning 'federal'. This expression knows its origin to former British Prime Minister Margaret Thatcher, who refused to speak the word 'federal' out loud; hence the dreaded 'f-word'. See K. Kiljunen, *The European Constitution in the Making* (Brussels, Centre for European Policy Studies, 2004), 10, at:aei.pitt.edu/32581/1/20._EU_Constitution.pdf (accessed on 26 September, 2016).
[569] See M. Burgess, *Federalism and European Union: The Building of Europe, 1950–2000* (London & New York), 17, 28–29, 41–43; 48 et passim; Hix & Høyland, 12–16; Magnett, *What is the European Union?*, 1–10; and J.-C. Piris, *The Lisbon Treaty*, 331, 335.

critical moments, national leaders (re)consider deepening, only to resume an inter-governmentalist attitude once the perceived danger subsides.[570] For example, Spinelli's appeal for the establishment of a 'United States of Europe' coincided with Western Europe's impotence in the face of feared Soviet aggression triggered by the communist takeover of Czechoslovakia, and the Berlin blockade, in 1948. However, it was the Americans who eventually warded off the Soviet threat with the establishment of the Atlantic Alliance in 1949, whereas the European project took off in 1951.[571] Similarly, when the Soviet empire was about to implode, many EC leaders believed that a politically unified Europe would stand a better chance to countervail any geopolitical instability in a post-communist era; hence the calling of an additional IGC on political union. But as the Russian Federation stepped down from its superpower status, and Soviet/Russian troops withdrew from the former Warsaw Pact countries, the intergovernmentalist rationale re-emerged, as the post-Socialist states became members of NATO and the EU. Indeed, the Union's dependence on NATO's security umbrella constitutes the main reason why the majority of member states seem loath to establish an alternative European defence alliance.

In the light of the foregoing, the Union's post-Maastricht constitution-making process has been characterized by the member states' guarded, almost defensive, attitude *vis-à-vis* the transfer of more powers from the national capitals to Brussels.[572] Typically, such overtures have been watered down via the crafting of complex mechanisms for cooperation among different subsets of member states. For example, Denmark rejected the idea that EPC should include co-operation in defence policies like the setting up of

[570] Nicoll & Salmon, 318–319; and Rosamond, 133.
[571] See page 96.
[572] See pages 193, 194–195.

common military forces; hence Copenhagen's request at the 1990–91 IGC that the consensus rule continue to apply to matters affecting EPC.[573] Actually, this concern constituted one of the reasons for the Danish people's rejection of Maastricht in June 1992, as may be construed from the memorandum entitled 'Denmark in Europe' of 30 October 1992. Eventually, Maastricht was salvaged at the Edinburgh Council, *after* Denmark was granted an opt-out from all common foreign policy initiatives that carried defence implications, together with opt-outs concerning other common policies. And in the light of the accession of the continental neutrals in 1995, the 'constructive abstention' mechanism was introduced under Amsterdam Treaty Article 23 (ex-Article J.13), to avert paralysis in joint foreign policy initiatives, by providing selective opt-outs, especially for neutral and/or non-aligned states unwilling to adopt specific foreign policy initiatives.[574]

Resistance to the evolution of the Euro-polity along more federal lines may be attributed to a number of reasons. To begin with, the Union still lacks the legitimizing principle of a sovereign authority in the form of *either* a European people, *or* a legislative assembly, which truly constitutes a sovereign European government. And since the Union cannot be understood in terms of the self-governance of citizens as members of one *demos*, many Europeans feel that they *should not* be unconditionally forced by their national governments to participate fully, and indiscriminately, in all of the Union institutions and common policies; *or* bear the unwarranted consequences of such policies. Furthermore, in the absence of a pan-European nation, there is no *Staatsvolk* identity that a polity may be based upon. In other words, the EU remains very ethno-culturally diverse

[573] 'Memorandum from the Danish Government 4 October 1990', in *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community*, eds F. Laursen & S. Vanhoonacker (Maastricht, 1992), Section VII, 'Unity and Cohesion in the Community's international role', 299.
[574] See page 99–100.

at any location; and dispersed, because political authority is exercised at different levels ranging from the local (or municipal), to the regional or sub-national level; *and* from the national, to the supranational level. In other words, the EU does not shift sovereignty from one locus of power to another, nor does it disperse sovereignty in the way the Founding Fathers of the US envisaged their Constitution would, because EU citizens are mainly defined by their national identity and constitutional tradition.[575]

Euro-federalists may argue that a similar diversity and dispersal of power did not stop the Helvetians from forging a federal state based on a common national citizenship. But then, the Swiss Constitution was agreed by virtue of the *Diet*'s legal fiat in the wake of the *Sonderbund* War.[576] Indeed, according to Bohman, the EU may at best be conceived as a transnational, or international, democracy because its structures do not resemble the unified structures of federal or unitary polities that can organize the will of the *pouvoir constituant*.[577] Indeed, unlike many other upper chambers, the Council of Ministers is a permanent institution, albeit in a constant state of flux every time national elections determine changes in the domestic governments, and whenever EU membership increases after every enlargement. Furthermore, Council members keep the Union's supranational initiatives under their vigilant watch. In other words, their task is to strike a delicate balance between the Union's supranational objectives, without losing sight of the national, and sub-national, interest.

[575] Magnett, *What is the European Union?* 174, 192.
[576] See page 51.
[577] See J. Bohman, 'Reflexive constitution-making and transnational governance', in Eriksen, *Making the European Polity*, 38–39.

8.3 Post-Maastricht decision-making and the national interest

As long as the European project focused on the completion of the internal market, most Europeans tended to be supportive of integration. But matters took a different slant when the unification of the two Germanys materialized within Maastricht's wider framework for political union. Indeed, political union inferred that common home and foreign policies needed to be communitarized. But whereas the national governments paid lip service to political union, they were determined to maintain their sovereignty in the most sensitive policy areas. Furthermore, in a federal state like Germany, the *Länder* were concerned about Bonn/Berlin possibly entrusting Brussels with missions pertaining to the *Länder*'s areas of competence.[578] Similar concerns were expressed in Belgium, whose government had proposed a coordinated version of a new federal constitution to the domestic Parliament, just four months before Maastricht came into force. In other words, both national and sub-national governments wished to see the Union's competences more clearly defined. Consequently, the Maastricht Council introduced the principles of subsidiarity and proportionality, under which Brussels was not to undertake or regulate tasks that could be managed efficiently at the national (or regional) level. Furthermore, for the areas which did not fall within its competence, the Community was to act 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore […] be better achieved by the Community';[579] and by way of proportionality, any action pursuant to the objectives of the EC was not to impose unnecessary constraints on the member states.

[578] See Gunlicks, 361–363.
[579] *Maastricht Treaty*, Article 3b.

Maastricht recognized also the importance of the regions as part of the Union's institutional architecture. Indeed, Article 198a TEU, established the Committee of the Regions (CoR), which could issue opinions of an advisory nature to the Council or the Commission on regional economic disparities; and in all four post-Maastricht IGCs and inter-treaty intervals, the policy-making process was characterized by two opposite forces, namely:

1. the federalist call for the transfer of policy areas falling under Maastricht Pillars II and III, to Pillar I; and the enhancement of the EP's decisional powers to compensate for the national parliaments' diminution of sovereignty incurred by such transfer; and
2. the sovereignist call for the fine-tuning of extant supervisory agencies and legislative procedures so that the EU countries be better equipped to monitor the Union's legislative process, and the effects of policy transfer from the national, to the supranational level.

Of these two options, it is to the second process that the chapter will focus on.

8.4 Thematic Study: The crafting of the Protocol on the principles of subsidiarity & proportionality, and the Protocol on the role of the national parliaments in the EU

8.4.1 The opening gambits

Maastricht's 'Declaration on the role of national parliaments in the European Union'; and the principle of subsidiarity (Article 3b TEC) had the making of last-minute adjuncts that were meant to appease the growing concern of those member states who were particularly uneasy with the TEU's federalist implications. Indeed, when the Danes rejected Maastricht in June 1992, the Edinburgh Council crafted more elaborate guidelines for the

Community 'to implement the subsidiarity principle and measures to increase transparency and openness in the decision making process.' In other words, 'the principle that the Community can only act where given the power to do so [and] that national powers were still the rule and the Community's, the exception' were to remain the basic features of the Union's legal order.[580] And to further appease the Eurosceptics, the Commission agreed:

- to produce an annual work programme in October of each year to allow for wider debate in national parliaments;
- seek closer consultation with the Council before making proposals;
- make its documents public in all of the Community languages.[581]

Thus, Maastricht's 105-word Article on subsidiarity, and the 111-word Declaration on the role of the national parliaments, became a fleshed-out eleven-page 'Overall approach to the application by the Council of the Subsidiarity Principle', under which the 'Basic Principles'; the 'Guidelines'; and the 'Procedures and Practices',[582] were intended to monitor and control the EU institutions' (federalist) initiatives. Subsequently, the EU leaders attached to Amsterdam a reworded Protocol (No. 30) on the application of the principles of subsidiarity and proportionality; and a more articulate Protocol (No. 9) on the role of national parliaments in the EU. The first: (1) recognised the supremacy of the principles developed by the ECJ regarding the relationship between national, and Community law; (2) defined the limits that subsidiarity and proportionality imposed upon the initiatives that the Community could take in those policy areas outside its exclusive

[580] 'European Council in Edinburgh 11–12 December 1992: Conclusions of the Presidency', SN 456/1/92 REV 1, 2, 14.
[581] Ibid., 4.
[582] Ibid., 12 – 23.

competence; and (3) sanctioned the lowest degree of Community action, such that the Community would expand its powers only where circumstances so required. However, the monitoring of the Commission proposals' compliance with the principle of subsidiarity remained in the hands of the Council, as may be construed from paragraph 2 of the Protocol on national parliaments, whereas the EP gained the right to be informed of the reasons on the basis of which, all, or part(s) of, the Commission proposals were deemed to be inconsistent with the principles of subsidiarity and proportionality.[583] On the other hand, the national parliaments could not bring actions to the ECJ regarding infringements of the principles of subsidiarity and proportionality; nor could they issue reasoned opinions on the Commission proposals' non-compliance with the same principles.

All this was expected to change in the light of the Nice Declaration. Indeed, the treaty reform process was to explore, *inter alia*, 'how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity [as well as define] the role of national Parliaments in the European architecture.'[584] In other words, the European Council acknowledged that an enhanced role for the domestic parliaments could enhance the Union's legitimacy by bringing it closer to its citizens. Besides, the Laeken Declaration queried whether national parliaments should be represented in a new institution (such as a Congress or second Chamber) alongside the Council and the EP; have a role in areas of European action in which the EP had no competence; and focus on the division of competence between

[583] *Amsterdam Treaty*, 'Protocol on the role of national parliaments in the European Union', para. 3.
[584] 'Nice Declaration on the future of the Union', para. 5, indents 1 and 4.

Brussels and the national capitals, through preliminary checking of compliance with the principle of subsidiarity.

8.4.2 The preparatory phase

The role of the national parliaments and the application of the principle of subsidiarity ranked high on the Convention's agenda because the participating countries perceived the

Table 8.1: Committee composition of WG I & WG IV by component group

Component Group	Subsidiarity (WG I)	National Parliaments (WG IV)
Commission	1	1
EP	5	5
Member state government	4	1
Member state Parliament	10	13
Candidate country government	2	1
Candidate country Parliament	9	13
Observers	4	1
Totals	**35**	**35**

Source: European Convention, 'Composition of the Working Groups', CONV 77/1/02, REV 1, Brussels, 14 June 2002, 2, 5.

Union's further deepening as a threat to state sovereignty. Thus, the Praesidium established WG I on Subsidiarity, with Spanish MEP Iñigo Méndez de Vigo as Chair; and WG IV on National Parliaments, with UK MP Gisela Stuart as Chair (see above, Table 8.1).[585]

Both committees included representatives of the national MPs and government representatives from all participating countries, as well as four EU institutions, namely the EP, the Commission, the ESC, and the CoR.[586] Furthermore, nine extra-Convention experts and practitioners in the Union's legal and administrative affairs participated in the

[585] European Convention, 'Note on Working Methods', CONV 9/02 Brussels, 14 March 2002, Article 15, Working Groups, 7; 'Mandate of the Working Group on the principle of subsidiarity', CONV 71/02, Brussels, 30 May 2002; and 'Mandate of the Working Group on National Parliaments', CONV 74/02, Brussels, 30 May 2002.
[586] CONV 77/1/02, REV 1, 2, 5. There were no representatives of the CoR in WG IV.

internal debate on subsidiarity in addition to those presented by the two WGs.[587] In total, 186 contributors submitted 142 position papers on both subjects, of which, 102 were presented *before* the WGs published their Final reports in autumn 2002.[588]

A comparative analysis of both reports shows that the majority of committee members favoured the creation of an enhanced system of national scrutiny. Indeed, the reports recommended that:

- the national parliaments be involved as early as possible in the Union's legislative process, and that *ex ante* monitoring of the principle of subsidiarity be primarily of a political nature;
- the Commission address directly to each national parliament, its legislative proposals at the same time as to the Community legislator;
- national parliaments be empowered to raise concerns about subsidiarity throughout the legislative process;
- national parliaments have at least six weeks from the date a Commission proposal is transmitted to issue a reasoned opinion regarding its compliance with the principle of subsidiarity, and if within that time-frame, a legislative proposal received reasoned opinions from one third of national parliaments regarding a breach of the principle of subsidiarity, the Commission would have to re-examine its proposal;[589]

[587] These experts presented six Working documents in addition to those presented by Working Group I (Subsidiarity), and Working Group IV (National Parliaments). See WG I, *Working documents 3, 4, 7, 9, 10,* and *14*, Brussels, various dates.

[588] 'Position papers' include 64 Working documents presented by thirty-three committee members of WGs I & IV, the Commission, and nine extra-Convention contributors mentioned; **and** 78 contributions submitted by members of both WGs and other conventioneers. These position papers represented the views of certain delegates from all the participating countries, the Commission, the EP, the CoR, and the ESC.

[589] On this point, WG IV did not commit to setting the threshold for the national parliaments of the EU at one-third.

- national parliaments be empowered to refer any matter to the ECJ that allegedly was in breach of the principle of subsidiarity.[590]

On its part, WG I was against the creation of a Congress for debating the Union's wider political orientation and strategy because, in their view, the national parliaments could fulfil that task.[591] Furthermore, the committee members posited that after the convening of the Conciliatory Committee as provided under Article 251 TEC, the Commission inform the national parliaments with the Council's common position and the amendments adopted by the EP. As for judicial review, WG I suggested that besides national parliaments, the CoR *also* have the right to seek judicial review on matters related to alleged violation of the principle of subsidiarity.[592] Meanwhile, WG IV proposed that:

- no agreement be reached in the Council and the Committee of Permanent Representatives (COREPER) on any proposal during the six-week consultation period;
- the efficiency of parliamentary scrutiny could be enhanced if regular contacts and networking between national parliaments, and best practices modalities were put in place by the Conference of European Affairs Committees (COSAC);
- the Commission transmit its Annual Policy Strategy, and annual legislative and work programme simultaneously to the national parliaments, the EP and the Council;
- the annual report of the Court of Auditors reach the national parliaments in a similar manner;

[590] European Convention, 'Conclusions of Working Group I on the Principle of Subsidiarity', CONV 286/02, Brussels, 23 September 2002, 1–10; and 'Final report of Working Group IV on the role of national parliaments', CONV 353/02, WG IV 17, Brussels, 22 October 2002, 1–15.
[591] CONV 286/02, 6, 9.
[592] Ibid., 7, 8.

- treaty amendment procedures via the Convention method (with the participation of the EP, and the national parliaments and governments), be entrenched in the Constitutional Treaty;
- the draft Constitution underscore the close link between subsidiarity and proportionality.[593]

8.4.3 The Praesidium proposes, and the Convention disposes

As soon as both Final reports were published in September–October 2002, the Praesidium evaluated the suggestions submitted by both WGs during two plenary sessions *before* publishing its draft proposals on 27 February 2003. Actually, the Praesidium drafts acknowledged many of the WGs' proposals, namely that:

1. the power to activate the early warning system be given to national parliaments, each of which would be responsible for making internal arrangements *re*: consultation of each chamber in the case of bicameral parliaments and/or regional parliaments exercising legislative powers;
2. the Commission send all legislative proposals and consultative documents directly to national parliaments, at the same time that they be transmitted to the EU legislator;
3. the Commission justify every legislative proposal allegedly in breach of the principle of subsidiarity in a detailed statement so that other parties would appraise its compliance or otherwise with the subsidiarity principle;
4. the threshold of national parliaments for obliging the Commission to reconsider its proposals be set at one third;

[593] CONV 353/02, 5–12.

5. within six weeks from the date of transmission of the Commission's legislative proposal, any national parliament could send to the Presidents of the EP, the Council, and the Commission a reasoned opinion stating why it considered that the proposal in question failed to comply with the principle of subsidiarity;
6. the ECJ hear, and determine, actions brought by member states on grounds of infringement of the principle of subsidiarity at the request of their national parliaments and/or regional parliaments with legislative powers;
7. the CoR have similar rights as those outlined under point 6, with regard to legislative acts on which it is consulted according to the Treaty provisions;
8. the Commission and the Court of Auditors send their respective annual report of application of the principles of subsidiarity and proportionality simultaneously to national parliaments, the EP and the Council;
9. Council proceedings agendas, be sent to national parliaments (and the EP) at the same time as they are sent to the national governments.[594]

However, the Praesidium draft Protocol on the national parliaments brushed aside COSAC's right to examine legislative proposals or initiatives concerning the rights and freedoms of the individual within the wider context of the establishment of an area of Freedom, Security and Justice (FSJ); and its right to communicate to the EU legislator and the Commission, any contribution to the Union's legislative activities in relation to: (1) the application of the principle of subsidiarity; (2) the area of FSJ; and (3) questions regarding fundamental human rights. On the other hand, the Praesidium draft solicited

[594] European Convention, 'Draft Protocols on: – the application of the principle of subsidiarity and proportionality – the role of national parliaments in the European Union', CONV 579/03, Brussels, 27 February 2003, 6–8; and 11–12.

more cooperation between the EP and the national parliaments.[595] Furthermore, paragraph 4 included the national parliaments among the institutions that would scrutinize the Commission's legislative proposals, whereas paragraph 3 reiterated the national parliaments' right to issue reasoned opinions on whether a Commission legislative proposal complied with the principle of subsidiarity. Besides, the Praesidium proposed that national parliaments gain immediate access to any instrument of legislative planning or policy strategy that the Commission formerly submitted to the EU legislator.

Table 8.2: Numerical breakdown of proposed amendments to Praesidium Protocols on Subsidiarity and the National Parliaments by institution/party allegiance

	Proposed amendments to Protocol on Subsidiarity	Proposed amendments To Protocol on National Parliaments	Totals
a. National Agents			
1. individual MPs	15	5	20
2. Government representatives	10	10	20
3. single party	9	8	17
4. cross-party	8	6	14
b. Transnational Agents			
5. Party group	2	1	3
6. cross-party	3	3	6
c. EU Agents & Institutions			
7. MEPs[1]	21	8	29
8. MEPs and National MPs	3	0	3
9. CoR	9	0	9
10. ESP	1	0	1
11. Commission	1	0	1
No. of proposed amendments	**79**	**41**	**120**

Source: Amendments to: 'Draft Protocol on the application of the principles of subsidiarity proportionality'; and 'Protocol on the role of the National Parliaments in the European Union'.

[1] Certain national MPs supported three amendment proposals tabled by MEPs.

Note: categories 3, 4, 5, and 6 included the support of certain MEPs.

[595] Ibid., 12.

Once published, the Praesidium proposals did not pass unscathed. Indeed, 136 delegates from every participating country, the Commission, the EP, the CoR, and the ESP,[596] tabled 120 suggestions for amendment, of which seventy-nine concerned the Protocol on subsidiarity. National agents tabled seventy-one suggestions for amendment to both protocols. Forty amendment proposals reflected the position of individual MPs and government representatives; another twenty reflected the position of single parties and same party groups at both the national, and the transnational level; and another twenty reflected the common positions of cross-party groups at both levels (see above, Table 8.2).

With regard to the draft Protocol on subsidiarity, the major bone of contention was the threshold that would oblige the Commission to reconsider a legislative proposal. Indeed, this subject triggered a lively debate between Euro-federalists on one side, and a loose coalition of Eurosceptics, intergovernmentalists, and sovereignists on the other. To begin with, thirty-six EPP delegates from twenty participating countries proposed that the early warning mechanism be activated if two thirds, rather than one third of national parliaments issued a reasoned opinion on a Commission proposal's alleged non-compliance with the principles of subsidiarity and proportionality.

With their suggestion for a higher threshold, the centre-right parties aimed at strengthening the Commission's arm, rather than 'risk paralysing the legislative

[596] The classification by component group was as follows: national MPs = 73 (53.68%); national government representatives = 27 (19.85%); MEPs = 27 (19.85%); Commission, CoR, and ESP = 9 (6.62%).

process.'[597] On the other hand, the Dutch government representatives proposed that the threshold be one fourth of national parliaments,[598] whereas UK Conservative MEP Timothy Kirkhope argued that the one-third threshold should oblige the Commission to withdraw its proposal altogether; and authorize member states to 'proceed on a bilateral basis.'[599] Meanwhile, a cross-party group of thirteen delegates from Denmark, Estonia, Finland, France, Latvia, Poland, Portugal, and the UK proposed that in addition to the one-third threshold, a second two-thirds threshold be introduced, which, if reached, would result in the mandatory withdrawal of the Commission proposal,[600] whereas two Eurosceptic MEPs, namely Jens-Peter Bonde and Esko Seppänen, posited that the Commission review its legislative proposal even if *one* parliament issued an opinion of non-compliance. And if one fourth of 'the national parliaments, the European Parliament or the Committee of the Regions issue opinions on non-compliance […] the Commission [would have to] withdraw its proposal and eventually put forward a new proposal'.[601]

The centre-right parties were also in favour of the devolution of *ex post* judicial review. Indeed, forty-two EPP delegates, plus another cross-party group of twenty members, tabled fifteen amendments in which they proposed that the CoR and sub-national units having legislative powers bring actions regarding infringement of the

[597] Amendment Form, 'Suggestion for Amendment of the revised Protocol on the application of the Principles of Subsidiarity and Proportionality, Article 6, by Brok; Almeida Garrett; et al.' Finnish MEP Piia-Noora Kauppi (EPP), concurred with the two-thirds threshold in a separate proposal.
[598] Amendment Form, 'Suggestion for amendment of subsidiarity and proportionality, article 6, 2nd paragraph, by Messrs G.M. de Vries, T.J.A.M. de Bruijn', 3.
[599] Amendment Form, 'Suggestion for Draft Protocol on the application of the principle of subsidiarity and proportionality, by Timothy Kirkhope MEP', 2.
[600] See Amendment Form presented by Ms Gisela Stuart and eleven other Convention members; and Amendment Form presented by Mr Matti Vanhanen, *re*: 'Suggestion for protocol on the application of the principles of subsidiarity and proportionality', 2 (in both documents).
[601] Amendment Form, 'Suggestion for Protocol on the application of the principles of subsidiarity and proportionality'; by Member of the Convention Mr Jens-Peter Bonde and alternate Esko Seppänen', 2–3.

principles of subsidiarity and proportionality to be heard by the ECJ.[602] However, the delegates that insisted most forcibly upon the legislative and judicial autonomy of sub-national units were the Belgians who proposed that the member states indicate in a declaration, which domestic parliament be considered as *the* national parliament having the legislative competence to execute different common policies, so that it might evaluate the principles of subsidiarity and proportionality.[603] This particularistic request reflected Belgium's brand of federalism based on the autonomy of its regions and linguistic communities, whereas eleven delegates from Belgium, the Czech Republic, Finland, France, Germany, and Italy retorted that any chamber of a bicameral national parliament, rather than 'any national parliament' ought to have the right to send a reasoned opinion to the Presidents of the EP, the Council, and the Commission.[604]

As for the draft Protocol on the national parliaments, eighty-seven delegates from all twenty-eight countries and the CoR submitted twenty-four suggestions for amendment which focused on the ulterior empowerment of the national parliaments in the Union's legislative and constitutional amendment processes. Furthermore, seventeen conventioneers from twelve countries suggested that the national parliaments participate in any constitutional amendment exercise on a par with the EP,[605] whereas four Dutch MPs suggested that ratification of amendments to the EU Charter of Fundamental Rights

[602] These amendment proposals originated from all EU member states, nine candidate countries, and the CoR.
[603] Formulaire d'amendement, 'Proposition pour le protocol: l'application des principles de subsidiarité et de proportionnalité, par M. Danny Pieters', 1.
[604] See for example, Amendment Form, 'Suggestion for amendment of Protocol: Subsidiarity and proportionality, by Mr Erwin Teufel', 1, 3, 4, 5.
[605] Amendment Form, 'Suggestion for amendment of Article: National Parliament Protocol, by Mr Andrew Duff, Paul Helminger, et. al.', 1. Two thirds of the 17 signatories were Liberals.

be approved by an enhanced majority of national parliaments.[606] Other suggestions for amendment tabled by large transnational groups concerned:

- greater cooperation between the EP and the national parliaments (forty-nine signatories from all participating countries, plus the CoR);
- greater scrutiny by national parliaments of their respective government's action in the Council (forty-five signatories from nineteen countries);
- the deletion of paragraph 7 of the draft Subsidiarity Protocol, which suggested that national parliaments be empowered to issue reasoned opinions *prior to* the convening of Conciliatory Committee meetings (fifty-four signatories from sixteen countries);
- an enhanced role for COSAC in the Union's legislative process, notably with regards to (1) CFSP, ESDP, and the area of FSJ; (2) questions regarding the rights and freedoms of individuals; and (3) the application of the principles of subsidiarity and proportionality (forty-two signatories from twenty countries);
- the improvement of EU governance rules, by determining the duration of 'a reasonable period of time' in order to enable national parliaments to exercise their control between the examination of a legislative proposal by COREPER, and the adoption of a common position by the Council (thirty-eight signatories from ten EU member states, and the CoR).

In conclusion, the Italian MEP Elena Paciotti posited that the two protocols be included in the Treaty text; whereas the Czech government representative Jan Kohout and German

[606] Amendment Form, 'Suggestion for protocol: on the role of National Parliaments in the European Union, by Messrs R. van der Linden (member), F. Timmermans (member), W. van Eekelen (alternate), J.J. van Dijk (alternate)'.

MP Erwin Teufel proposed that the two protocols be merged, given their similarity in substance.[607]

8.4.4 The Praesidium proposals revised

When it came to re-drafting the protocols in question, the Praesidium took on board many of the delegates' second wave of suggestions. To begin with, all the provisions under both protocols were to apply to 'each chamber of a national Parliament'. And in order to calculate the one-third threshold that would activate the early warning mechanism, a points system was devised, under which a unicameral parliamentary system would have two votes, and each chamber in a bicameral system would have one.[608] Furthermore, the national parliaments were to have the right to formulate initiatives concerning judicial cooperation in criminal matters and the police, if at least a quarter of the EU countries were to present a coordinated initiative in policies which fell under the area of FSJ.[609] Finally, the draft Protocol on subsidiarity was to empower the national parliaments to bring *ex post* actions to the ECJ on grounds of infringement of the principle of subsidiarity by a European legislative act.[610] What the Praesidium *did not* include was the veto mechanism proposed by the cross-party group of thirteen delegates from eight countries, under which a reasoned opinion on a Commission proposal's non-compliance

[607] Fiche amendement, 'Proposta di emendamento ai titoli dei Protocolli sull'Applicazione dei principi di sussidiarietà e proporzionalità e sul ruolo dei Parlamenti Nazionali nell'Unione Europea, déposée par Mme Elena Paciotti'; and Amendment Forms, 'Suggestion for amendment of Protocol on the Role of the National Parliaments and Protocol on the Application of the Principles of Subsidiarity and Proportionality, by Mr J. Kohout; and Teufel'.

[608] European Convention, 'Summary report on the plenary session – Brussels, 17 and 18 March 2003', CONV 630/03, Brussels, 21 March 2003, 6.

[609] *Draft Treaty establishing a Constitution for Europe*, in OJ C 169, 18 July 2003, Article 6, paragraph 3. See also, Article III-165, under Chapter IV (Area of FSJ); Articles III-171 to 175, under Section 4 on 'Judicial cooperation in criminal matters'; and Articles III-176 to 178, under Section 5 on 'Police cooperation'.

[610] *Draft Constitution*, Protocol 2, Article 7, paragraph 1.

with the subsidiarity principle from two thirds of the national parliaments would compel the Commission to abandon its legislative proposal. It also rejected the EPP proposal, according to which, the early warning mechanism would be activated if the two-thirds threshold were reached. And once the 2003 IGC got underway, the representatives of the governments of the member states concurred with most of the provisions under both protocols. Nevertheless, amendments were agreed to:

1) include more stakeholders in the formulation of draft European legislative acts;
2) improve inter-institutional consultation;
3) recognize the complexity and diversity of the constituent states' parliamentary systems.

With regard to point 1, the revised protocols included new provisions, under which, draft European legislative acts could include: (i) initiatives from a group of member states *or* the EP; (ii) requests from the ECJ *or* the EIB; (iii) recommendations from the ECB, besides the Commission's legislative proposals.[611]

As for point 2, the EU leaders concurred that the national parliaments needed enough time to assess whether:

- the Council's adoption of a European law or framework law in accordance with a special legislative procedure; *or*
- a European Council's intention to authorize the Council to act by a qualified majority in a given area or case,

were actually compatible with the principles of subsidiarity and proportionality. Thus, they provided for the inclusion of an additional clause, which stated that national

[611] Conference of the Representatives of the Governments of the Member States, '2003 IGC – Annexes I and II to the EC Treaty, Protocols drawn up by the Convention and Protocols annexed to the EU Treaty and to the EC and EAEC Treaties', CIG 50/03, ADD 1, Brussels, 25 November 2003, 18, 24.

parliaments be informed of the European Council's initiative 'at least six months before any European decision is adopted.'[612]

With regard to point 3, the definitive version of the Protocol on the national parliaments referred to 'component chambers' of 'bicameral national Parliaments', in order to include the legislative assemblies of certain member states' constituent regions and communities that qualified as 'national' parliaments.

8.4.5 The structural weakness of the 'early warning mechanism' revealed

By virtue of these protocols, the domestic parliaments had been empowered to monitor the Union's legislative process; and bring *ex post* action to the ECJ on grounds of alleged infringement of the principle of subsidiarity by a European legislative act.[613] However, according to COSAC Secretariat members Stephanie Rothenberger and Oliver Vogt, the problem with the early warning mechanism was that the six-week time-frame could hardly qualify as 'early', especially if national parliaments were engaged *after* the Commission transmitted its draft legislation to the national parliaments. Furthermore, they argued that it could hardly qualify as an effective 'warning', since national parliaments would be faced with the Herculean task of selecting the most sensitive proposals from among a plethora of European legislative proposals.[614] Hence, they argued that the national parliaments' hypothetical inability to determine whether an EU

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[612] Ibid., 'Protocol on the Role of **Member States'** National Parliaments in the European Union', 20. See also, *Constitutional Treaty*, Article IV-444.

[613] *Constitutional Treaty*, 'Protocol on the application of the principles of subsidiarity and proportionality', Articles 6 and 8.

[614] S. Rothenberger & O. Vogt, *The "Orange Card": A fitting Response to National Parliaments' Marginalisation in EU decision-Making?* Paper prepared for the Conference "Fifty Years of Interparliamentary Cooperation", 13 June 2007, Bundesrat, Berlin, organised by the Stiftung Wissenschaft und Politik, 4, at:
www.swp-berlin.org/fileadmin/contents/products/projekt_papiere/ipacoo_rothenberger_vogt_ks.pdf
(accessed on 17 December 2014).

legislative proposal infringed upon the principles of subsidiarity within the stipulated time could lead to the *de facto* slippage of national sovereignty. Thus, in November 2004, COSAC decided to conduct a six-week pilot project in order to assess the feasibility of the early warning mechanism.[615]

Once completed, this pilot project revealed that most national parliaments *did* encounter difficulties in formulating a reasoned opinion within the prescribed timeframe. Two other checks were conducted during 2006, with only 37 to 40 per cent of twenty-seven national parliamentary chambers from twenty-one participating member states managing to produce a reasoned opinion within six weeks.[616] Meanwhile, the Dutch Prime Minister Jan Peter Balkenende was pressed by his country's voters – who had rejected the Constitutional Treaty in the June 2005 referendum – to request more power for the national parliaments. Indeed, the second most mentioned reason for the June 2005 referendum 'no' vote, was rooted in their perceived 'loss of national sovereignty', followed by: (1) the Dutch people's perception that the Constitution was 'not democratic enough'; (2) their lack of trust in Brussels; and (3) their perceived loss of national identity.[617] Thus, Balkenende reached an agreement on a coalition government programme with regard to the EU, under which the Netherlands would

> seek an amendment and possible consolidation of existing European Union treaties to safeguard subsidiarity and democratic scrutiny [and] work for […] a clear division of responsibilities between member states and the European Union based on the principle of subsidiarity. [Thus] National Parliaments should be given a stronger position in relation to the subsidiarity test (a 'red card' procedure for example).[618]

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[615] *History of COSAC*, at http://www.presidenciaue.parlamento.pt/ingles/documentos/COSAC_His_EN.pdf (accessed on 24 September 2015), 23.
[616] Ibid., 5–6.
[617] *Flash Eurobarometer 172*, 15. These four reasons accounted for 31 per cent of the 'no' vote.
[618] 'Netherlands Coalition Agreement, "An active international and European role"', quoted in V. Miller, 'EU Reform: a new treaty or an old constitution?' House of Commons Library Research Paper 07/64, 24 July 2007, 27, at: www.parliament.uk/briefing-papers/RP07-64.pdf (accessed on 23 December 2014).

In the pursuit of this objective, Balkenende was supported by the Polish and Czech governments, who also wanted a mechanism under which a third of national parliaments could request that EU powers be returned to the member states.[619] Consequently, in its end-of-term *Report to the European Council*, the German Presidency acknowledged that

> there is concern to underline the respect for the identity of the Member States and to introduce greater clarity over the delimitation and definition of competences of the Union and of the Member States. Furthermore, there is clear demand from some delegations to further enhance the role of national parliaments.[620]

In other words, the Presidency acknowledged, *inter alia*, that the national parliaments needed more time and better means to monitor any alleged infringement of the principle of subsidiarity. Indeed, as the negotiations on the formulation of the draft IGC mandate were concluded in June 2007, the Dutch delegation obtained a 'reinforced control mechanism' (or 'orange card'), which was to complement the early warning mechanism. Indeed, under this double control mechanism, if a simple majority of national parliaments were to raise concerns with regard to the principle of subsidiarity after the application of the early warning mechanism, the Commission would be obliged to re-examine its proposals. And if the Commission were to maintain its position, it had to issue a reasoned opinion, which together with the reasoned opinions of the national parliaments would be submitted to the EU legislator for consideration. Eventually, if 55 per cent of the Council members, *or* a majority of the votes cast in the EP found a breach of the principle of subsidiarity, the proposal would 'not be given further consideration.' The other significant amendment proposal concerned Article 4 of the Protocol on the role of

[619] Ibid., 31, 36.
[620] Council of the European Union, 'Report from the Presidency to Council/European Council: Pursuing the treaty reform process', 10659/07, POLGEN 67, Brussels, 14 June 2007, 4.

national parliaments, under which the original six week time-frame was to be extended to eight weeks.[621]

These additional amendments provided better safeguards for the sovereignty of the national parliaments. In fact, the Chair of the Constitutional Affairs Committee of the EP Jo Leinen pointed out that whereas in the original draft on the reinforced control mechanism, the Council *and* the EP were to decide that a legislative proposal was not compatible with the principle of subsidiarity for the draft to be abandoned, the 'orange card' mechanism rested on the vote of any *one* branch of the EU legislator.[622]

8.5 Conclusion

After Maastricht, the Union's treaty reform process was characterized by the sovereignists' and intergovernmentalists' resolve to: (1) control or prevent further slippage of powers from the national- and sub-national levels, to the supranational level; and (2) craft adequate mechanisms to ensure that legislative proposals of the Commission would not be in breach of the principle of subsidiarity. Thus at Amsterdam, the EU leaders agreed that the role of the national parliaments in the EU; and the application of the principles of subsidiarity and proportionality included under Maastricht were to assume greater relevance. On the other hand, the major bone of contention during the Convention was the lack of agreement among the delegates on the national parliaments' threshold required to oblige the Commission to reconsider its legislative proposals, with the EPP group suggesting that it be two thirds; the Dutch government suggesting that it

[621] Council of the European Union, 'Amendment of the Treaties on which the Union is founded', 11222/07, POLGEN 75, Brussels, 27 June 2007, (points 10 and 11), 7.
[622] Council of the European Union, 'Report on the meeting of the Committee on Constitutional Affairs, held in Brussels on 25 and 26 June 2007', from General Secretariat of the Council to Delegations, 11504/07, PE 222, INST 88, 4.

be one fourth; and the Praesidium opting for a one-third threshold after ignoring a cross-party proposal from eight participating countries that in addition to the one-third threshold, a second two-thirds threshold be introduced, which if reached, would result in the mandatory withdrawal of the Commission proposal.[623] These suggestions lay bare the rift that ran between the pro-federalists, who wanted to strengthen the Commission's arm by fixing a high threshold for the national parliaments, and the sovereignists who favoured a stricter double control mechanism. Eventually, the double threshold formula won the day because the Dutch voters did not endorse the Constitution, and therefore the Dutch government could force the European Council to accept that the national parliaments be granted a stronger say in the Union's legislative process. Indeed, Article 7(2) of the Protocol on the application of the principles of proportionality and subsidiarity as amended under Lisbon has strengthened the role of the member states *vis-à-vis* the EU executive because a simple majority of the votes allocated to the national parliaments compels the Commission to review its legislative proposal for alleged non-compliance with the subsidiarity principle. And despite the fact that the Commission may maintain its position, on condition that it justifies, in a reasoned opinion, why it considers that the proposal complies with the said principle, the EU legislator, after 'taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission', may decide that the proposed legislation is not compatible with the principle of subsidiarity. In other words, the domestic parliaments have secured the means by which they may curtail the Commission's supranational ambitions by 'borrowing' the EU legislator's veto power, since a simple majority of the national parliaments *and* a majority of votes in the EP; *or* a

[623] See page 241.

simple majority of the national parliaments *and* 55 per cent of the members of the Council can stop any legislative proposal from becoming EU law. Thus, just as the Irish 'no' vote on Lisbon translated, *inter alia*, into the permanence of one representative from each member state in every Commission line-up, the Dutch voters' rejection of the Constitutional Treaty enhanced the member states' control over the Union's legislative process via the reinforced control mechanism.

CHAPTER 9

RECONCILING DIVERSITY AND UNITY: IN SEARCH OF A COMMON WEAL

9.1 Introduction

During his speech at the University of Leiden William and Mary Lecture in 1994, British Prime Minister John Major cautioned against the futility of forcing the EU countries into the same mould.[624] Major made this evaluation on the eve of the EFTA enlargement, and in the knowledge that the Commission was due to start accession negotiations with ten CEECs, plus Cyprus and Malta. Besides, this speech came after the Danish voters had rejected Maastricht in 1992. In other words, the member-state governments had reached the point at which the federalist goals as laid down in the TEU; and the nature of institutional reform in anticipation of the Union's eastern enlargement, were beginning to be seriously questioned.

In order to evaluate this quandary, it was deemed appropriate to assess whether Maastricht's rights-based European citizenship had favoured what Easton describes as the development of a diffuse support of a constitutional order based on a 'sense of community' or 'we feeling', as to justify the Union's further deepening.[625] Indeed, section two posits that the Euro-polity's multiculturalism and ethno-cultural diversification induced its most liberal democracies to include aliens within the national sphere of social, economic, civic, and political rights; and uphold common rights provided under international charters like the European Convention for the Protection of

[624] 'Mr Major's Speech in Leiden', 7 September 1994, at: www.johnmajor.co.uk/page1124.html (accessed on 30 September 2015).
[625] See page 199.

Human Rights and Fundamental Freedoms. Arguably, this practice has helped to accommodate diversity within Europe, which integrationists deem necessary for the Union's stability. In section three, it is argued that this phenomenon assumed greater relevance in the post-Wall era with the Union institutions' adoption of the EU Charter of Fundamental Rights in December 2000. Besides, the prospect of unprecedented enlargement led many to entertain the idea that Council decisions be taken along more federalist lines (e.g. by a majority of member states representing the majority of the EU population).

In order to assess these issues, the thematic study in this chapter explores whether the stakeholders involved in the post-Laeken reform process were actually ready to replace the intergovernmentalist formula of the Treaties' opening article with a more federal-like statement on the establishment of the Union, and endow the EU with state-like features like: (1) an enhanced Union citizenship; (2) the incorporation of the EU Charter of Fundamental Rights into the Constitution; and (3) the adoption of symbols of Union identity, like a flag and anthem. These state-building features were chosen because they constitute a strong complement to the creation of what Chryssochoou calls a 'composite citizen body' that is willing to share an active interest in the Union's democratic governance, and identify with its institutions.[626] Indeed, this thematic study explores whether Europeans and their political leaders are actually ready to embrace this 'feeling of belonging together',[627] because if this were to be the case, then the member states and their transnational *demos* would be ready to brush aside, *inter alia*, the

[626] Chryssochoou, in Cini, 'Trust in Europe', 63.
[627] Easton, *A System Analysis of Political Life*, 185.

complex triple-majority formula agreed at Nice, and adopt a more straight-forward double-majority voting system in the Council.

9.2 Post-national citizenship, constitutional patriotism, and the civic society

According to Sørensen, the nation state is based on two kinds of community, namely: a community of citizenship concerning the relations between citizens and the state (including political, social, and economic rights and duties); and a community of sentiment, emanating from a common language, culture and historical identity based on a common literature, myths, symbols, music and art.[628] However, the 'national sentiment' of ethnic minorities may wax or wane as a result of shifts in the economic balance of power, or following a defining political event. For example, the decline of Wallonia's heavy industry after the Second World War shifted Belgium's economic leadership to the Flemish region. Furthermore, the resentment of the Dutch-speaking majority at the political dominance exercised by a former French-speaking majority within the unitary state brought the bipolar character of Belgian politics to the fore when the major political parties split on ethnic lines and kick-started Belgium's gradual transformation into a federal state.[629] Such identity-related problems are clearly imputable to historically grounded ethno-cultural differences that may remain irreconcilable.

Nevertheless, contemporary factors have contributed to the heightening of multiculturalism and ethno-cultural diversification, namely, '[t]he intensified flow of capital, post-Fordist modes of production, a global spread of Western consumer culture, the end of the Cold war and bipolar international order, the emergence of trans-national

[628] G. Sørensen, 'The Transformation of the State', in Hay, et al., 196.
[629] J.J. Branigan, *Europe*, 2nd edn. (London, 1974), 166–167; Palmowski, 55; and Watts, 3rd edn., 43–44.

migrant networks, forces of secularisation and moral individualism.'[630] Indeed, in the more advanced liberal democracies, citizenship is being denationalized to include aliens within the national sphere of social, civic and political rights. Analysts refer to this process as the emergence of post-national citizenship, which 'confers upon every person the right and duty of participation in the authority structures and public life of a polity, regardless of their historical or cultural ties to that community'.[631] And progress has been made toward the 'generalization' of rights, an expression of which are the UN and European charters of human and fundamental rights; and adherence to ECHR rulings by most European governments. Furthermore, some countries have made constitutional provisions for the transfer of national sovereignty to international organizations.[632] For example, Article 25 of the German Basic Law states that '[the] general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.'

But constitutional patriotism is a legal, as opposed to a cultural identity, since it refers to one's identification with democratic or constitutional norms, rather than the state, territory, nation or cultural traditions. Consequently, Delanty posits that 'post-national identity is compatible with multi-identities',[633] whereas Lister and Pia argue that 'the overarching principle of membership in contemporary societies has shifted from the logic of national citizenship to the logic of personhood',[634] or what Longo calls 'a

[630] M. Lister & E. Pia, *Citizenship in Contemporary Europe* (Edinburgh, 2008), 44–45.
[631] See Y.N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago, 1994), 3.
[632] German *Basic Law*, Article 24, paragraph (1).
[633] Delanty, 115.
[634] Lister & Pia, 62.

semantic shift' from state-based sovereignty to a human rights-based conception of popular sovereignty.[635]

Undoubtedly, one of the challenges facing democratic citizenship is to accommodate diversity, because in multicultural societies, any political doctrine formulated from within one particular cultural perspective is bound to be biased and risks being perceived by other ethnicities as unjust. Furthermore, multicultural societies need to devise political structures that enable them to deal fairly and effectively with conflicting demands. Thus, Parekh posits that such structures must 'foster a strong sense of unity and common belonging among citizens, as otherwise [society] cannot act as a united community able to take […] collectively binding decisions and regulate and resolve conflicts'.[636] And Kymlicka argues that the institutions of a liberal state can work only if liberal beliefs have been internalized voluntarily through time, as in multicultural federations like Switzerland and the US.[637]

Some analysts consider the development of a common identity as a *sine qua non* for the Union's legitimization and survival.[638] However, Fuchs posits that the acceptance of the majority principle and majority decisions is only viable if the overruled minorities continue to consider themselves part of that polity despite the (super)majority rule. In other words, a would-be federal polity must overcome its unconditional attachment to the

[635] Longo, 129.
[636] B. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (London, 2000), 196.
[637] W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, 1995), 167.
[638] See D. Beetham & C. Lord, 'Analyzing legitimacy in the EU', in *Legitimacy and the EU*, ed. D. Beetham & C. Lord (London & New York, 1998), 1–32; F. Scharpf, *Governing in Europe – Effective and Democratic?* (Oxford & New York, 1999); R. Herrmann & M.B. Brewer, 'Identities and Institutions: Becoming European in the EU, in *Transnational Identities: Becoming European in the EU*, ed. R. Herrmann, T. Risse & M.B. Brewer (Lanham, MD, 2004), 1–22.

unanimity principle,[639] meaning that 'constitutional patriotism' should foster a kind of 'overlapping consensus', leading to shared political attachments, which would break the historical link between republicanism and nationalism, thus shifting the loyalty of citizens away from the ethnos, towards the fundamental principles of a post-national constitutional order.[640] Thus, constitutional patriotism purports to establish an abstract, legally mediated 'solidarity among strangers' with the aim of binding together individuals with no pre-political ties into 'a highly artificial kind of civic solidarity.'[641] But when it comes to transposing this theory to the EU context, one will find that this solidarity paradigm is invariably challenged by:

- the post-Wall resurgence of regional and/or ethno-cultural nationalism across the continent (e.g. separatism in the Basque region, Catalonia, and Scotland);
- the replacement of (Western) Europe's welfarist regime, by what Rose refers to as the 'advanced liberalism' rationale;
- the aftermath of the international financial crisis of 2008;
- the destabilizing effect of illegal migration into EU territory, which is heightened by the exponential increase in the number of asylum seekers that are entering Europe from conflict zones in the Middle East, North Africa and beyond;
- the destabilizing effect of recurrent radical Islamic terrorist attacks on Europe's major national capitals.

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[639] D. Fuchs, 'Cultural diversity, European identity and legitimacy of the EU: A theoretical framework', in Fuchs & Klingemann, 35–36.
[640] A. Baumeister, 'Diversity and Unity: The Problem with "Constitutional Patriotism"', *European Journal of Political Theory* (2007), 6(4), 485.
[641] See J. Habermas, 'Why Europe Needs a Constitution', *New Left Review 11* (September–October 2011), 16; and H.U.J. d'Oliveira, 'European Citizenship: Its Meaning, its Potential', in *Europe After Maastricht: An Ever Closer Union?*, ed. R. Dehousse (Munich, 1994), quoted in J. Shaw, 'The Interpretation of European Union Citizenship', *The Modern Law Review* (1998), 61(3), 308.

Indeed, these factors are currently putting to the test Europeans' civic solidarity. For example, if one concurs with Rose that advanced economic liberalism tallies with reducing costs, rather than with creating a skilled labour force,[642] it follows that the Union's unemployed would find it hard to relate to the abstract principle of civic solidarity. And currently, Europeans' civic solidarity is being undermined by the presence in EU territory of hundreds of thousands of refugees from Syria, Iraq and elsewhere.

9.3 Institutional implications of Union citizenship: a post-Maastricht perspective

In Chapter 4, reference was made to the political events that characterized the Gorbachev era, which urged EC leaders to launch an additional IGC on political union. Undoubtedly, a salient feature of Maastricht was the establishment of a common Union citizenship, under which every person holding the nationality of a member state was to be(come) a citizen of the Union. In fact, Union citizenship entitles its holders to:

- move and reside freely within the territory of the member states;
- vote and stand as candidates at municipal and EP elections in the member state in which they reside, under the same conditions as nationals of that state of which they are not nationals;
- petition the EP on matters which come within the Community's fields of activity and which affect them directly;
- lodge complaints about instances of maladministration in the activities of the Community institutions or bodies to the European Ombudsman.[643]

[642] N. Rose, 'Death of the social? Re-figuring the territory of government', *Economy and Society* (1996), 25(3), 327–356; and N. Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge, 1999).
[643] *Maastricht Treaty*, Article 8a–d.

Furthermore, EU citizens are entitled to protection by the consular or diplomatic authorities of any other member state, whenever they are in the territory of a third country in which the country of which they are nationals is not represented.[644] Actually, the granting of these rights was the natural consequence of intra-EC/EU migration, which has been going on since the establishment of the ECSC. Furthermore, the extension of EU citizens' right to vote and stand for municipal and EP elections attempts to reinforce the concept of a transnational citizenship, which confers upon EU citizens the right and duty to participate fully in the Union's political life and authority structures. And as the post-Maastricht reach of integration continued to expand, so did the need for the extension of a wider range of social, economic, political, cultural, civic, and citizenship rights. Thus, at the Cologne European Council of June 1999, the EU leaders decided to draw up a Charter of Fundamental Rights. And although this Charter was the summation into a single document of existing rights already recognized by EU countries, its legal and constitutional implications were recognized in the Nice and Laeken Declarations, wherein the member states agreed that the status to be given to the Charter was to be discussed during the Convention.

Arguably, the idea behind the promulgation of the Charter was to reinforce the 'we-feeling' among Union citizens, by endowing them with a broad human rights-based European identity. And in view of the Union's eastern enlargement, Amsterdam contained a protocol which called for institutional reform, since the decision-making mechanisms that were originally designed for the Six were deemed inadequate for a

[644] Ibid., Article 8c.

Union comprising twenty-five member states or more.[645] But although the Nice IGC was supposed to resolve pressing institutional issues, several commentators were critical of the achievements obtained. For example, Dinan remarked that 'rarely did an inter-governmental conference devote so much time to so few issues with so few consequential results.'[646] Indeed, it is to whether the Convention and subsequent IGCs could actually resolve the issues outlined in the foregoing sections that the discussion now turns.

9.4 Thematic study: Post-national citizenship, the symbols of EU identity, and the double-majority predicament explored

9.4.1 The opening gambits

Under Nice, after 1 January 2005, Council decisions were to take effect on obtaining a majority of the votes of the governments representing at least 62 per cent of the EU population, in addition to the majority of weighted votes, and a majority of the member states.[647] The Nice Treaty demographic criterion was *circa* 4 per cent higher than the one prevailing under previous EU Treaties that catered for a Council comprising fifteen member states or less.[648] Indeed, this triple-majority formula was crafted to safeguard the interests of the 'big four', in anticipation of a wider Union which was destined to include an overwhelming majority of small-, and medium-sized states. However, this awkward mechanism was bound to have an adverse effect on the consolidation of the 'we-feeling', which ideally was needed to facilitate the member states' acceptance of decision making based on simple double-majority voting in the Council. Thus, the Laeken Declaration

[645] *Amsterdam Treaty*, 'Protocol on the institutions with the prospect of enlargement of the European Union'.
[646] D. Dinan, *Europe Recast: A History of European Union* (Basingstoke, 2004), 228.
[647] *Nice Treaty*, 'Protocol [10] on the enlargement of the European Union', Article 3.
[648] Bache, et al., 175.

solicited that in order for the enlarged Union to become more transparent and democratic, the national leaders needed to improve the efficiency of the decision-making mechanisms of the EU institutions. This implied, *inter alia*, that the triple-majority formula had to be replaced by a simpler one.

9.4.2 The initial debate

In order to address these issues, the Praesidium established WG II to deal with the incorporation of the EU Charter of Fundamental Rights in the Constitution; and WG IX on Simplification.[649] Surprisingly, one comes across *one* sentence on double-majority voting in the Final report on Simplification, which said that 'a large number of members proposed simplifying the formulation of qualified majority voting in the Council by introducing a double-majority system (majority of States, majority of populations).'[650] On the other hand, about 150 conventioneers from all twenty-eight participating countries and the Commission tabled a plethora of personal, or joint, contributions on QMV. For example, the EPP Group proposed that '[w]here the Council is required to act by a qualified majority, the assent of the majority of members of the Council representing 50% of the total population of the Union is necessary.'[651] Likewise, the PES Group declared that '[EU] legislation should be decided on by qualified majority voting, with a double majority, first of member states and second of the population across the EU as a

[649]; European Convention, 'Final Report of Working Group II', CONV 354/02, WG II 16, Brussels, 22 October 2002, and CONV 77/1/02, REV 1, 3.
[650] European Convention, 'Final report of Working Group IX on Simplification', CONV 424/02, WG IX 13, Brussels, 29 November 2002, 27.
[651] EPP Convention Group meeting in Frascati, 'Discussion Paper – The Constitution of the European Union', 10 November 2002, (draft) Article 105(2), 66.

whole.'[652] Furthermore, French Socialist MEPs Olivier Duhamel and Pervenche Berès rallied the support of sixteen French Socialist MEPs for the separation of the Council-legislator from the Council-executive, with the former being composed of 'permanent representatives of the States, which decide by the rule of double majority of the States and the population.'[653] Likewise, nineteen conventioneers attached to the ALDE group, and another composite group of five government representatives, four MEPs, all four Commission representatives, and four national MPs, advocated that QMV be determined as a majority of member states representing a majority of the EU population. Finally, the Benelux favoured qualified majority voting with a demographic criterion well above 50 per cent of the total EU population.[654]

Meanwhile, European citizenship captured the interest of just a handful of delegates. For example French Socialist MEP Robert Badinter argued that its establishment under Maastricht had promoted an organized community, such that '[t]wo sources of legitimacy are thus reunited through the Union: that of the Member States and that of the people of the Union, composed of all its citizens, without any distinction as to nationality.'[655] However, Badinter's aura around Union citizenship was questioned by the Polish government representative Danuta Hübner, who raised doubts as to whether a genuine 'we-feeling' could forge anything like a transnational European *demos*, although she *did* acknowledge that the Union's future depended on the degree to which citizens

[652] European Convention, 'Contribution from the PES members of the Convention: "Priorities for Europe"', CONV 392/02, CONTRIB 137, Brussels, 8 November 2002, 7.
[653] European Convention, 'Contribution from Mr Olivier Duhamel, member of the Convention, and Ms Pervenche Berès, alternate member of the Convention:–"Objectives for the Union"', CONV 398/02, CONTRIB 140, Brussels, 12 November 2002, 6.
[654] European Convention, 'Contribution by the Benelux countries, presented by Mr Gijs de Vries, Mr Jacques Santer and Mr Louis Michel: "The Union Institutions", CONV 732/03, CONTRIB 320, Brussels, 8 May 2003, 4.
[655] European Convention, 'Contribution from M. Robert Badinter, alternate member of the Convention: "A European Constitution"', CONV 317/02, CONTRIB 105, Brussels, 30 September 2002, 7.

and nations could identify with it.[656] On the other hand, the Maltese MPs Alfred Sant and George Vella argued that '[t]he diversity of cultures, languages, traditions, beliefs, and historical backgrounds found in the present and future member States […] is the strongest factor against the claim that the European Union should assume the structures of a federal superstate.'[657] Such comments call in question the appropriateness, or otherwise, of endowing the Union with state symbols. Actually, the EPP was the only group to propose that: (1) Brussels be the seat of the Union; (2) the euro its currency; (3) a circle of twelve gold stars on a blue ground its flag; (4) the instrumental version of Beethoven's 'Ode of Joy' its anthem; and (5) Union day be celebrated on 9 May.[658]

9.4.3 The Praesidium proposes, and the Convention disposes

Before publishing its draft Treaty articles, the Praesidium waited until February 2003 for all eleven WGs to table their final reports. Eventually, the Praesidium proposals which concern us, namely:

- draft Article 1, on the establishment of the Union;
- draft Article 5, on fundamental rights;
- draft Article 7, on citizenship of the Union; and
- draft Article 17b, on QMV in the Council,

were published between 6 February, and 23 April 2003.

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[656] European Convention, 'Contribution from a member [Danuta Hübner] of the Convention', CONV 20/02, CONTRIB 5, Brussels, 3 April 2002, 2–3. See also, 'Contribution from Ms Pervenche Berès, alternate member of the Convention:– "Which citizenship for the Union?"', CONV 576/03, CONTRIB 255, Brussels, 25 February 2003, 3–5.
[657] CONV 763/03, CONTRIB 340, 2.
[658] Text of EPP Convention Group, (draft) Article 61, 29–30; and European Convention, 'Contribution by Mr Elmar Brok, member of the Convention: "The Constitution of the European Union"', CONV 325/2/02 REV 2, CONTRIB 111, Brussels, 7 March 2003, (draft) Article 66, 36, based on the revised version (dated 27 January 2003) of the Frascati discussion paper (dated 10 November 2002).

The impression one gets on reading these drafts is that the Praesidium was more or less in agreement with many of the delegates' proposals. Actually, the Praesidium dared take a bolder federalist stand, as in draft Article 1, under which, the Constitution was to reflect 'the will of the peoples and the States of Europe to build a common future [in a Union] within which the policies of the Member States shall be coordinated [and its common competences administered] on a federal basis.'[659] Besides, the Union was to guarantee a set of common rights for all its citizens. However, the symbols of the Union were not mentioned anywhere.

As for draft Article 5, the Praesidium concurred with the Final Report of WG II, and proposed that the EU Charter of Fundamental Rights become an integral part of the Constitution; and that the Union accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[660] As for Union citizenship, draft Article 7 did not include outstanding novelties *vis-à-vis* Maastricht, except that all citizens were to be considered 'equal before the law'; and that Union citizenship was to be additional to national citizenship, without replacing it. As for QMV in Council, draft Article 17b proposed that '[w]hen the European Council or the Council take decisions by qualified majority, such a majority shall consist of the majority of the Member States, representing at least three fifths of the population of the Union.'[661]

These draft Articles provoked the reactions of 193 delegates from all twenty-eight participating countries, the Commission, the CoR, the ESP, and the Ombudsman, who altogether tabled 235 suggestions for amendment. Indeed, the ensuing debate was

[659] CONV 528/03, 2.
[660] Ibid., 3. See also CONV 354/02, 2 et passim.
[661] European Convention, 'Institutions – draft articles for Title IV of Part I of the Constitution', CONV 691/03, Brussels, 23 April 2003, 6.

characterized by divergences between a small group of Euro-federalists, and a larger coalition of intergovernmentalists, sovereignists and Eurosceptics. For example, fifty-two conventioneers from seventeen participating countries opposed the idea that Union matters be administered 'on a federal basis', and called for the deletion of the 'f-word' from draft Article 1.[662] Likewise, eleven members from that group, plus forty-one others, requested that firmer safeguards *re*: the protection of national, linguistic, and cultural autonomy; and/or the principle of local and regional government, be included under draft Article 1(2). In other words, ninety-four delegates from all participating countries bar Hungary, had rebutted, in one way or another, the Praesidium's federalist design for the Union. On the other hand, twenty-three delegates took a more Habermas-like stand by suggesting that the establishment of the Constitution reflect the will of the citizens and the States of Europe.[663] In other words, these delegates considered the semantic shift from a *demos*-based national sovereignty to a citizen rights-based sovereignty compatible with the Union's constitution-making process, whereas thirteen delegates from this group were joined by another twenty-one to suggest that the symbols of Union identity feature in the Constitution's opening articles.[664]

The incorporation of the Charter into the Constitution, proved to be another divisive issue, despite the fact that all thirty-three members of WG II, *either* supported

[662] The number of dissenters for each country is indicated in brackets: Austria (1); Czech Republic (3); Denmark (4); Estonia (5); Finland (3); France (1); Germany (2); Ireland (2); Italy (2); Latvia (6); Lithuania (4); Poland (2); Portugal (6); Slovakia (2); Slovenia (3); Turkey (1); the UK (5).

[663] These were: Johannes Voggenhuber, Evelin Lichtenberger, and Reinhard Rack (Austrian); Marie Nagy (Belgian); Neil MacCormick (British); Josef Zieleniec and František Kroupa (Czech); René van der Linden and Maij-Weggen (Dutch); Piia-Noora Kauppi (Finnish); Jürgen Meyer, Sylvia-Yvonne Kaufmann, Elmar Brok, Erwin Teufel, and Peter Altmaier (German); Giorgos Katiforis (Greek); József Szájer (Hungarian); Antonio Tajani and Marco Follini (Italian); Teresa Almeida Garrett (Portuguese); Ivan Korčok (Slovak) Ana Palacio (Spanish); and Göran Lennmarker (Swedish).

[664] The countries that did not show support for the symbols initiative at this stage were Bulgaria, Denmark, Lithuania, Malta, Romania, Spain, and the UK.

strongly its incorporation into the Constitutional Treaty, *or* did not rule out giving favourable consideration to its incorporation therein. Actually, this issue split the Convention, with 103 delegates from twenty-four countries, the Commission, the EP, the CoR, and the ESP favouring the incorporation of the Charter into the Constitution,[665] and thirty-one delegates from twelve participating countries rejecting such a proposal. For example, both Dutch government representatives and their co-national MP Jan Jacob van Dijk, argued that if this were to materialize, the Charter would become substantive EU law, which could result in direct claims by citizens against their government.[666] Furthermore, British MP David Heathcoat-Amory argued that the Charter's incorporation into the Constitution would set European law against established national practice, and create 'immense legal uncertainty which can only be settled through the ECJ acting as a constitutional arbiter, a role for which it was manifestly not established.'[667] Indeed, three Latvian MPs and the British, Danish, Dutch, Irish, and Swedish government representatives demanded that the draft Constitution clarify that the provisions of the Charter be addressed to the various EU organs, with due regard for the principle of subsidiarity to the member states when implementing EU law; and that the application of the Charter would not extend the field of application of EU law *beyond* the powers of the Union, or establish new powers for the Union.[668] On the other hand, twenty-seven delegates from twelve participating countries suggested that the Charter be annexed to the

[665] European Convention, 'Contribution by members of the Convention: "Initiative for the incorporation of the Charter of Fundamental Rights into the European Constitution"', CONV 607/03, CONTRIB 274, Brussels, 11 March 2003. None of the delegates from Bulgaria, Estonia, Latvia, and Sweden signed this initiative, whereas Denmark and the UK were indirectly represented by their MEPs.
[666] Amendment Form, 'Suggestion for amendment of Article 5, by G.M. de Vries, Th. J.A.M. de Bruijn, J.J. van Dijk', Explanation, 1.
[667] Fiche d'amendement, 'Proposition d'amendement à l'Article 5', deposée par Rt Hon David Heathcoat-Amory MP, Art 5.1', Explication éventuelle, 1.
[668] European Convention, 'Incorporation of the Charter in the EU Constitutional Treaty', CONV 659/03, CONTRIB 292, Brussels, 14 April, 2003, 2–3.

Constitution as a Protocol, in order to allow each member state to decide upon its legal status.[669]

With regard to Union citizenship, David Heathcoat-Amory called for the deletion of draft Article 7(1), which stated, *inter alia*, that '[e]very national of a Member State shall be a citizen of the Union', because by his reckoning, '[y]ou cannot be a citizen of a treaty', since citizenship is an attribute of statehood.[670] Besides, he concurred with eight other Eurosceptics that the 'Europe of Democracies' which they were proposing instead of the draft Constitution would only respect one's national citizenship.[671] On the other hand, a cross-party group of Liberals and Socialists from Belgium, France, Hungary, Italy, Luxembourg, Slovenia, and the UK, tabled four amendment proposals in which they favoured the duality principle (i.e. national *and* European) of Union citizenship, whereas a larger group of Socialists and other Left-wingers from Austria, Belgium, France, Germany, Italy, Luxembourg, and Spain proposed that the nationals of third countries, refugees, or stateless persons residing legally in Union territory for five years be granted the citizenship of the Union.

Voting in the Council was yet another divisive issue that provoked reactions from 105 delegates from all participating countries, bar Turkey and the Commission. Out of this total, twenty-five EPP delegates, two PES members, plus ten delegates from other party groups, concurred with Praesidium Article 17b, to the effect that a Council decision be taken by a majority of member states representing at least three fifths of the EU

[669] See Amendment Form, 'Suggestion for amendment of Article 5.1, Title II, by Sandra Kalniete, et al.', Explanation, Paragraph 3, 1.
[670] Fiche d'amendement, 'Proposition d'amendement à l'Article 7, deposée par Rt Hon David Heathcoat-Amory, MP', Art 7.1, Explication éventuelle, 1.
[671] Amendment Form, 'Suggestion for amendment of Article 7, by Ms. Irena Belohorska, Mr. Jan Zahradil, et al.', Art. 7.1, 1.

population, whereas another cross-party group of thirty-four delegates favoured the retention of the Nice triple-majority formula. This meant that on a country-by-country basis:

- Denmark, Estonia, Ireland, Lithuania, Slovakia, Spain, and Sweden preferred retaining the triple-majority formula as agreed at Nice and the Accession Treaty of 2003;
- nine countries supported the Praesidium proposal, with Britain, Finland, Luxembourg, Malta, and the Netherlands ranking among its staunchest supporters, followed by Austria, Bulgaria, Italy, and Romania;
- Cyprus, Poland, Portugal, and Latvia had no marked preference for either of the two formulae at this stage.[672]

On the other hand, about forty delegates came up with alternative proposals. For example, ten Euro-federalists from the Commission and four member states tabled five amendment proposals to the effect that a Council decision be taken by a majority of member states representing the majority of the EU population, rather than three fifths.[673] Fourteen sovereignists proposed higher thresholds, like: (1) the Spanish MP Cisneros Laborda who suggested that QMV be based on 60 per cent of the member states, representing 60 per cent of the Union population;[674] (2) the Czech MP František Kroupa,

[672] This analysis is based on: 37 suggestions for amendment of Article 17b; CONV 732/03, CONTRIB 320, 4; and CONV 757/03, CONTRIB 334, 4.
[673] These were: Austrian MEP Maria Berger (PES), and co-national MP Caspar Einem (Socialist); Belgian MEP Anne van Lancker (PES); German MEP Sylvia-Yvonne Kaufmann (EUL/NGL); Greek government representatives Giorgos Papandreou and Giorgos Katiforis (PASOK); Commission members Michel Barnier (French, UPM) and António Vitorino (Portuguese, Socialist), and Commission alternates David O'Sullivan (Irish, bureaucrat) and Paolo Ponzano (Italian, advisor/academic).
[674] European Convention, 'Contribution by Mr Gabriel Cisneros Laborda, member of the Convention:– "The distribution of seats in the European Parliament and the weighting of votes in the Council"', CONV 757/03 CONTRIB 334, Brussels, 22 May 2003, 4.

who fixed these thresholds at 75, and 70 per cent respectively;[675] and (3) six other delegates who suggested that a qualified majority consist of a majority of member states, as long as this majority represented two thirds of the Union population.[676] But the most unworkable formula was proposed by Jens-Peter Bonde, who besides proposing a majority based on 75 per cent of member states representing at least 50 per cent of the Union population, added that EU laws be approved by the national parliaments, with these having the right of veto on any issue they deemed of vital importance to them, with prime ministers having the right to defend their position during European Council summits.[677] In other words, various delegates from nineteen countries expressed their outright opposition to: (1) the Praesidium proposal; and (2) the Euro-federalists' double-majority rule.

The Praesidium's next task was to revise the drafts on the basis of these reactions. Thus, in the Constitution's founding act, the Praesidium replaced 'peoples' with 'citizens', to read thus:

> Reflecting the will of the *citizens* and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common.[678]

Furthermore, the Union was to exercise the competences conferred upon it by the member states 'in the Community way', rather than 'on a federal basis'. With regard to draft Article 5 (now draft Article 7), the Praesidium chose to incorporate the Charter of Fundamental Rights in Part II of the Constitution, thus copying the German Basic Law

[675] Amendment Form, 'Suggestion for amendment of Article 17b, para 1 – CONV 691/03, by Mr František Kroupa', 1.
[676] These were: Czech MP Josef Zielniec; French MPs Hubert Haenel and Robert Badinter; German MP Erwin Teufel; and Greek government representatives Giorgos Papandreou and Giorgos Katiforis.
[677] Amendment Form, 'Suggestion for amendment of Article 17b, by Mr Bonde', 1.
[678] European Convention, 'Revised text of Part One', CONV 797/03, Volume I, Brussels, 10 June 2003, 5 (emphasis added).

and/or the Swiss Constitution. On the other hand, Article 7 (now draft Article 8) on Union citizenship remained practically unchanged, meaning that the Praesidium did not include, *inter alia*, the proposal of those members who had suggested that nationals of third countries, refugees, or stateless persons, residing legally for five years in the EU be granted Union citizenship. As for Article 17b (now draft Article 24), the Praesidium defended its original QMV-definition.[679] However, after holding consultations with each component group of the Convention, it added another provision to its original draft, which stated that when the Constitution did not require the Council to act on the basis of a Commission proposal or initiative of the UMFA, qualified majority would consist of two thirds of the member states representing at least three fifths of the Union population. Furthermore, the Praesidium proposed that its original QMV-definition and the proposed higher threshold for member states take effect as from 1 November 2009, with the possibility for the European Council to decide, by qualified majority, to prolong for a maximum period of three years the interim arrangements as set out in the Nice Protocol on the weighting of votes in the Council.[680] In other words, the Praesidium agreed to keep the triple-majority system, possibly until 2012, before its proposed QMV-definition eventually replaced it.

However, once these revisions were published, thirty-six delegates of seventeen countries, plus one observer from the ESP, tabled twenty-seven other suggestions for amendment. Once again, the divergences between federalists and integrationists on one side, and sovereignists on the other, came to the fore. Thus, according to a small group of Liberals, 'federal' remained 'the most truthful description of the way in which the Union

[679] European Convention, 'Part I, Title IV (Institutions) – revised text', CONV 770/03, Brussels, 2 June 2003, 9–10.
[680] CONV 797/03, 19.

exercises its common competences'; furthermore, they pointed out that the phrase 'in the Community way' was unheard of.[681] On the other hand, the Hungarian, Lithuanian, and Polish government representatives, plus four Lithuanian MPs insisted that in Article 1, 'peoples' follow 'citizens', whereas the Portuguese government representatives insisted that 'citizens' be replaced by 'peoples'. With regard to the Charter, the British, Dutch, Latvian, and Swedish government representatives suggested that it feature as a Protocol to the Constitution. Finally, four Left-wingers[682] reiterated that non-EU citizens lawfully residing in the EU for five years be granted Union citizenship, as suggested by the Parliamentary Assembly of the Council of Europe.[683] However, none of these suggestions were included in the final draft Constitutional Treaty, whereas the Praesidium *did* include the symbols of the Union, as suggested by the EPP Group.[684]

9.4.4 The 2003 IGC

Once the Praesidium published the draft Constitution, it was up to the representatives of the national governments to revise it. To begin with, there was general agreement upon the articles *re*: the establishment of the Union (Article I-1); fundamental rights (Article I-7); citizenship of the Union (Article I-8); and the symbols of the Union (Article I-6a). However, consensus on the adoption of the QMV-definition as proposed by the Convention was harder to come by, since Spain and Poland insisted that the Nice triple-

[681] Amendment Form, 'Title I: Definition and objectives of the Union, by Members: Mr Andrew Duff, Mr Lamberto Dini, Mr Paul Helminger, Lord Maclennan', 1.
[682] These were: German and Spanish MEPs Sylvia-Yvonne Kaufmann and Carlos Carnero González; and Spanish MPs Josep Borrell Fontelles and Diego López Garrido.
[683] Parliamentary Assembly Resolution 1314, 'Contribution of the Council of Europe to the constitution-making process of the European Union', Assembly debate, 29 January 2003 (4th Sitting), point 14(v), at: www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/ERES1314.htm (accessed on 16 May 2015).
[684] CONV 850/03, 222; and Amendment Form, 'Suggestion for a new Article 6a, by Brok, Szajer, et al.', 1.

majority formula be preserved, whereas France, Germany, and the Italian Presidency kept defending the Convention proposal.[685]

Actually, Madrid and Warsaw's rejection of the new QMV-definition stemmed from the fact that Nice had allotted Spain and Poland twenty-seven votes each, compared to the twenty-nine for each of the big four, even though Spain and Poland's populations were *circa* 52 per cent smaller than Germany's. Consequently, Spanish Prime Minister José María Aznar and his Polish counterpart Leszek Miller were determined to defend these gains. Thus, the Working Party of IGC Legal experts limited themselves to corroborating the wording of Article I-24;[686] and reiterated that such provisions take effect, on 1 November 2009, on the basis of the timetable under the Declaration [20] on the enlargement of the EU of the Nice Final Act.[687]

Basing himself on *EUobserver*, and *Financial Times* reports published in October 2003, Crum suggests that various options were circulated to persuade Spain and Portugal to accept the Convention's QMV-definition, most notably a 5-per cent increase in the EU population threshold,[688] that would empower *either* Spain *or* Poland to form a blocking minority (if one of them were to join Germany and a third big country) whenever a Council member requested the Council to check whether the member states comprising the qualified majority satisfied the population threshold. However, the differences

[685] See B. Crum, 'Getting the Constitution into Shape: A Comparison of the strategies of the two IGC 2003–2004 Presidencies', Free University of Amsterdam, Department of Political Sciences, 9, at: www.ecpr.eu/Filestore/PaperProposal/be6da317-c685-435f-8070-92c142aa7b7f.pdf (accessed on 18 May 2015); and Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Naples Ministerial Conclave: Presidency proposal', CIG 52/03, PRESID 10, Brussels, 25 November 2003, 4.

[686] Compare, Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Editorial and legal comments on the draft Treaty establishing a Constitution for Europe – Basic document', CIG 4/1/03, REV 1, Brussels, 6 October 2003, 64–65; with '2003 IGC – Draft Treaty establishing a Constitution for Europe', CIG 50/03, Brussels, 25 November 2003, 32–33.

[687] CIG 4/1/03, REV 1, Article I-24, paragraph 3, 64; and 'Protocol on the transitional provisions relating to the institutions and bodies of the Union', Title 2, Article 2, 527–528.

[688] Crum, 9.

between Madrid and Warsaw on one side, and Paris, Berlin, London, and Rome on the other, continued until the European Council of December 2003 was prematurely broken off after French President Jacques Chirac expressed his dissent, which was covertly shared by other leaders.[689] Thus, the Italian Presidency was left with no other option but to note that 'it was not possible for the Intergovernmental Conference to reach overall agreement on a draft constitutional treaty'.[690]

From then on, it was clear that the population threshold had to be revised upwards to meet Spain and Poland's demands. Meanwhile, the in-coming Irish Presidency was aware that the majority of delegations were supportive of the Convention's QMV-definition. Thus, in his IGC report, Taoiseach Bertie Ahern informed the European Council that the principle of double majority 'must allow for greater efficiency in decision-making than the provisions in the current Treaties, and must have due regard to balance among all Member States and to their specific concerns.'[691]

A re-launch came after a two-month 'period of reflection', during which the Irish Presidency took in consideration the member-state governments' specific concerns. This re-launch also coincided with the departure from office of Prime Minister Aznar, who was ousted by the Socialists in the elections of 14 March 2004; and Prime Minister Miller's resignation seven weeks later, after an unprecedented dip in popular support for his two-party minority government. However, the new Spanish Prime Minister José Luis Rodríguez Zapatero requested a two-thirds population threshold in order to keep a blocking power comparable to that which Spain had obtained under the Nice Treaty,

[689] Ibid., 10.
[690] Council of the European Union, 'Brussels European Council, 12–13 December 2003. Presidency Conclusions', 5381/04, POLGEN 2, Brussels, 5 February 2004, 2.
[691] Conference of the Representatives of the Governments of the Member States, 'Report on the Inter-Governmental Conference', CIG 70/04, PRESID 15, Brussels, 24 March 2004, 4.

something which the small states were against because they wanted that the gap between the two percentages remain narrow in order to preserve a form of parity between the two thresholds.[692] On the other hand, the Irish Presidency wanted to make sure that the gap between the population and member-states thresholds would not exceed the 10-per cent gap set by the Convention.

Eventually, the Irish Presidency crafted a new package, which provided that the population threshold be set at 65 per cent, and the member-states' at 55 per cent. Moreover, in order to have 'due regard to balance among all Member States' the Presidency suggested that a blocking minority include at least four Council members representing member states with at least 12, or 15 per cent of the Union population.[693] This formula was crafted to prohibit Germany, France, and the UK from forming a blocking minority; and whenever the Council was not to act on a proposal from the Commission or the UMFA, qualified majority would comprise 72 per cent of the Council members, and the population threshold be set at 65 per cent.[694]

According the Crum, the Irish Presidency had tested these options during bilateral contacts with the government representatives of Britain, France, Germany, Poland, and Spain.[695] Eventually, the complete package was revealed at the Brussels Summit of 17–18 June 2004, during which the QMV-definition underwent two other modifications,

[692] Piris, *The Lisbon Treaty*, 222.
[693] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Meeting of Heads of State or Government, 17/18 June 2004', CIG 82/04, PRESID 24, Brussels, 16 June 2004, 2. In EU-27, the 12% threshold applied to France, the UK, and Italy, whereas the 15% threshold applied to Germany.
[694] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Meeting of the Heads of State or Government, Brussels, 17/18 June 2004', CIG 83/04, PRESID 25, Brussels, 18 June 2004, 2.
[695] Crum, 16.

namely: the addition, upon Austria's insistence,[696] of a minimum of fifteen states for QMV to materialize; and clearer provisions regarding the blocking minority, to include a firm reference to 'at least four Council members, failing which the qualified majority shall not be deemed attained.'[697] Finally, Protocol [34] on the transitional provisions related to the institutions and bodies of the Union', reconfirmed that these QMV procedures take effect on 1 November 2009. In the end, these provisions made it possible for the EU leaders to reach an agreement.

From the foregoing, it is clear that the enthusiasm that had characterized the early stages of the Convention regarding: (1) the adoption of a straight-forward double-majority voting system; and (2) decision-taking 'on a federal basis', had fizzled out by the time the EU leaders approved the Constitution. On the other hand, what *had* withstood intergovernmentalist objections were:

- reference to 'the will of the citizens and States of Europe' (rather than 'the peoples'), in the establishment of the Union (Article I-1);
- the inclusion of the state-like symbols of the Union (Article I-8);
- the inclusion of the EU Charter of Fundamental Rights under Part II of the Constitution.

But things were to take another turn after the French and Dutch voters rejected the Constitution in May–June 2005.

[696] Piris, *The Lisbon Treaty*, 222.
[697] Conference of the Representatives of the Governments of the Member States, 'IGC 2003 – Meeting of Heads of State or Government, Brussels, 17/18 June 2004', CIG 84/03, PRESID 26, Brussels, 18 June 2004, 2.

9.4.5 The post-referenda amendments

Much has already been said about the decisive role that the German Presidency played in drawing up the proposals for amendment to the Reform Treaty. Here, it suffices to recall that the Presidency had suggested that the constitutional concept be abandoned, and that there be, 'no article in the amended Treaties mentioning the symbols of the EU such as the flag, the anthem or the motto.'[698] As for the status of the Charter of Fundamental Rights, the Presidency acknowledged that it had created political difficulties for some member states when trying to ratify the Constitution. For example, it was criticized in the UK for containing certain obligations, notably under Title IV (social and labour rights), which could have negative effects on the domestic economy. And in Poland, fear that the Charter could lead to the legalization of abortion constituted another sticky point.[699] Thus, the Presidency solicited the removal of the Charter from the Treaties, and suggested that ex-Article I-9 on fundamental rights contain cross references to it, thus making it legally binding on the Union's institutions when they implemented EU law.[700] The Presidency also favoured the inclusion of: a unilateral declaration by Poland; and a Protocol on the application of the Charter to the UK, in order to reassure both countries that the Charter would 'not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.'[701] Indeed, the Polish Foreign Affairs Minister Anna Fotyga declared that Warsaw intended joining the UK in the Protocol on the application

[698] Council of the European Union, 'Amendments of the Treaties on which the Union is founded', 11222/07, POLGEN 75, Brussels, 26 June 2007, 5, 6.
[699] Piris, *The Lisbon Treaty*, 150, 155.
[700] Council of the European Council, 11222/07, POLGEN 75, 7.
[701] Ibid., 7; and 15 (footnote 17, point 2; and footnotes 18–20).

of the Charter.[702] Actually, these were important guarantees that both governments needed in order to reassure their domestic audiences that the rights emanating from the Charter would not extend the ability of the ECJ, or any national court or tribunal, to find that national laws, regulations, or administrative provisions, practices or actions were inconsistent with the Charter's rights, freedoms and principles. As for QMV-definition (ex-Article I-25), the Presidency defended the provisions agreed in 2004, and proposed that they take effect on 1 November 2014, until which date, the triple-majority system would remain in force.[703]

The last unresolved issue was how to appease Madrid and Warsaw, once the Nice formula expired. Actually, the EU leaders had addressed this quandary in the draft European decision contained in Declaration No. 5, under the Final Act of the 2004 IGC, which stated that as from 1 November 2009, when the blocking minority represented: 35 per cent or more of the Union population; *or* 45 per cent or more of the member states (at least thirteen states in EU-27), the Council would be compelled to 'do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council.'[704] Thus, the German Presidency suggested that during the transitional period running between 1 November 2014 and 31 March 2017, a Council member could request that a decision be taken in accordance with the Nice provisions; *or* the provisions under Declaration No. 5 of the Final Act of the 2004 IGC.

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[702] Conference of the Representatives of the Governments of the Member States, 'IGC 2007: Statement by Ms Anna Fotyga, Polish Minister for Foreign Affairs, on the occasion of the opening of the Intergovernmental Conference', CIG 5/07, Brussels, 25 July 2007, 2.

[703] Council of the European Union, 11222/07, POLGEN 75, 8, points 12 and 13.

[704] Conference of the Representatives of the Governments of the Member States, 'Declaration to be annexed to the Final Act of the Intergovernmental Conference and the Final Act', CIG 87/04, ADD 2 REV 2, Brussels, 25 October 2004, 21–22.

As for the formation of a blocking minority *after* the transitional period, the German Presidency suggested that the percentages required for its formation as crafted in said Declaration No. 5, be revised downwards: to at least 19.25 per cent of the Union population; *or* at least 24.75 per cent of the member states (at least six states in EU-27).[705] Thus, as from 1 November 2014, Spain and Poland could still join the big four to form a blocking minority. Indeed, the in-coming Portuguese Presidency presented this proposal at the 2007 IGC, which provided also that Council members lend their assistance to the Council Presidency who, 'with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council.'[706] And since this mechanism enabled Spain and Poland to ask the Council for an issue to be discussed further when the minority was close to forming a blocking minority, the EU leaders had overcome another major obstacle on the road to Lisbon.

9.4.6 The final hurdle

The Irish 'no' vote of June 2008, which subsequently gained Dublin a number of guarantees and concessions, encouraged the Eurosceptic Czech President Václav Klaus not to sign the act of ratification of the Lisbon Treaty, despite the fact that both chambers of the Czech parliament had authorized its adoption in May 2009.

Klaus's opposition stemmed from the fact that he wanted the European Council to grant the Czech Republic an opt-out to avoid the risk of having the Union pressing Prague to repeal the infamous Beneš Decrees of 1945–48, under which, property had

[705] Council of the European Union, 11222/07, POLGEN 75, 8, point 13: and Piris, *The Lisbon Treaty*, 224.
[706] Conference of the Representatives of the Governments of the Member States, 'IGC 2007: Draft declarations', CIG 3/07, Brussels, 23 July 2007, 6.

been confiscated, and Czechoslovak nationality removed, from *Südeten* Germans and peoples of Hungarian origin considered disloyal to Czechoslovakia during the Second World War. The Legal Counsel of the Council of the EU and Director-General of its Legal Service Jean-Claude Piris argues that Klaus's argument was legally unfounded.[707] Nevertheless, the European Council of 29–30 October 2009 met Klaus's request when it stated that 'Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom shall apply to the Czech Republic.'[708] In other words, Klaus had exploited the Union's urgency of having Lisbon in place without any further delay, to protect his country's particularistic request.

9.5 Conclusion

This chapter shows that Europeans and their political representatives find it hard to shift their loyalty away from the ethnos to embrace the fundamental principles of a post-national and federal rationale. In other words, most Europeans seem unwilling to belong simultaneously to the national state *and* the supranational order. Consequently, the post-Nice reform process continues to be characterized by a mismatch between what the Praesidium and the more federalist-leaning constitution-makers hoped to achieve during the Convention and subsequent IGCs, and what the High Contracting Parties actually agreed to under Lisbon. For example, words normally associated with a state, like 'constitution', 'anthem', 'motto', and 'flag', were deleted from the opening articles of the Constitutional Treaty, as was the Praesidium's original proposal that common EU policies be administered 'on a federal basis'. Equally indicative of the retreat from

[707] Piris, *The Lisbon Treaty*, 61–62.
[708] Council of the European Union, 'Brussels European Council 29/30 October 2009, Presidency Conclusions', 15265/09, REV 1 CONCL 3, Brussels, 1 December 2009, Annex I, 14.

Maasticht's federalist trajectory are the new provisions under Article 9 TEU on citizenship, which make it crystal clear that '[c]itizenship of the Union shall be additional to national citizenship *and shall not replace it*',[709] whereas the EU Charter of Fundamental Rights has found its place as an annex to the Treaties, unlike the charters of individual rights or fundamental rights and liberties incorporated into the constitutions of the US, Canada, Switzerland, and Germany. And after five-odd decades of EU constitution-making, Article 1(2) TEU states that Lisbon 'marks a new stage in the process of creating an ever closer union among the peoples of Europe'. But this sounds rather trite, considering that the quest for 'ever closer union' featured already in the Treaty establishing the EEC. In other words, Europeans remain averse to universalism as a possible solution for the coexistence of their diverse identities. Thus, in the absence of a trans-European 'civic culture', the way decisions are taken in the Council fails to approximate that of established federal practices. Consequently, the Masters of the Treaties have replaced the Nice triple-majority voting procedure with another complex QMV-definition, which is hedged with equally complex blocking minority provisions that have no equal in any federal order. Indeed, these mechanisms have been crafted to safeguard the national interest of the largest possible number of Council members in a Union which currently comprises twenty-eight states. In other words, Europeans are still deprived of the legal habit which would lead to the acceptance of a truly double-majority mechanism, wherein the overruled minorities would continue to consider themselves part of the polity, despite the (super)majority rule.

[709] Emphasis added.

CHAPTER 10

CONCLUSION

10.1 Ambivalent Europeans

EU constitutional development has been characterized by the making of *circa* twenty treaties and extra-treaty accords since 1951. Some were crafted to cover new policy areas; others were meant to consolidate the remit of the founding Treaties, at times via the incorporation of extra-treaty accords. In other words, rather than founding a proto-state, the founding fathers opted for the sectoral, (neo)functionalist approach to integration. Subsequently, EC/EU leaders exploited landmark moments to forge ahead with integration. For example, the completion of the internal market came about at a time when the world's most industrialized countries started deregulating their economies along neo-liberal lines. This in turn induced the member states to consider creating a single currency area; hence the Maastricht accords that provided the timetable, and the institutional framework for the realization of monetary union. Likewise, there could not have been the EFTA and eastern enlargements, or any talk on political union, without the dissolution of the Soviet Union and the demise of the Cold War. And as the financial crisis of 2008 assumed catastrophic proportions, the euro area member-state governments decided to forge ahead with more intergovernmental cooperation in the fiscal and economic fields. In other words, the Union's constitution-makers have used landmark events as valid pretexts for the pursuit of an incremental brand of integration. In consequence, the Treaties have taken many of the characteristics of a constitution.

Another distinctive feature of the European project is its voluntary nature, which by definition excludes any form of coercion. Again, this sets the EU apart from the four comparators, wherein the more powerful constituent states imposed federal settlements, which the weaker sub-national units were compelled to accept. For example, the US became ever more centralized after the Civil War, when the Confederate States were forced to rejoin the Northern States on Unionist terms. By way of contrast, Lisbon Article 50 TEU allows any member state to negotiate its exit from the Union. This cardinal difference stems from the fact that *before* and *after* the signing of the Treaties of Paris and Rome, the political map of Europe comprised a collection of nation states, some of which were several centuries old, others were the creation of the Treaty of Versailles, whereas others (re)gained their independence after the dissolution of the USSR and Yugoslavia. Besides, this Westphalian order was reinforced by the 'hard' security context of the Cold War. In other words, today's member states were already sovereign states *before* joining the Union, who through their foreign policy could define and manage their relationships with each other; defend their security and territorial integrity; and promote their national interests. This kind of political DNA explains why the Union's constitution-making process has not had its 'Philadelphia moment', but rather various episodes of intergovernmental negotiation, with federation as a possible constitutional horizon.

This study confirms that although the Union's constitutional architecture does not comprise a succinct set of rules and guiding principles, its extensive body of treaties, laws, and annexes renders it a vibrant emerging polity. Actually, the Treaties' prolix nature is attributable to the fact that its constitution-makers have tried to accommodate the divergent world-views, aspirations and constitutional traditions of twenty-eight

member states, who find it hard to abandon their ingrained nationalistic moorings for a federal-type constitutional settlement. In other words, Europeans find it difficult to embrace what Longo calls the 'semantic shift' from state-based sovereignty to a human rights-based conception of popular sovereignty,[710] which would help them overcome their unconditional attachment to the unanimity principle in matters concerning treaty amendment, but not just. This explains why EU constitution-making is characterized by an ongoing piecemeal process via which, its political actors are constantly in search of a delicate and unstable balance between the preservation of the member states' national interests via the application of carefully crafted decision-making formulae, and the transfer of certain national competences to the Union level. For example, the various QMV-definitions agreed since 1951 have permitted the member states to keep EC/EU legislation under the watchful eyes of the national capitals.

This study also shows that the post-Maastricht reform process was characterized by the sovereignists' and Eurosceptics' resolve to neutralize Maastricht's federalist euphoria through classic 'lowest common denominator' bargaining at Amsterdam, Nice, the Convention, and subsequent IGCs. Actually, the thematic studies show that the sovereignist rationale hardened in stages:

- after the European Council decided that the ten acceding countries could veto decisions taken during the 2003/04 IGC negotiations;
- after the French and Dutch double rejection of the Constitutional Treaty, when the European Council decided that the TEU and the TFEU were *not* to have a constitutional character;

[710] See pages 255–257.

- during the ratification process of the Lisbon Treaty, when the Irish electorate rejected the Treaty in 2008;
- as the international financial crisis of 2008 developed into national debt crises across the EU;
- since the start of the Arab Spring revolutions in January 2011 to the time of writing, with the inflow into EU territory of millions of asylum seekers and economic migrants from the war-torn and politically unstable Middle East, North Africa and beyond, which has provoked a nationalistic backlash across the EU.

In other words, in the absence of the characteristics of a purposeful *res publica* or composite polity able to navigate the normative orientations of a transnational civil society, the more sovereignist EU countries are demanding that certain competences previously conferred upon the Union (e.g. border control), be returned to the national capitals. Actually, the British voted to take back their sovereignty when asked by Cameron's Conservative government to choose whether they should remain in, or quit, the EU, in the Brexit referendum of June 2016.

10.2 Strengths and shortcomings of primary sources used

This study captures the personal views and preferences of the official elites entrenched in the governing institutions and leading political organizations of the EU, its constituent states, and the candidate countries. It also captures the nature of the plans and objectives of Europe's pro-democracy NGOs who succeeded in having a say in the constitution-making process by convincing the Union's prominent advocates of direct democracy to adopt the ECI proposal as their own, who then used their political weight to convince the

Convention Presidency about the appropriateness of incorporating such an initiative in the Constitution.[711]

Admittedly, access to other primary sources, such as interview feedback from key figures involved in the Union's constitution-making process, and access to their private memoranda and papers would have shed more light upon the subject, as well as countervailed the officialdom of the Convention and subsequent IGC documentation. However, the Convention's archival material can hardly qualify as 'insufficient' or 'one-sided' because it represents the views of a wide gamut of actors ranging from: national delegates who had specific mandates from their capitals; members who had a strong ideological agenda, which could be at variance with that of their government representatives; delegates who appeared more open to learn through argumentation; observers who were interested in promoting (or defending) the interest of the respective committee they represented; and conventioneers who opposed the European project. Besides, the Convention proceedings were enriched by the input of numerous outsider experts, which the Convention's eleven Working groups and three Discussion circles took into account *before* tabling their final reports, whereas the party groups sought the input and support of extra-Convention co-party MPs and MEPs when tabling certain contributions. Finally, the thematic studies confirm that the conventioneers felt free to engage in an open debate because they knew that in the end, the EU leaders were to have the last word upon the draft Treaty; and bearing this in mind, they had nothing to lose by being outspoken and controversial in their arguments. Thus, to the various proposals regarding the enhancement of Union citizenship, British Conservative MP David Heathcoat-Amory retorted that one cannot be a citizen of a treaty, since citizenship is an

[711] See pages 210–212, 215–216.

attribute of statehood. Likewise, the proposal presented by a transnational group of Left-wingers, that nationals of third countries, refugees, or stateless persons residing legally within the EU for five years be granted Union citizenship, was turned down by the Convention.[712] As for the incorporation of the EU Charter of Fundamental Rights, a handful of sovereignist government representatives did not mince words in saying that such a decision would set EU law against established national practices.[713] And to the Praesidium proposal regarding Council decisions being taken by a majority of member states representing 60 per cent of the EU population, Danish Eurosceptic MEP Jens-Peter Bonde posited, *inter alia*, that EU laws be approved by the national parliaments, with the latter having the right to veto any issue they deemed of vital national interest.[714] Likewise, French centre-right MP Pierre Lequiller's seemingly sound proposal that the College of the Commission be downsized to reflect the demographic variances between big, medium-sized, and small states provoked a transnational chorus of dissent, which the federalist-leaning Convention Presidency ignored, and which the European Council was compelled to redress *after* the Irish electorate rejected Lisbon in 2008.[715] In other words, the strong objections that were raised to these, and many other controversial proposals, highlighted the tension that ran between Euro-federalists, Leftists, and an assertive sovereignist–Eurosceptic coalition. For this reason, the Convention proceedings provided insightful and premonitory indicators regarding the unravelling of the Union's post-Convention sequel, during which the EU leaders were to revise the draft Constitution in a prevalently sovereignist key which the Convention Presidency had chosen to put aside.

[712] See pages 267, 271.
[713] See page 266.
[714] See page 269.
[715] See pages 142–144, 153.

Indeed, this reactive attitude seems to confirm Milward's thesis that Europe's integration process still does not constitute 'a [firm] thread woven into the fabric of Europe's political destiny'.[716]

10.3 Sovereignist traits in the Union's institutional framework

Over the past sixty-odd years, the High Contracting Parties have crafted a constitutional architecture which has endowed the Union with certain characteristics of statehood. To begin with, the Union now has one legal personality, with the Commission as its executive; the Council and the EP as its legislator; and the ECJ as its arbiter on the legality of decisions made by the EU institutions. Furthermore, the European External Action Service assists the High Representative for Foreign Affairs and Security Policy of the EU in the execution of her mandate. The Union's supranational institutions exercise exclusive competence in the economic pillar, and share competence with the member states in twenty-five policy areas.[717] On the other hand, the EU countries still have exclusive competence in a number of sensitive areas like, *inter alia*, citizenship, immigration, criminal justice, security and defence, economic policy, education, and taxation, some of which fall under the exclusive competence of the US, Canadian, Swiss, and German federal governments. Furthermore, the European Council provides the Union with the necessary impetus for its development, and defines its general political direction and priorities. Thus, the EU continues to fall short of being a state, not just because the member states refuse to transfer certain competences like foreign policy, security and defence, or economic policy to the supranational level, but also because a sovereignist

[716] A. Milward, *The Reconstruction of Western Europe, 1945–51* (London, 1984), 493.
[717] McCormick, *European Union Politics*, 150.

attitude has characterized successive revisions of the decision-making procedures so that, for example, QMV in the Council still falls short of the federalist call for a straightforward double-majority rule. Furthermore, Lisbon's QMV-definition is hedged about with several provisions and mechanisms, which keep outvoted Council members in play until a more consensual solution be brokered.[718] This constant quest for compromise bestows stability to the Union, but dilutes the founding fathers' federalist *telos*. In fact, the member states seem set to defend their sovereignist prerogatives by defending, *inter alia*, the presence of their national appointee in the Union's supranational institutions, even though these institutions might function more efficiently with a number of members that be less than that of the constituent states. Likewise, overlapping in key offices like that of the EU High Representative for Foreign Affairs and Security Policy, the Commission Presidency, and the European Council Presidency, may adversely affect the Union's efficiency, besides creating ambiguity with regard to the Union's external representation, visibility, and credibility. And despite the fact that future enlargements may render acuter the problem related to institutional overcrowding, the EU Treaties continue to entitle each member state to appoint its national in certain institutions like the Commission, the ECJ, and the Court of Auditors.[719] By way of contrast, the current US executive consists of sixteen departments, meaning that the overwhelming majority of the US states are not represented in the Federal Cabinet. And in Switzerland, the Federal Council comprises seven members who represent the Confederation's four ethno-linguistic communities, rather than all of Switzerland's constituent cantons. Likewise, the number of judges in the Supreme Courts of Canada and the US is inferior to the number

[718] See pages 277–278, 280.
[719] See pages 155–156; and *Lisbon Treaty*, Article 19(2) TEU, and Article 285 TFEU.

of sub-national units. Actually, the pervasive presence of the member states' representatives in the Union's institutional framework sets the Euro-polity apart from the four comparators, and underscores the fact that the nation state rationale remains strong, no matter what the advocates of post-nationalism and constitutional patriotism might advocate for the EU.

10.4 The politics of constitution-making, voluntary cooperation, à la carte integration, and disjointed incrementalism

Another distinctive feature of EU constitution-making has been its politics of disjointed incrementalism. Indeed, whereas the establishment of most polities usually goes back to one founding moment, and is the product of one constitutional assembly that shares a common world-view, the EU Treaties are the product of three to four generations of constitution makers, whose world views and aspirations have changed over time, and become more conceptually diverse with every enlargement. Thus, the founding Treaties were agreed by six national leaders who were committed to the return of peace and stability among former Allies and Axis powers. But this *Weltanschauung* was revised in the post-Wall era when the Union's NATO countries had to take into account the neutrals' distancing from those ESDP operations that complemented NATO-led military initiatives. Then, the membership of eleven post-Socialist states and two ex-British colonies rendered the deepening process more complex, because after breaking free from their communist or colonial past, these newcomers have proven to be particularly jealous of their national sovereignty, and rather guarded in their approach toward any federalist initiative. Thus, the post-Laeken IGCs have taken longer to bear fruit, compared to earlier ones. In fact, whereas the duration of most pre-Maastricht IGCs varied between one day

and just over one year,[720] the process which led to Lisbon spanned over a record-breaking seven years and nine months, and comprised a variety of constitution-making experiences namely:

- the Constitutional Convention (inaugurated on 28 February 2002);
- the ensuing 2003/04 IGC;
- the failed ratification process of the Constitutional Treaty;
- the subsequent 'period of reflection', and the crafting of a mandate for the amendment of the Reform Treaty;
- the ensuing 2007 IGC;
- the Lisbon Treaty's problematic ratification process, until it came into effect on 1 December 2009.

Indeed, this lengthy process was due to three factors. First, the heads of state or government were not always in full agreement with the draft Constitution as crafted at the Convention; and since the former had the last word on its remit, each national delegation used the IGCs and intervening rounds of consultation organized by successive EU Presidencies to re-negotiate those provisions that the national capitals deemed unacceptable, until they obtained what they wanted, failing which they went for the crafting of opt-outs that addressed their objections to certain Treaty provisions.[721] Second, the rejection of the Constitution strengthened the sovereignists' and Eurosceptics' call for the elimination of those provisions which gave the impression that the Union could become a superstate. Third, the member states' search for consensus on new policy areas has become very difficult because the veto points have doubled after the

[720] McCormick, *European Union Politics*, 138.
[721] See pages 86 (Table 3.5), 133 (Table 5.2), 194, 228, 294.

EFTA enlargement. This explains why the constitution makers are frequently obliged to craft:

- several protocols and declarations annexed to the Treaties;
- detailed mechanisms that enhance voluntary transnational cooperation;
- extra-Treaty accords, like the ESM and fiscal compact Treaties,

whenever unanimity among the member states fails to materialize. For example, an outstanding feature of the Lisbon Treaty – which has no equal in the constitutions of the four comparators – is the inclusion of thirty-seven protocols and sixty-five declarations annexed to the 413 articles that constitute the TEU and TFEU. Besides, the protocols fall under three categories. First, there are those which have been designed to exempt certain EU countries from partaking of certain common policies, while allowing the others to implement such policies. For example, Britain's opt-out on monetary union *did not* bar other member states from agreeing to adopt the single currency. And had it not been for the crafting of the Protocol on the application of the EU Charter of Fundamental Rights to the satisfaction of the Czech Republic, Poland, and the UK, agreement on Lisbon might have taken longer than it actually did.[722] Second, there are protocols which refer to the Union's guiding principles, like the Protocol on the application of the principles of subsidiarity and proportionality. Others explain how the national institutions *fit* in the Union's institutional framework, like the Protocol on the role of the national parliaments in the EU; or how the Union institutions *operate*, like the Protocol on the Statute of the Court of Justice of the EU. What is more, some protocols are complex, almost treaty-like catalogues of rules and procedures. For example, the seventy-seven articles under the

[722] See pages 276–277, 278–279.

Protocol on the Statute of the Court of Justice, and the fifty articles under the Protocol on the Statute of the ESCB and of the ECB, have no equal in the US, Canadian, Swiss, and German constitutions. Again, this demonstrates that whenever the member states *do* agree to transfer certain competences to the Union level, the Masters of the Treaties deem it necessary for them to define to the last detail, the design, remit, and *modus operandi* of the Union institutions.

As for mechanisms that enhance transnational cooperation, the High Contracting Parties have agreed several non-coercive provisions. For example, the EU countries have adopted the open method of coordination, which bases policy making on a 'soft' combination of cooperation, reciprocal learning, and the voluntary participation of the member states in certain policy areas such as health care, education and pensions, rather than the 'hard' setting of binding legal norms. Likewise, Article 20 TEU enables at least nine countries that wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences, to make use of the Union's institutions and exercise certain competences by applying the relevant provisions of the Treaties, whereas the Union's conduct, definition, and implementation of the CFSP is based on the development of mutual political respect among the member states. Furthermore, the EU countries are expected to support the Union's external security policy actively and unreservedly in a spirit of loyalty, whereas the CSDP does not prejudice the specific character of the security and defence policy of certain member states who continue to see their common defence realized within NATO.[723] Finally, under Article 42(2) TEU, the Council may entrust the implementation of a Petersberg task to a group of member states that are willing, and have the necessary capability, to assume

[723] See pages 98, 99, 121, 125, 126.

such a task. And whereas permanent structured cooperation is open to any member state, any member state may pull out, if it no longer fulfils the criteria, or is no longer able to meet the commitments under Articles 1 and 2 of the Protocol on permanent structured cooperation.[724]

These flexible mechanisms have been crafted to make it possible for all the EU countries to define, partake of, and implement, certain common initiatives on a voluntary basis. For example, the CFSP and CSDP's non-binding provisions underscore the fact that the member states refuse to endow the Union with the power of coercion that one associates with any sovereign state. These shortcomings may be seen as flaws in the eyes of Euro-federalists, but are actually indispensable for the polity's stability and longevity. In other words, these provisions put the Union's constitution-making process in a class of its own, while easing the tension between the Euro-federalists' and the sovereignists' ambivalence *vis-à-vis* the Union's constitutional horizon.

10.5 The impact of national referenda on EU constitution-making

Whereas the pre-Maastricht era had been characterized by a permissive consensus, which political leaders exploited to proceed with the Union's deepening without consulting the electorate, the complexity of the Maastricht Treaty gave Eurosceptics more slack to influence public opinion by making the case that the TEU, and subsequent treaties for that matter, involved the surrender of too much sovereignty to the EU. Actually, Maastricht's federalist thrust was one reason that determined the Danish 'no' vote and the French *petit oui* on the TEU in 1992. Indeed, such setbacks changed the political landscape in which subsequent treaties were to be revised, thus prompting the Laeken

[724] See page 125.

Council to try ending the practice of periodically updating the Treaties by agreeing a more permanent constitution for a pan-continental Union. But despite the fact that the European Convention was more transparent and innovative compared to the classical IGC method, the Constitutional and Lisbon Treaties were neither shorter than the previous treaties, nor easier to understand. Furthermore, various Eurobarometer surveys conducted after the rejection of the several Treaties underscored a certain degree of apprehension among the 'no' voters with regard to the surrender of national sovereignty. In fact, after 1992, national referenda became a recurring legitimacy test, and an effective means by which certain domestic electorates have compelled their government to ask for the retention of various aspects of national sovereignty that otherwise would have slipped to the Union level. Thus, the Danes' initial rejection of Maastricht did not only win Denmark the right to opt out of monetary union, but also other opt-outs regarding defence, citizenship, and JHA, whereas the 2005 Dutch 'no' vote won the national parliaments more powers under Lisbon's reinforced control mechanism.[725] Likewise, the Irish initial rejection of Lisbon guaranteed every member state's right to appoint its representative in every term of the Commission. Besides, the Irish also won firmer guarantees regarding their country's status of neutrality and other domestic policy areas.[726] To these referenda, one may add the Danish and Swedish votes of 2000 and 2003 on the adoption of the euro, which both electorates rejected; and the Danish referendum of 2015, in which the electorate refused to convert Denmark's full opt-out on JHA into a case-by-case opt-out. In other words, as many as seven referenda held in five

[725] See pages 249, 250–251.
[726] See pages 151–152.

older EU countries have reinforced these member states' presence in, and control over, certain EU institutions and common policies.

Meanwhile, the unpredictable nature of these votes, and the European Council's involuntary crafting of country-specific solutions after each negative result, have sharpened the EU leaders' resolve to minimize potential opposition, and circumvent veto points. For example, the strategy adopted by each EU Presidency between June 2005 and June 2007 was to identify the issues which determined the French and Dutch negative votes on the Constitution; and revise those provisions that could raise objections of a constitutional nature at the domestic level. Eventually, the German Presidency left little to chance, and presented an agreed mandate to the European Council, which prescribed the legal solutions to all possible contentious issues regarding treaty reform, in order to facilitate the proceedings during the 2007 IGC. The objective of this exercise was to minimize recourse to referendum for treaty ratification, and avoid as much as possible that private citizens or constituted bodies request constitutional court rulings on the compatibility of the Reform Treaty. Later, the EU leaders decided to brush aside the unanimity principle when ratifying extra-Treaty accords that were crafted in the wake of the international financial crisis of 2008. Thus, the then seventeen euro area countries plus Latvia agreed that the ESM Treaty take effect, once the instruments of ratification were deposited by the signatories whose initial capital subscriptions represented 90 per cent of the total amount. Furthermore, twenty-five contracting parties agreed that the TSCG would take effect, once ratified by twelve member states whose currency was the euro.[727] Similar ratification and application procedures were agreed when all the EU countries, bar Britain and Sweden, signed the intergovernmental agreement on the Single

[727] See page 190.

Resolution Mechanism (SRM) on 21 May 2014, which established uniform rules and procedures for the recovery and resolution of credit institutions and investment firms found to be in danger of failing.[728] Indeed, the crafting of such mechanisms does not just avoid veto points, but leaves the door open for non-ratifying parties and future euro area member states to partake of the ESM and SRM, as well as adopt the rules of the fiscal compact, if, and when, they commit to do so.

10.6 The democratic deficit

The enhancement of the Union's legitimacy and democratic credentials were singled out at Laeken as matters that required remedial action. This was due to the fact that the Union's constitution-making had been elite-driven, with crucial decisions concerning the Union's constitutional framework being taken by the EU heads of state or government.

The Convention method was supposed to change this *modus operandi* by widening the forum on constitutional reform. Nevertheless, this method was characterized by the frequent lack of convergence between what the Convention members proposed with regard to treaty reform, and what the Masters of the Treaties were ready to concede during the post-Convention IGCs. A case in point was the debate on QMV-definition in the Council. On the one hand, the overwhelming majority of the EPP, PES, and ALDE delegates were generally in favour of the simple double-majority rule that they deemed necessary for an enlarged Council. On the other, the 2003/04 IGC negotiations were characterized by:

[728] 'Single Resolution Mechanism to come into effect for the Banking Union', Brussels, 31 December 2015, at: europa.eu/rapid/press-release_IP-15-6397_en.htm (accessed on 25 February 2016).

- Spain and Poland's resolve to defend the Nice QMV-definition, thanks to which either of them could join the big states to form a blocking minority;
- the small states' concern that their chance of blocking a Council decision on the basis of the demographic criterion was remote, given their small share of the Union's total population.

Thus, the tension caused by the proposals tabled by many conventioneers; and the national governments' right to disagree at a later stage, forced negotiations to drag through two Presidencies, until the Masters of the Treaties crafted compromise formulae, which addressed the concerns of all the EU countries by increasing the member-state and demographic thresholds way past a simple double majority.[729] Likewise, although the majority of the conventioneers were contrary to the Commission's downsizing, the European Council abandoned this idea only when forced to do so *after* the Irish rejected Lisbon. Indeed, a persistent lack of agreement prevailed between the Convention delegates and the EU citizens on one side, and the High Contracting Parties on the other, with the initial tendency being for the latter to take decisions that *either* ignored the Convention's counterproposals regarding certain aspects of the Constitution, *or* underestimated the popular will.

Actually, the EU leaders' preference to keep popular input under the watchful eyes of European and national institutions seems to pervade the Treaty provisions that were crafted to reduce the Union's democratic deficit, such as the ECI, and the Protocol on the role of the national parliaments in the EU. This does not mean that these provisions have not enhanced the Union's legitimacy and democratic credentials. However, the complex mechanism that activates the ECI offers a daunting challenge to

[729] See page 274.

one million EU citizens to call on the Commission to propose a legal act in areas where the Union enjoys exclusive competence. In fact, at the time of writing, the Commission had presented its conclusions to just three ECI submissions, and none had gone through all the stages as to translate into EU legislation. Thus, despite Laeken's rhetoric on bringing the European institutions closer to EU citizens, the governance principles of the regulatory state seem hardly affected by the introduction of the ECI. On the other hand, the Protocol on the role of the national parliaments has given the citizens of the member states an indirect tool that can stop proposed EU legislation that is found to be in breach of the principles of subsidiarity and proportionality from taking effect.[730]

10.7 The seemingly impossible definition of a constitutional 'horizon'

The post-Maastricht era was characterized by what seemed to be the maturation of a **quasi-constitutional moment**, as twelve member states forged ahead with their economic convergence programmes in order to achieve monetary union while the Commission conducted accession negotiations with twelve candidate countries; hence Laeken's call for the revision of the Treaties for a wider Europe via the convention method.

Actually, the Convention Praesidium was supportive of a series of proposals that were meant to bestow a state-like character to the EU, like the one on the adoption of the symbols of the Union, and the other on the incorporation of the EU Charter of Fundamental Rights into the Constitutional Treaty. And in the best of federalist tradition, the Praesidium proposed that the opening article on the establishment of the Union reflect the will of the peoples and the States of Europe to build a common future in a Union in

[730] See page 250–251.

which the policies of the member states would be coordinated, and the Union's common competences be administered, 'on a federal basis.'[731] However, these, and certain other federalist proposals like:

- the deepening of the CFSP and the CSDP;
- the downsizing of the College of the Commission;
- the completion of EMU;
- the introduction of a voting system for the Council based on a straightforward double-majority rule, and
- the adoption of state-like symbols of the Union

were fought back, modified, or rejected, *either* by the sovereignist-leaning member states at the Convention and during the 2003/04 and 2007 IGCs; *or* by those national electorates who were called upon to vote in domestic referenda to decide the fate of the Treaties. Thus, in one way or another, the member states ended up:

1. preserving the unanimity clause in the so-called common foreign, security and defence policy;
2. rejecting the proposal that the Treaties be approved by a dual majority of EU citizens and member states in a Europe-wide referendum;
3. defending the presence of their own representative in every line-up of the College of Commissioners;
4. refusing to communitarize the economic arm of EMU;
5. crafting a two-stage 'reinforced control mechanism', under which the national parliaments came out stronger in the monitoring of EU legislative proposals;

[731] See page 264.

6. rejecting the state-like symbols of the Union;
7. relegating the EU Charter of Fundamental Rights to an annex to Lisbon;
8. specifying that EU citizenship be *additional* to national citizenship, rather than *replacing* the latter;
9. rejecting the adoption of a simple double-majority rule as a voting procedure in the Council.

In other words, the EU countries seem to have lost sight of the constitutional horizon that Laeken had purportedly set, because many Europeans are still not ready to let go their nationalist moorings. A case in point is the British electorate's recent decision to take back control of their country by exiting the EU. And immediately after the Brexit referendum, many far-right and anti-migration leaders across the EU, like Marine Le Pen of France, Matteo Salvini of Italy, Geert Wilders of the Netherlands, and Kristian Thulesen Dahls of Denmark declared that their co-nationals should be granted the right to decide about their country's permanence in the EU.[732]

In the light of the foregoing, one is bound to ask whether the integration process has run its full course. Indeed, the Union's constitutional horizon, like its earthly counterpart, seems to recede with every step taken toward it. Meanwhile, it has been reported that the incumbent British Prime Minister Theresa May might decide to invoke Lisbon Article 50 TEU in January or February 2017,[733] after which London and Brussels would start negotiations on: (1) an agreement on the UK's withdrawal from the EU; and (2) a framework for the UK's future relationship with the Union. Actually, much depends

[732] BBC News, 'EU referendum: Brexit sparks calls for other EU votes', 24 June 2016, at: www.bbc.com/news/world-europe-36615879 (accessed on 26 September 2016).
[733] The Telegraph, 'Bratislava summit: Europe's 'united front' proves a fragile façade as leaders refuse to share a stage', 16 September 2016, at: www.telegraph.co.uk/news/2016/09/16/eu-bratislava-summit-donald-tusk-calls-for-sober-and-brutally-ho1/ (accessed on 26 September 2016).

on what kind of settlement the Theresa May government will clinch, especially with regard to the restrictions on the free movement of workers between the single market and the UK. Indeed, a good settlement for Britain could set a precedent, which other Eurosceptic member states might be tempted to copy or emulate.

10.8 The state of the Union: suggestions for further research

The Union's constitution-making process has been defined primarily by a series of endogenous and exogenous economic factors which prompted the governments of an increasing number of constituent states to go beyond traditional interdependence, and surrender sovereignty in key policy areas in order to ensure their own survival in a globalizing economy via the establishment of the single market and EMU. On the other hand, the national capitals remain jealous of their sovereignty in sensitive areas such as immigration, security and defence, and economic policy, as may be construed from the behind-the-scenes animosity that characterized the informal Bratislava Council meeting of 16 September 2016, which was supposed to communicate the impression to the global stage that the Union was still solid despite Brexit.[734] Indeed, what has been confirmed by this study is that the Union's current constitutional architecture remains fragile because it continues to be essentially devoid of a European *demos* and an accompanying 'we-feeling', despite the establishment of a Union citizenship. This explains why the Union's internal cohesion seems to be at risk every time a major crisis looms on the horizon. One may mention, besides Brexit, the debilitating effect of the Greek debt crisis on the euro area at its worst moments; or the anti-EU sentiment among the Greek people who

[734] Ibid. See also, Italy Europe 24, 'A dissatisfied Renzi says after Bratislava EU has six months to give post-Brexit Europe more "content"', at: www.italy24.ilsole24ore.com/art/business-and-economy/2016-09-16/bratislava-meeting-and-flexibility-144933.php (accessed on 28 September 2016).

continue to oppose the austerity measures that Athens had to accept for Greece to secure the bail-out packages agreed between 2010 and 2015, in order for her to remain in the euro area. Meanwhile, Italy and Greece are finding it hard to cope with the refugee and migration crisis caused by the conflicts in Syria and the rest of the Middle East, because other European capitals along the Western Balkans route have closed their national borders in their desperate attempt to stop the massive inflow of political asylum seekers and economic migrants into their territory. At the same time, the ongoing migration crisis has determined a steady shift to the far right reminiscent of an ideological trend that characterized the continent's interwar years. Finally, Britain's resolve to exit the EU is a stark reminder of the European *demoi*'s ambivalence *vis-à-vis* the European project. Indeed, such events highlight the fault-lines and the contradictions inherent in the Union's constitutional design, besides underscoring the absence of a real political community. Indeed, these are some of the issues that other researchers could explore in order to explain how such issues might affect the Union's permanence and its future constitution-making process.

10.9 Closing remarks

During the last decade of the twentieth century, Europe's integration process was marked by an unprecedented spate of applications for EU membership, and the EU leaders' resolve to incorporate Europe's post-Socialist states within a deeper Union; hence the maturation of a seemingly 'European Philadelphia'. However, this study has shown that despite the candidate countries' initial enthusiasm to embrace the European project, and the Laeken Council's intention to tie the Union's constitutional 'loose ends' that had

materialized over the previous fifty-odd years of piecemeal constitution-making, the High Contracting Parties' sovereignist rationale prevailed over the integrationists' vision of a Union run 'on a federal basis.' Indeed, Lisbon *does not* copy Laeken's resolve to endow the Union with one treaty text, and one genuinely merged pillar; nor has it simplified, or reduced, the complexity of the Union's constitutional architecture. Indeed, this study confirms that the habitual piecemeal incremental practice of adding extra-Treaty accords to the basic Treaties continues to characterize the Union's post-Lisbon constitution-making process, mainly because a European *demos* that shares common loyalties has failed to materialize. Consequently, the current Union cannot truly substitute the national states; nor can the Treaties constitute a meaningful contract between the Union and its citizens. In other words, Monnet's approach to the building of Europe via the gradual internalization of the externalities of the state has failed to materialize, exception being made, albeit with opt-outs, to the economic pillar. However, this study also illustrates that the various mechanisms crafted by the Masters of the Treaties have so far proven to be vital 'holding together' arrangements, which allow enough flexibility for the Union's (incomplete) edifice to remain in place, despite the post-Convention hardening of the sovereignist rationale and the Brexit quandary.

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