Explaining the constitutionalization of the European Union

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ABSTRACT Parliamentarization and the institutionalization of human rights are two processes of constitutionalization in the EU that constitute a puzzle for explanations inspired by both rationalist and constructivist institutionalism. We propose to analyse these processes as strategic action in a community environment: community actors use the liberal democratic identity, values and norms that constitute the EU’s ethos strategically to put social and moral pressure on those community members that oppose the constitutionalization of the EU. Theoretically, this process will be most effective under conditions of high salience, legitimacy, and publicity.

KEY WORDS Constitutionalization; constructivism; European Parliament; human rights; rationalism; rhetorical action.

INTRODUCTION Constitutionalization has become a buzz-word in the study of the European Union (EU). Past years have seen a constant increase in references to constitutionalization in the academic literature and in political commentary. In the academic literature, constitutionalization has traditionally been employed to capture the process of European legal integration which has led to a remarkable transformation of the EU displacing ‘the traditional, state-centred, “international organization” of the diplomat and the “regime” of the international relations scholar’ (Stone Sweet 2003: 18) with a polity which has evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere of application of EC law’ (Haltern 2002: 2).1 Constitutionalization has thus profoundly affected the EU’s legal system as well as national legal systems. The establishment of the doctrines of supremacy and direct effect and the system of judicial review have ‘to a large extent nationalized Community obligations and introduced on the Community level the habit of obedience
and the respect for the rule of law which is traditionally less associated with international obligations than with national ones’ (Weiler 1999: 28, emphasis in original). Political science and legal scholarship have dedicated scores of books and articles to the question of constitutionalization by taking recourse to and refining theories of European integration, most notably intergovernmentalism and supranationalism/neofunctionalism.2

In the more recent past, the scope of empirical phenomena and processes which attach themselves to the label of constitutionalization has widened. From this purview, constitutionalization more generally refers to ‘processes which might tend to confer a constitutional status on the basic legal framework of the European Union’ (Snyder 2003: 62–3). What kind of processes does this comprise? The deepening of European legal integration, evidently, is one of these processes. But according to Snyder, constitutionalization also encompasses those processes which relate to ‘deepening and delimitation’ (Snyder 2003: 63) including diverse processes such as democratization, the creation of solidarity, or the establishment and maintenance of boundaries. Generally speaking, there exists a broad normative consensus that constitutions should encompass three core principles: rights, the separation of powers and representative democracy (see, for example, Wiener 2005). A more inclusive definition of constitutionalization – which includes but goes beyond the phenomenon of European legal integration – relates to all those processes through which the above mentioned core principles are becoming embedded in the EU’s legal order. In this vein, constitutionalization is being employed, *inter alia*, to refer to the inclusion of fundamental rights within the EU Constitution as the Charter of Fundamental Rights (Sadurski 2003) while Stephen Day and Jo Shaw have focused on the core principle of representative democracy: ‘By “constitutionalization” we mean the embedding of principles related to representative party-based democracy into the treaties’ (Day and Shaw 2003: 150). This introduction echoes this development as it takes issue with precisely these two constitutionalization processes: the development of representative parliamentary institutions and the codification of fundamental rights.

The development of representative parliamentary institutions and the codification of fundamental rights constitute processes which are foundational for liberal democratic polities. In this special issue, we argue and demonstrate that these developments are, however, not solely restricted to the domain of the nation-state. In the EU, over the past half century, the European Parliament (EP) has undergone a remarkable transformation from an assembly endowed with supervisory powers to a directly elected legislator, co-deciding ever more secondary legislation on equal footing with the Council of Ministers. While human rights were not institutionalized in the founding Treaties of the European Communities, the European Court of Justice (ECJ) began to make references to fundamental rights in its jurisprudence in the late 1960s (Stone Sweet 2000). The recent past has seen the codification of fundamental rights in the Charter of Fundamental Rights and, most recently, in the Treaty establishing a Constitution for Europe. Yet, the processes which underlie
these two developments are fundamentally different to the parliamentarization and institutionalization of human rights in nation-states. In the member states of the EU, these processes have not been triggered ‘from below’ by civic protest or even revolutionary movements, or as a result of the intervention of foreign powers – rather, parliamentarization and the institutionalization of human rights are elite-driven processes.

The central focus of this introductory article is thus to identify the dynamics and mechanisms that brought and continue to bring about parliamentarization and institutionalization of human rights by asking the following questions: Why and under what conditions have human rights become increasingly enshrined in the EU’s legal architecture? Why has the EP come to acquire powers over time that resemble those of national parliaments more than those of any parliamentary assembly of an international organization (Malamud and de Sousa 2004; Rittberger 2005: 2–3)?

We will argue that for explanations inspired by both rationalist and constructivist institutionalism these two phenomena constitute a theoretical puzzle which has not yet been resolved. To counter this state of affairs, we propose to analyse the constitutionalization of the EU as ‘strategic action in a community environment’ (Schimmelfennig 2001, 2003). According to this approach, community actors can use the liberal democratic identity, values and norms that constitute the EU’s ethos strategically to put social and moral pressure on those community members that oppose the constitutionalization of the EU. Theoretically, strategic action will be most effective in a community environment if constitutional issues are highly salient, constitutional norms possess high international legitimacy and if constitutional negotiations are public.

To develop our argument, we will proceed as follows. In the ensuing section, we will discuss the integration theoretic literature and illustrate why the state of the literature is unsatisfactory with regard to the explanations and cues offered to shed light on the parliamentarization and the institutionalization of human rights. We then introduce strategic action in a community environment as an alternative theoretical perspective. This alternative perspective will be tested in the comparative analyses and case studies of this issue.

1. THE CONSTITUTIONALIZATION OF THE EU: A THEORETICAL PUZZLE

Integration theorists have for long debated the causes of transfers of sovereignty from the domestic to the supranational level. The theory-oriented causal and empirical analysis of ‘constitutional’ negotiations and outcomes has been a stronghold of rationalist liberal intergovernmentalism which regards economic interdependence, commercial interests, bargaining power, and the institutionalization of state commitments to bargaining outcomes as the central factors in the institutional development of the EU (Moravcsik 1998). Other rationalist studies on the delegation of competences to EU institutions, inspired by
principal–agent theory, have focused on the Commission or the ECJ (Pollack 1997, 2003) while neglecting other aspects of constitutional politics – such as parliamentarization and the institutionalization of human rights. It has been demonstrated that these processes are difficult to explain on the basis of both rationalist intergovernmentalist as well as constructivist premises (Rittberger 2005).

1.1 Rationalism and constitutionalization

From a rationalist perspective, actors in constitutional politics seek to institutionalize competences and rules of decision-making which are most likely to maximize their utility in future political bargains for which, however, the constellation of actors and preferences is uncertain. In order to determine what kind of rules maximize an actor’s utility, rationalists make auxiliary assumptions regarding those interests and preferences integral to their utility function. Rationalist explanations for institutional choices in the EU stress a number of functions exercised by institutions which induce political actors to delegate sovereignty. First, institutional choices can reduce the transaction costs associated with decision-making and thus carry efficiency-enhancing effects. For instance, slimming a legislative procedure by reducing the number of readings or, more drastically, reducing the number of veto players involved in decision-making may speed up decision-making or reduce the potential for stalemate or non-decision and hence reduce the costs of decision-making. However, attempts to improve the efficiency of institutional arrangements may carry significant distributional implications. Actors may challenge existing institutions not merely to improve the efficiency of decision-making but also to improve their capacity to affect policy decisions (Tsebelis 1990; Knight 1992). The second strand of literature thus looks at actors as policy-seekers, who prefer those institutions which best help them to ‘lock in’ their preferred ‘policy-streams’.

In the EU literature, Hix (2002) has advanced a rationalist-institutionalist argument as to why the EU member states decided to reform the co-decision procedure at Amsterdam by scrapping the third reading, thereby improving its overall efficiency. By doing so, however, the member states formally improved the position of the EP in the legislative game, thereby redistributing decision-making power from the member states to the EP. Hix thus asks why the EP ‘won at Amsterdam’ and stipulates that an exclusive focus on the Amsterdam Treaty negotiations obscures the fact that the reform of the co-decision procedure was first and foremost the achievement of ‘rule interpretation’ by Members of the European Parliament (MEPs) of the Maastricht provisions of the co-decision procedure (see also Rasmussen 2000; Farrell and Héritier 2003, 2004). At Amsterdam, the member states merely institutionalized formally what was already common practice: the de facto operation of the Maastricht version of the co-decision procedure. Hix (2002: 272) argues that even though the ‘governments do not expect these new rules to redistribute
power to the EP, as the governments expect to retain ultimate control under the legislative ... procedure’, MEPs seek for a favourable interpretation of the new rules and threaten to jeopardize the legislative process if the Council is not willing to accept the EP’s interpretation. Since there is at least one member state government which is indifferent to the de facto operation and the de jure rules, the initial status quo cannot be enforced and hence, once the next constitutional reform phase comes about, the EP will propose formalizing the de facto operation of the legislative rules to the member states. Hix, however, qualifies the scope of the applicability of this seeming ‘automatism’ by introducing two conditions which have to be met for this transformation to occur: first, there must be a zero redistribution of powers between the de facto operation of the old and the de jure operation of the proposed new rules; second, there have to be collective efficiency gains with the new procedure such as greater transparency or greater simplicity in the actual operation of the procedure (see Hix 2002: 272). If these conditions are met, even the most recalcitrant government is unlikely to veto a proposal which entails these efficiency and transparency gains. Hix’s argument constitutes a systematic attempt to explicate conditions under which the EP is able to successfully challenge the de jure Treaty rules. Yet, the two aforementioned conditions, which are crucial for parliamentarization to succeed, are too restrictive to provide a comprehensive account of parliamentarization. First, to unpack Hix’s functional argument, we need empirical evidence to know whether member states acquiesced to co-decision reform due to the expected efficiency-enhancing effects or whether other considerations played a role. Hix’s argument about the efficiency-enhancing effects of the ‘interpreted’ co-decision procedure is not backed up by empirical evidence: making a functional argument about the expected efficiency-enhancing effects of co-decision reform is not the same as providing an argument that looks at actors’ actual motivations (see Pierson 2004: 46–7). Second, in contrast to the expectations derived from Hix’s efficiency-based explanation, reforms of legislative decision-making rules in the EU only rarely result in Pareto-improving bargains. As a result of subsequent Treaty reforms, decision-making efficiency has been substantially hampered by the reform of legislative rules. Schulz and König (2000) show that legislative reform in the EU reduces decision-making efficiency since ‘giving the Parliament a formal role in the legislative process significantly increases the duration of the decision-making process’ (Schulz and König 2000: 664; see also Rittberger 2005: ch. 5).

Efficiency-based arguments thus offer a poor fit for explaining the increasing role the EP is playing in legislative decision-making, let alone for the parliamentarization phenomenon as a whole. Opting for a policy-seeking argument as point of departure, Bräuninger et al. (2001) argue that political actors will attempt to create and to sustain those rules from which they expect the generation of ‘policy streams’ which maximize their policy preferences under given constraints (such as the unanimity rules at intergovernmental conferences (IGCs)). Bräuninger et al. (2001) develop and test a set of hypotheses which
reflect this underlying assumption about member states as ‘policy-seekers’ and institutions as instruments for member states to reap the ‘policy streams’ they expect institutions to help generate (see also Steunenberg and Dimitrova 1999). First, the authors propose that changes in the voting rules in the Council and EP participation in the legislative process can only come about when all member states expect to be better off under the proposed institutional changes. They find that member states’ net expected utilities (i.e. the gains expected from institutional reform resulting from the Amsterdam Treaty), even though they vary substantially across member states, are all greater than zero when compared with the status quo. Second, the authors propose and find confirmation for the proposition that member states advocate institutional changes along issue-specific lines if they expect to be better off as a result (i.e. if they calculate the net gain from institutional choices in each individual policy area). In their discussion of the results, the authors state that their models fare well in accounting for the move to qualified majority voting or the retention of unanimity in various policy areas in the Amsterdam Treaty, yet their findings are unsatisfactory as far as the EP’s participation in the legislative process is concerned: whereas member states ‘take into account their individual expected gains from future policy-making when deciding in the Council’s voting quota for future decision-making’, the same does not hold for the EP. Bräuninger et al. (2001: 64) thus conclude that ‘the results on the EP’s participation indicate different reasons for its choice. Commitments of a certain number of member states do not sufficiently explain the participation of the EP. We suspect that policy-seeking delegations may be guided by different “central ideas” when deciding on both voting rules.’

A further attempt to explain the extension of the EP’s (legislative) powers grounded in a policy-seeking approach has been advanced by Moravcsik and Nicolaïdis (1999). Explaining member state governments’ decision to empower the EP by reforming the co-decision procedure at Amsterdam, they offer the following logic: social democratic parties and governments in the Council supported an increase in the EP’s legislative powers given that – at the time of the Treaty negotiations – there existed a left-wing majority of MEPs in the EP. This left-wing majority in the EP, so the argument goes, rendered the decision to increase the legislative powers of the EP ‘easy’ for the mainly social democratic chiefs of government during the Amsterdam negotiations. This claim, however, is not supported by any data. More fundamentally, however, if the decision of the predominantly left-wing chiefs of government was based on the instrumental calculation that a left-wing majority in the EP would (help) produce legislation closer to the respective governments’ ideal points than a right-wing dominated EP, Moravcsik and Nicolaïdis assume that governments are extremely short-sighted and demonstrate little understanding of the logic of EP elections as ‘second order national contests’ which tend to provide electoral benefits to those parties in opposition domestically. Hix argues that ‘by strengthening the EP’s power, the centre-left governments increased the likelihood of centre-right policies at the European level. Hence,
Moravcsik and Nicolaïdis’s explanation only holds if it includes the assumption that the governments negotiating the Treaty of Amsterdam made a major miscalculation about the future political make-up of the EP (Hix 2002: 269).

Pollack (1997, 2003) has analysed the delegation of powers from member states to EU organs, the Commission, ECJ and EP, from the perspective of principal–agent (P–A) theory. P–A theory stipulates that principals may delegate four function powers to their agents: monitoring the compliance with agreements among principals; filling in ‘incomplete contracts’; providing credible expert information; agenda-setting to avoid endless ‘cycling’ of proposals (see Pollack 2003: 21). This ‘functional logic of delegation’ fares well in accounting for the pattern of delegation to the Commission and the ECJ, yet Pollack admits that it offers a poor fit for explaining the powers of the EP. He echoes Bräuninger et al.’s results when he argues that the willingness of the member states to support or oppose EP legislative participation in specific policy areas has varied considerably as a result of cross-national variation in substantive policy preferences and the expected consequences of parliamentary involvement in specific policy areas. He stresses that throughout past Treaty revisions, the member state governments adopted a case-by-case approach to the extension of the respective legislative procedures whereby they took account of the anticipated consequences of EP participation in each individual issue area and the particular ‘sensitivities’ of each member government. While this evidence supports the claim that member states follow a rationalist ‘logic of consequentialism’ when they bargain over the participation of the EP in individual policy areas, the question of why the EP was given a legislative role in the first place remains unanswered (Pollack 2003: 257–8). Neither the efficiency- nor the policy-seeking arguments enable us to capture the general decision to improve parliamentary participation in the EU’s legislative process, let alone the decision to endow the EP with budgetary powers or the rationale behind its creation.

Against this background, even rationalist authors refer to the role of norms and the perceived necessity by political actors to inject the EU with a dose of parliamentary democracy to explain the delegation of competences to the EP.

In the case of the institutionalization of human rights at the EU level, one can reason by analogy that political efficiency gains of binding EU decisions to human rights norms are hard to imagine. Rather, the institutionalization of human rights introduces a constraint on intergovernmental policy-making autonomy and potentially strengthens independent, judicial review of EU legislation. What is more, Daniel Kelemen points out that ‘the experience of federal polities suggests that the creation of individual rights at the federal level can have dramatic centralizing effects’ (Kelemen 2003: 221) and observes the same development in the EU. Whereas the supranational organizations of the Community can be assumed to have a self-interest in establishing such rights, this is not the case for the member states. Even if one dismisses the formal institutionalization of human rights in the EU as a mainly or even purely symbolic act with negligible cost implications for member state governments, it remains to be explained why governments would engage in this process in the first place.
The rationalist literature on general international human rights does not help in explaining the institutionalization of human rights in the EU either. First, the establishment of international human rights institutions constitutes a puzzle for functional regime theory (Donnelly 1986; Moravcsik 2000: 217; Schmitz and Sikkink 2002: 521), since classical human rights issues concern a purely domestic relationship between a state and its citizens and do not require international co-operation to overcome externalities and inefficiencies created by international interdependence. In contrast, in his analysis of the Council of Europe-based European human rights regime, Andrew Moravcsik suggests that the international institutionalization of human rights is in the self-interest of newly established democratic government in order ‘to “lock in” and consolidate domestic institutions, thereby enhancing their credibility and stability vis-à-vis non-democratic political threats’ (2000: 220). This explanation does not entirely fit the institutionalization of human rights in the EU, however. It could account for human rights rules binding candidate and member states (such as the Copenhagen political conditions for membership or Article 7 of the Treaty on the European Union (TEU), which empowers EU institutions to suspend the rights of a member state in a case of a serious and persistent breach of the core community norms, as an instrument of reducing political uncertainty). It is less clear, however, why member governments would be interested in binding the EU to human rights rules, thus reducing the very political autonomy that they sought to increase by transferring policy to the EU level (Moravcsik 1994; Wolf 1999).

1.2 Constructivism and constitutionalization

While rational studies thus struggle to explain parliamentarization and institutionalization of human rights, the constructivist literature refers to the role of identities and norms, for instance in explaining the decisions of member state governments to empower the EP. Yet this literature is also ill-suited to explaining the progressive parliamentarization and institutionalization of human rights.

All EU member states share the basic liberal constitutional norms that governments and their actions shall be constrained by respect for human rights and approved directly or indirectly by elected, representative assemblies of the people: parliaments. These norms are not only common to the member states but also form a central part of their identity as liberal-democratic states. In light of these common norms and identities, and assuming a logic of appropriateness, it is puzzling why member state preferences on the application of these norms to the EU have regularly diverged and led to controversy – and why it took such a long time for these norms to become institutionalized at the Union level (Bojkov 2004: 333–4).

In response to this apparent puzzle, the constructivist literature argues that, whereas ideas on human rights and parliamentary power are widely shared among EU member states and societies, it is their EU-related identities and constitutional ideas that not only differ strongly but also have changed little over
time (see Jachtenfuchs et al. 1998; Jachtenfuchs 2002; Marcussen et al. 1999; Wagner 1999). Yet, if ideational convergence or international socialization has not taken place, it is still puzzling why the EU should have undergone progressive democratic constitutionalization. It is even more puzzling that this democratic constitutionalization has taken place and accelerated as the membership and its constitutional ideas have become more heterogeneous and less federalist as a result of successive rounds of enlargement.

Most accounts in this tradition stress the distinctiveness of domestically held ‘polity ideas’ or ‘legitimating beliefs’ which inform political actors’ institutional choices. Wolfgang Wagner, for instance, argues that political élites in the member states employ notions of ‘appropriate parliamentary legitimation’ (Wagner 1999: 427) which states derive from domestic political culture when contemplating the role and powers to be exercised by the EP. ‘Political culture’ is operationalized by identifying ‘those worldviews and principled beliefs – values and norms – that are stable over long periods of time and are taken for granted by the vast majority of the population’ (Risse-Kappen quoted in Wagner 1999: 427). Wagner thus employs domestic constitutional arrangements as a proxy for its political culture: member states will hence ‘respond to the question of supranational democracy in the same way they have addressed the question of sub-national democracy’ (Wagner 2002: 29; emphasis in the original). More concretely, Wagner argues that we should expect support for direct parliamentary legitimation by those countries whose policy at the regional level has been legitimized by directly elected regional parliaments, i.e. by federal states ... [C]ountries whose regional-level policy has been legitimized indirectly by the national parliaments, i.e. unitary states ... are expected to prefer indirect parliamentary legitimation for the EU.

(Wagner 2002: 29)

Hence, federally organized member states such as Germany and Belgium in which regional policy is directly legitimized through the involvement of regional parliaments are expected to be in favour of a strengthening of the EP’s powers while unitary states, such as France, are less inclined to support an empowerment of the EP.

In several contributions to the subject, Jachtenfuchs (1999, 2002) and his collaborators (Jachtenfuchs et al. 1998) have specified the content of shared beliefs about a ‘legitimate political order’ (‘polity ideas’) which are attributed a prominent role in the constitutional development of polities (see Jachtenfuchs et al. 1998: 410). They show that variation in polity ideas helps to explain why different EU member states, but also different political parties within a member state, hold different preferences for the ‘appropriate’ scope of policy integration and form and powers of EU institutions. According to Jachtenfuchs et al. (1998), political parties are the major ‘carriers’ of polity ideas: they are articulated in national party manifestos and records of parliamentary debates during which governments have to justify their foreign policy behaviour
before their domestic audience. Four analytically distinct polity ideas are identified – Intergovernmental co-operation (‘Staatenbund’), Federal state (‘Bundesstaat’), Economic community (‘Wirtschaftsgemeinschaft’) and Network (‘Netzwerk’) – which offer alternative prescriptions for action. Depending on which polity idea an actor adheres to, the answers to questions such as the sources of legitimate governance, the desirability and possibility of democracy at the supranational level, supranational citizenship, etc. will vary substantially. This argument also applies to the phenomena of parliamentarization and the institutionalization of human rights: élite support depends on the polity idea which respective political élites hold. Contrary to Wagner, Jachtenfuchs and collaborators offer a more nuanced analysis of those normative beliefs which define what actors consider ‘appropriate’ governance structures, pointing at the observation that political culture is not interpreted uniformly within each member state. Even though Jachtenfuchs’s account is more precise in specifying the content of alternative polity ideas and their behavioural prescriptions, explanations inspired by constructivism do not offer a satisfactory explanation for the processes of parliamentarization and the institutionalization of human rights at the EU level. First, neither Wagner nor Jachtenfuchs can account for the conditions under which these issues become salient: the timing of constitutional reform decisions remains unaccounted for. Second, while Jachtenfuchs focuses on the formation and content of actors’ preferences, nothing is said about the process whereby diverse preferences are translated into co-operative collective outcomes; that is, concrete institutional choices. In particular, why have governments with different polity ideas repeatedly agreed to strengthen the powers of the EP?

The review of the existing work on the subject demonstrates that both rationalist and constructivist approaches appear ill-suited to explain the constitutionalization phenomena under consideration. From the rationalist perspective, neither an efficiency- nor a policy-seeking logic helps us to account for the progressive empowerment of the EP. Approaches informed by constructivism ascribe an important role to polity ideas in shaping actors’ preferences and guiding action. While these accounts improve our understanding about the source and content of political élites’ preferences as to what role the EP should play in the EU polity, these accounts fall short of offering a causally complete explanation of constitutionalization processes. In the ensuing section, we present a theoretical approach which aims at overcoming these shortcomings.

2. SOLVING THE PUZZLE: STRATEGIC ACTION IN A COMMUNITY ENVIRONMENT

Any theoretical solution to the puzzle of EU constitutionalization needs to explain why and how the EU has made progress toward parliamentarization and the institutionalization of human rights in spite of stable adverse or divergent member state preferences and in the absence of intergovernmental efficiency or learning and socialization effects conducive to constitutionalization.
The solution we propose here is ‘strategic action in a community environment’ (Schimmelfennig 2003: 159–63).

On the one hand, and in line with rationalist institutionalism, the approach assumes that actors involved in EU integration and policy-making have stable interest-based or idea-based preferences and act strategically to achieve an outcome that maximizes their utility. In contrast to constructivist propositions, this means, first, that policy preferences are not derived from collective identities, values, and norms constructed and institutionalized at the EU level. Rather, they reflect actor-specific interests or ideas. Second, the actors follow a logic of consequentiality, not appropriateness (March and Olsen 1989) or truth-seeking (Risse 2000) in their actions and interactions, and, third, they will not change their identities and norms or learn and internalize new, ‘appropriate’ preferences as a result of their interaction in the EU context.

On the other hand, we assume that the EU constitutes a community environment for its members. This assumption goes beyond the regime rules stressed by rationalist institutionalism but agrees with the constructivist emphasis on informal, cultural values and norms. An international community is defined by three core characteristics: its ethos, its high interaction density, and its decentralization. The ethos refers to the constitutive values and norms that define the collective identity of the community – who ‘we’ are, what we stand for, and how we differ from other communities. A high interaction density is indicated by frequent and relevant interactions in a multitude of policy areas and at various political levels. Moreover, membership in communities is permanent for all practical purposes. Finally, international, pluralistic communities lack a centralized rule-making and rule-enforcement authority.

These conditions apply in the EU. First, it has a European and liberal identity that is most explicitly stated in Article 6 of the TEU: ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.’ Second, it probably has the highest interaction density of all international organizations. At the same time, the EU still relies predominantly on voluntary rule compliance and national rule implementation. Primary political socialization still takes place in a national rather than a European context.

For strategic actors, acting in a community environment means that the effective pursuit of political goals is not only dependent on the constellation of actor preferences, their relative bargaining power and formal decision-making rules. The community ethos defines a standard of legitimacy that community members have to take into account to be successful. In addition, the high interaction density provides for soft, informal mechanisms of rule enforcement. In particular, a community environment affects interaction and collective outcomes in the following ways: first, it triggers arguments about the legitimacy of preferences and policies. Actors are able – and forced – to justify their preferences on the basis of the community ethos. They engage in ‘rhetorical action’, the strategic use of the community ethos. They choose ethos-based arguments to strengthen the legitimacy of their own goals against the claims...
and arguments of their opponents. Second, the community ethos is both a resource of support and a constraint that imposes costs on illegitimate actions. It adds legitimacy to and thus strengthens the bargaining power of those actors that pursue preferences in line with, although not necessarily inspired by, the community ethos. Third, the permanence of the community forces actors to be concerned about their image. This image depends not only on how they are perceived to conform to the community ethos but also on whether they are perceived to argue credibly. Credibility is the single most important resource in arguing and depends on both impartiality and consistency (Elster 1992: 18–19). If inconsistency and partiality are publicly exposed and actors are caught using the ethos opportunistically, their credibility suffers. As a result, their future ability to successfully manipulate the standard of legitimacy will be reduced. Thus, community members whose preferences and actions violate the community ethos can be shamed and shunned into conformity with the community ethos and their argumentative commitments – even if these contradict their current policy preferences.

In sum, a community environment has the potential to modify the collective outcome that would have resulted from the constellation of actor preferences and power and the formal decision-making rules alone. It facilitates individual compliance and the reproduction of a normative order in the absence of an interest-based equilibrium or centralized enforcement. On the other hand, it does not necessarily require the internalized following of community norms or a true consensus. This theoretical approach with its postulated causal mechanisms of rhetorical action and social influence should be particularly suitable to analysing institutions that, on the one hand, have the core characteristics of community (ethos and high density) but cannot count on centralized rule enforcement or strong political socialization, on the other – such as the EU.

What do these theoretical ideas imply for the study of liberal-democratic constitutionalization in the EU? They generate the expectation that, even though parliamentarization and institutionalization of human rights at the EU level may not reflect the collective institutional interest or the normative consensus of member state governments, their collective identity as democratic states and governments and as members of a liberal international community obliges them in principle to conform to basic norms of liberal democracy. Community actors interested in expanding the powers of the EP and the role of human rights in the EU for self-interested or principled reasons are therefore able to exert effective social influence by using ethos-based frames and arguments in constitutional negotiations and to persuade reticent community actors to make constitutional concessions.

We expect that the strength of community effects on strategic action in international communities will vary according to several context conditions.

1 Constitutive rules. Obviously, the more constitutive a policy issue is or the more it involves fundamental questions of community purpose, the easier it is for interested actors to bring in questions of legitimacy and to frame
the issue at stake as one of community identity that cannot be left to the inter-
play of self-interest and bargaining power. Since both human rights and par-
liamentary competencies are such constitutive rules and are directly linked to
the fundamental political norms of a liberal community, we expect this con-
tdition to be constantly present.

2 Salience. Within the domain of constitutive politics, we expect community
effects to increase with the salience of the constitutional problem. We
define salience as the perceived discrepancy between ‘ought’ and ‘is’. The
more a proposed or implemented step of EU integration is perceived to
curb the competencies of national parliaments and to undermine national
or other international human rights provisions, the more salient the
‘democratic deficit’ of European integration becomes and the stronger the
normative pressure on EU actors to redress the situation through strengthen-
ing constitutional rights at the EU level (see Rittberger 2003, 2005).

3 Legitimacy. Even among issues that are constitutive and highly salient,
community effects may vary according to the norms in question. According to
Thomas Franck, the degree to which an international rule ‘will exert a strong
pull on states to comply’ depends on four properties, which account for its legiti-
macy: determinacy, symbolic validation, coherence in practice, and adherence to
a norm hierarchy (Franck 1990: 49). To the extent that the relevant community
norm possesses these qualities, it becomes difficult for the shamed community
members to neglect or rhetorically circumvent its practical implications (see
Shannon 2000: 294). We focus specifically on two dimensions of legitimacy.

(a) Internal coherence refers to established EU norms and practice.
Community effects in constitutional negotiations will be strongest
if demands are based on precedent, that is, for instance, earlier treaty
provisions, common member state declarations, or informal practices.

(b) External coherence refers to international norms and practices outside the
EU. Again, we assume that the legitimacy pull of constitutional norms
will be stronger if their proponents can refer to the norms and practices
of other international organizations of the same community. Such an
extra-institutional precedent is most obvious in the case of human
rights, which are already strongly institutionalized in the Council of
Europe system of human rights protection. In contrast, the competen-
cies of parliamentary assemblies in other Western international organi-
zations such as the North Atlantic Treaty Organization (NATO) or the
Council of Europe are so minor that they cannot be expected to
strengthen the legitimacy of demands for more EP competencies.

4 Publicity. Shaming and shunning is better done in public than behind closed
doors. In a public setting, strategic actors feel more compelled to use impartial
and consistent norm-conforming language and to behave accordingly. We
therefore assume that the community ethos will have a stronger impact on
constitutional negotiations and outcomes if they are conducted in public
rather than in the usual format of IGCs.
Figure 1 summarizes the assumed mechanism and conditions of strategic constitutional negotiations in a community environment.

Briefly summarized, the model postulates that, on the basis of divergent or adverse constitutional member state preferences, progress in constitutionalization results from a process of rhetorical action and social influence, and depends on the presence and strength of salience, internal and external coherence as well as publicity. Moreover, the model contains a potential dynamic effect, since constitutionalization at one point in time will increase the legitimacy pull of coherence in future constitutional negotiations.

Theoretically, this model is able to fix the explanatory deficiencies of extant rationalist and constructivist analyses of constitutionalization. It provides a causal mechanism and conditions under which, in the absence of efficiency, common interests, and a constitutional consensus among EU member states, parliamentarization and the institutionalization of human rights make progress in the EU. The preceding discussion is summarized in the ‘constitutionalization hypothesis’:

Decisions to empower the EP and to institutionalize human rights in the EU are likely to occur:

- if a proposed step of EU integration is perceived to undermine the powers of national parliaments or human rights provisions, thereby producing a ‘democratic deficit’ and exercising normative pressure on EU actors to redress the situation through strengthening constitutional rights at the EU (salience);
- if the norm in question is internally and/or externally coherent; and
- if the setting for constitutional decision-making is public.

3. WHAT LIES AHEAD: THE CONTRIBUTIONS TO THE SPECIAL ISSUE

In the contributions to this special issue the constitutionalization hypothesis will be empirically scrutinized by employing a variety of comparative case studies, all of which address ‘constitutive’ policy issues where we would expect rhetorical action to be the central mechanism driving the constitutionalization of the EU.

The contribution by Frank Schimmelfennig, Berthold Rittberger, Alexander Bürgin and Guido Schwellnus probes the plausibility of the constitutionalization hypothesis by conducting a qualitative comparative analysis (QCA). Their study offers a systematic diachronic and synchronic comparison of sixty-six constitutional decisions between 1951 and 2004 across different areas of
parliamentary competence and human rights issues. The results of the QCA generally confirm the constitutionalization hypothesis and reveal salience to be the most relevant condition of constitutionalization in the EU.

Daniel C. Thomas analyses the impact of enlargement debates in the infant European Economic Community (EEC) on constitutionalization. While the Treaty of Rome did not contain political criteria such as references to the principles of democracy and human rights as conditions for entry into the Community, Spain’s request for an association agreement with the EEC in 1962 led to a virulent political controversy over the Community’s constitutive norms and values — its ‘ethos’. Even though France and Germany expressed general support for negotiating an association agreement with General Franco’s authoritarian regime, MEPs, federalists, and trade union activists blocked it by arguing publicly that such an agreement would contradict the member states’ national constitutional norms and their obligations under the Council of Europe. In so doing, they established an informal rule (later formalized in the ‘Copenhagen criteria’ and the TEU) that community membership requires respect for the principles of democracy, the rule of law, and human rights.

Berthold Rittberger argues that constitutionalization has been a central concern of political élites since the early days of the European integration project. He shows that the negotiations leading to the European Defence Community (EDC) and the European Political Community (EPC) in the early 1950s signalled that a parliamentary assembly with legislative and budgetary powers was considered to be an integral part of the institutional setting of the two ‘failed’ communities. Salience — the intended transfer of sovereignty and the perceived negative repercussions on liberal-democratic standards — triggered a ‘democratic spillover’ process: the transfer of policy competences to the European level threatened to undermine domestic parliamentary competencies and liberal-democratic standards which prompted political élites to press for compensatory measures at the supranational level, which were to be exercised by a European parliamentary assembly.

Wolfgang Wagner raises an issue which is central to the integrity of the liberal constitutional state: parliamentary and judicial control of the police force. He argues that the institution of the European Police Office (Europol) has been kept at arm’s length from parliamentary and judicial control exercised by the EP and the ECJ respectively. Wagner is able to show that while salience and coherence are necessary for constitutionalization to ensue in order to subject Europol to closer parliamentary and judicial scrutiny, it was only with the Constitutional Convention that the constitutionalization of parliamentary and judicial control of Europol was successful, although it remains difficult to determine to what extent this success can be attributed to its publicity or the predominance of parliamentarians in the convention.

The institutionalization of human rights is the central focus of the ensuing contributions to this special issue. While the Treaty of Rome did not contain human rights provisions, Frank Schimmelfennig argues that the institutionalization of human rights in the Community can be accounted for by analysing the
interaction of the ECJ and national courts which – even though they compete over jurisdictions – are part of a liberal international community environment in which human rights norms enjoy the status of highest-order constitutional norms. Schimmelfennig shows that the ECJ incorporated human rights into his case law in order to defend its claim of supremacy against defiant national courts. At the same time, it became increasingly entrapped in the Council of Europe’s human rights regime.

Referred to by many commentators as a milestone in the constitutionalization of the EU, the Charter of Fundamental Rights is at the centre of Guido Schwellnus’s contribution. Analysing proposals and the arguments made for their justification during the Charter’s Convention in the fields of minority rights, non-discrimination and the right to work, Schwellnus is interested in the success of those arguments which reflect the conditions conducive to constitutionalization. His analysis reveals that arguments with reference to internationally codified human rights standards (external coherence) play a crucial role for constitutionalization to ensue.

Sandra Lavenex takes issue with an often overlooked aspect of human rights politics in the EU asking why – in selected policy fields – individual rights of third country nationals (TCN) are gradually becoming institutionalized at the EU level. She argues that, even though preferences for restrictive policies regarding TCN dominate in many national contexts, constitutionalization has progressed because EU actors accepted the prescriptive value of Community norms (internal coherence). Interestingly, the norms that proved to be ‘successful’ – most notably mutual recognition and non-discrimination – were not framed by the proponents of constitutionalization as being constitutive of the Community ‘ethos’, but rather as central to the completion of the single market.

4. THEORETICAL IMPLICATIONS: NORMATIVE SPILLOVER

In a broader theoretical perspective, the approach presented in this introductory article underlines the relevance of two central mechanisms of ‘supranationalist’ theories of European integration: spillover processes and institutional path dependencies. Our approach suggests that functional integration triggers a normative spillover process: once integration looms, normative pressure is generated to counter the threat which community actors in the EU associate with integration, namely that further integration undermines the competencies of national parliaments and human rights provisions. In addition, supranationalist theories emphasize institutional path dependencies (see, for example, Pierson 1998; Stone Sweet and Sandholtz 1997) and argumentative self-entrapment (Schimmelfennig 2001) in the process of European integration. The relevance of coherence as a condition of constitutionalization appears to corroborate these mechanisms.

While our approach and supranationalist theories of integration are in agreement on the underlying theoretical mechanisms triggering and structuring the path of integration, namely constitutionalization, our approach diverges from supranationalist theories in the conception of the central actors: supranationalist
theories emphasize the importance of societal groups and supranational actors; our approach argues that the governments of the member states are the key actors in the process of the constitutionalization of the EU.

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**NOTES**

1 See, for example, the pioneering works by Stein (1981) and Weiler (1981).
2 The battle between intergovernmentalists (see Moravcsik 1991, 1993, 1998; Garrett 1995; Garrett et al. 1998), who argue that legal integration broadly reflects the interests of the (large) member states, and supranationalists/neofunctionalists (Burley and Martti 1993; Alter 1998; Stone Sweet 2000, 2003), who argue that legal integration has progressed ‘behind the back’ of and even against the interests of the member states, is still waging. Empirical evidence suggests, however, that the ‘winning formula’ is to be found with the supranationalists/neofunctionalists (see Stone Sweet and Brunell 1998; Stone Sweet 2000, 2003).
3 The two constitutionalization phenomena have been well described in the literature. For parliamentarization, see Corbett (1998); Maurer (2003); Westlake (1994); for the institutionalization of human rights, see Alston (1999); McCrudden (2001); Quinn (2001). Yet, as far as human rights are concerned, there is no theoretically driven literature explaining institutionalization.
4 Pollack (2003: ch. 4) refers to Joseph Jupille’s work to back up his arguments (see Jupille 2004). See also Steunenberg and Dimitrova (1999: 21). They quote Moravcsik’s (1993, 1998) argument that ‘when the consequences of institutional decisions are politically risky, calculable and concrete, national positions will be “instrumental” reflecting the expected influence of institutional reforms on the realization of substantive interests.’
5 See the concept of ‘pluralistic security community’ developed by Deutsch et al. (1957).
6 For recent studies demonstrating the weak socialization capability of the EU, see Beyers (2005); Hooghe (2005); Scully (2005).
7 On social influence, see Johnston (2001).

**REFERENCES**


