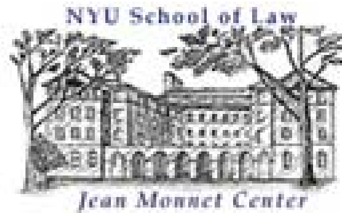

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Altneuland: The EU Constitution in a Contextual Perspective

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Antje Wiener

Evolving Norms of Constitutionalism in Europe: From 'Treaty Language' to 'Constitution'

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Evolving Norms of Constitutionalism in Europe:

From 'Treaty Language' to 'Constitution'

Antje Wiener

Paper prepared for presentation at "*Altneuland*: The Constitution of Europe in an American Perspective", a joint conference organized by the Hauser Global Law School Program, the Jean Monnet Center for International and Regional Economic Law & Justice, New York University School of Law and Woodrow Wilson School of Public and International Affairs, Princeton University April 28-30, 2004.

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> "[i]n spinning a thread we twist fibre on fibre. And the strength of the thread does not reside in the fact that some fibre runs through its whole length, but in the overlapping of many fibres."[1]

Introduction[2]

Constitutions "organize the political" within a community.[3] Four meanings of a constitution matter most, including the way in which a polity is, in fact, organized (1); the totality of fundamental legal norms of a legal order (2); the fundamental legal act that sets forth the principal legal norms (3); and the written document as outcome of deliberations (4).[4] Constitutions are functional to the political organization of a community; however, whether or not they trigger the creation of such a community based on a constitutional moment,[5] and whether or not they enhance the perception of legitimacy in differently structured systems of governance remains to be established. Since putting the European Union's own constitutional moment onto the political agenda with the post-Nice process, these questions have acquired some political urgency in Europe. Thus, especially after the Brussels Intergovernmental Conference (IGC) in June 2004, public reactions in European Union (EU) member states have varied considerably in their perception of what a European constitutional treaty might imply. As the electoral campaigns in the running-up

[1] WITTGENSTEIN, L. (1967) *Philosophical Investigations (tr. G.E.M. Anscombe)*. Oxford: Basic Blackwell at 67, cf. Tully 1995, 139.

[2] This paper has been presented at the Department of Political Science at Carleton University, Canada, 16 March 2004, and, at the workshop "Handlungsfähiger und demokratischer? Die Verfassung Europas nach der Regierungskonferenz," at the Hanse Institute for Advanced Study, Delmenhorst, Germany, 2-3 April 2004. I would like the participants for their very helpful comments. Special thanks for discussions of previous versions go to Raingard Esser, Diana Schmidt and Jose Maria de Areilza. The responsibility for this version is mine. Financial support from the Hanse Institute for Advanced Study, two British Academy Small Research Grants # SG-34628 and # SG-31867 and a Social and Legal Studies Association Small Research Grant is gratefully acknowledged.

[3] Preuss, U.K. (ed) 1994. *Zum Begriff der Verfassung. Die Ordnung des Politischen*. Frankfurt/M.: Fischer.

[4] Stone Sweet, A. (2001) Institutional Logics of Integration, in: Stone Sweet, A., Sandholtz, W. and N. Fligstein (eds.) *The Institutionalization of Europe*, at 227; Snyder, F. (2003) The Unfinished Constitution of the European Union, in: J.H.H. Weiler and M. Wind (eds) *European Constitutionalism Beyond the State*, at 56; see also Moellers, C. (2003). Begriffe der Verfassung in Europa, in Bogdandy, A. v. *Europaeisches Verfassungsrecht.* Heidelberg et al. 1-58 for further details on distinct modern constitutions.

[5] On the constitutional moment see Ackerman, B. (1991) *We the People I: Foundations*. Harvard UP, Belknap.

to the European Parliament elections demonstrate, for example, in the UK the discussion focused on whether or not to support membership in the EU. As Patricia Hewitt, the Trade and Industry Secretary noted, a no vote in the referendum "would have the effect, and would be intended to have the effect, of putting Britain on the margins, and probably on the road to withdrawal" of the EU.[6] In turn, German public discourse focuses on the question of whether or not to hold a referendum on the constitution. The reactions in both member states demonstrate a dramatic lack of public understanding of, insight into, and knowledge about the DCT's text. For political scientists, the issue is pressing, as misunderstanding triggers conflict and facilitates all sorts of manipulation. It can be safely stated that, had the IGC discussed *treaty* revisions, following the practice of all previous IGCs, no such debate would have occurred either on this or that side of the Channel. Public debate is rightly and importantly considered as the cornerstone of democratic politics – if and when it not only follows but also precedes constitution building.[7] That is, the timing and conditions of such debate are critical.

While *constitutionalisation* defined as "the process through which constitutional norms come to constitute a source of law […]; the constitutional court, through its jurisdiction over concrete review referrals and individual complaints, comes to behave as a kind of super-court of appeal for the judiciary […]; and the techniques of constitutional decision-making become an important mode of argumentation and decision-making in the ordinary courts;"[8] has been an ongoing process throughout the almost five decades of European integration, the language shift from 'treaty' towards 'constitution' has alerted the European public, activating both hopes and fears based on past experience with the concept. In the light of this dramatic shift in language – and in the absence of a clear understanding of the substance brought about by the Draft Treaty establishing a Constitution for Europe (DCT), the question of whether or not this particular constitution

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[6] See *euobserver.com*, 24.06.2004; <assessed on: 24.-6.2004>

[7] For a discussion of participatory democracy, see Pateman, C. (1970) Participation and Democratic Theory. Cambridge, New York et al.: CUP, esp. at 110; for the model of a 'living constitution', see the Canadian constitutional discourse, e.g. Cairns, A. (1989) The Living Canadian Constitution, in *Constitution, Government and Society in Canada: Selected Essays*, edited by A. Cairns, Toronto: McClelland and Stewart, at 38.

[8] STONE SWEET, A. (2002) Constitutional Courts and Parliamentary Democracy. *West European Politics* **25**:77-100, at 96.

is indeed functional to the political organisation of a consortium such as the EU [9] remains to be established. As an "academic artefact,"[10] *constitutionalism* provides the framework of reference to conduct such an assessment. It allows various perspectives on the process of constitution building, distinguishing most significantly among a meta-theoretical focus on questions such as why is a constitution legitimate; why is it authoritative and how should it be interpreted, on the one hand, and a more descriptive approach that establishes whether or not particular features of a constitution are in place or not, on the other. Generally, the assessment of constitutionalisation as the process which leads to the establishment of such specific constitutional features follows from the latter approach.[11]

This paper's emphasis is less on the normative than on the analytical descriptive dimension. The issue is not to engage with the critical justification of particular constitutional norms, rules and procedures that are to guide European governance.[12] Nonetheless, it does entail a normative dimension all the same by critically discussing different approaches to constitutionalism beyond the state and their respective capacity to accommodate diversity. In accordance with Walker's definition of constitutionalism, it engages the issue of "the normative discourse through which constitutions are justified, defended, criticised, denounced or otherwise engaged with."[13] The yardstick is the analytical framework that is able to capture constitutional norms as "evolving" rather than static institutions.[14] At issue are, then, approaches to constitutionalism and their respective awareness of diversity and commonality in the meaning of core constitutional norms. The argument is developed from a political science standpoint. It holds that focussing on the issue of diversity (and commonality) helps tackling two major political

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[9] See Schmitter, Philippe C. 2000. *How To Democratize the EU ... And Why Bother?* Rowman and Littlefield, for exploring the details of various ways of associating communities.
[10] Weiler, J. H. H. 1999. *The Constitution of Europe. 'Do the new clothes have an emperor?' and other essays on European integration*. Cambridge and New York: Cambridge University Press, p. 223.
[11] CRAIG, P. (2001) Constitutions, Constitutionalism, and the European Union. *European Law Journal* **7**:125-150, at 127.
[12] For such an enterprise see e.g. Bogdandy, A. v. (ed) (2003) *Europaeisches Verfassungsrecht. Theoretische und dogmatische Grundzuege*, Heidelberg et al.: Springer for a German perspective on European constitutional law; as well as DE BURCA, G. and J. SCOTT (2000) *Constitutional Change in the EU: From Uniformity to Flexibility?* Oxford: Hart Publ.
[13] Walker, N. (2002) The Idea of Constitutional Pluralism, *The Modern Law Review* 65, 3, 317-359 at 318.
[14] Shaw, J. and A. Wiener (2000) The Paradox of the European Polity, in M. Cowles and M. Smith (eds) *The State of the European Union 5: Risks, Reform and Revival* (Oxford: OUP); Wiener, A. and J. Shaw (eds) Evolving Norms of Constitutionalism. Special Issue, *European Law Journal* **9** (1).

problems. The first is addressed by the descriptive analytical approach of historical institutionalism. Drawing on previous experiences with supranational institution building in the European supranational context e.g. in the cases of Union citizenship and minority rights policies, unintended consequences of institution building which result in political back-lash and unintended feedback loops are predictable results of rushed constitutional closure.[15] The second problem is addressed by a normative assessment of different approaches to constitutionalism and their respective capacity to address cultural diversity in the constitution. Here, it is argued that premature constitutional closure foregoes the opportunity to build institutions that are equipped to incorporate cultural diversity. To sustain the argument, the paper is organised in three parts. First, it makes the case for constitutional pluralism in Europe as developing in a "multiverse"[16] rather than a universe (*Part I*); secondly, it discusses three social science approaches to assess the validity of the norms, rules and procedures that organise governance, focusing on Weber, Habermas and Tully (*Part II*); thirdly, it proposes ways of mapping cultural diversity as a core indicator for institutions that can accommodate and maintain constitutional multiversity. Constitutionalism in Europe is then confronted not only with the "problem of translation" of constitutional norms from statist to non-state contexts[17], in addition, it is challenged by the problem of diverse interpretation of supranational constitutional treaty norms in domestic contexts (*Part III*).

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[15]On institutional approaches to path-dependency, see in general NORTH, D. C. (1990) "The path of institutional change." In *Institutions, Institutional Change and Economic Performance*, edited by North, D. C., pp. 92-104. Cambridge: Cambridge University Press; with reference to the process of European integration, see PIERSON, P. (1996) The Path to European Integration: A Historical Institutionalist Analysis. *Comparative Political Studies* **29**:123 – 163; on unintended consequences of citizenship policy, see WIENER, A. (2001) Zur Verfassungspolitik jenseits des Staates: Die Vermittlung von Bedeutung am Beispiel der Unionsbürgerschaft. *Zeitschrift für internationale Beziehungen* **8**:73-104; on unintended consequences of minority rights policy during the most recently completed enlargement round; see WIENER, A. and G. SCHWELLNUS (2004) "Contested Norms of European Enlargement." In *Law and Governance in an Enlarged Europe*, edited by Bermann, G. and K. P. Pistor, pp. 455-488. Oxford: Hart Publishing.

[16] TULLY, J. (1995) *Strange multiplicity: constitutionalism in an age of diversity*. Cambridge, New York: Cambridge University Press, at 131.

[17] Weiler, J.H.H. note 8; Walker (2002) note 10, at 322; Shaw, J. and A. Wiener (2000) note 13.

Part 1: Making the Case for Multiversity

Like a decade earlier, when the concept of citizenship was formally included in the *acquis communautaire* in 1993,[18] the introduction of the 'constitution' to the *acquis* raises the question about the validity of such a concept in a non-state context. Both innovations reflect an interest in strengthening the EU's identity rather than, as often claimed, enhancing the legitimacy of the politics conducted in this non-state polity. Both citizenship rights and the constitution are, in the end, more of symbolic than procedural value. Nonetheless, they are not presented to the public based on this symbolic value. Instead, they are promoted as practical ('tidying up') or substantial ('more democratic' and 'legitimate') improvements. Yet, paradoxically, as this paper contends with the benefit of hindsight (e.g. on the citizenship case), symbolic politics borrowed from modern nation-state experience are likely to trigger conflict, as the experience and expectations of symbolic meaning do not converge among different communities.[19] More in detail, the paper will demonstrate that while – like citizenship – constitution building appears as a desirable policy tool towards bringing the union finally closer to its citizens, as an institution – like citizenship – it is likely to create unintended consequences. That is, based on past *experience* in modern constitutional settings such as in each of the 25 EU member states, the *expectations* towards the constitution vary. Thus, while it could be argued, that the branding of the document as either 'treaty' or 'constitution' is of relatively minor influence compared to the type of core constitutional norms in the actual text, it is held here that constitutional experience in different EU contexts creates potentially divergent expectations. These divergent expectations are prone to trigger back-lash.

The argument is based on the observation of a considerable variation when it comes to interpreting the meaning of core constitutional norms – not least, the term 'constitution'

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[18] Article 8e-f TEC (Maastricht); then Articles 17-22 TEC (Amsterdam); on the distinction between the formal and informal resources of the *acquis*, see WIENER, A. (1998) The Embedded Acquis Communautaire. Transmission Belt and Prism of New Governance. *European Law Journal* **4**:294-315.

[19] See for a comparative study: BRUBAKER, W. R. (1992) *Citizenship and Nationhood in France and Germany*. Cambridge MA: Harvard University Press; for the specific reference to European Union citizenship: Wiener 2001, note 11; WIENER, A. (2003) "Citizenship." In *European Union Politics*, edited by Cini, M., pp. 397-414. Oxford: Oxford University Press.

itself – among EU member states. The variation in the interpretation of meaning is not immediately obvious, however. Thus, it has been stated that "[M]any will see the shift from 'treaty' to 'constitution' as the will of their national representative institutions to form a *single* group among European peoples." [20] In turn, polls as well as a series of qualitative interviews conducted with elites in London, Berlin and Brussels between 2001 and 2003 suggests otherwise.[21] According to an opinion poll conducted after the failed agreement about a constitution in December 2003 in Brussels 71% of the people in the United Kingdom feel "badly informed about what an EU constitution involves" yet 51% think the constitution – designed to streamline EU decision-making and clarify who does what – is vital to the future smooth running of the enlarged Europe of 25 countries."[22] According to qualitative interviews, the majority of German and British interviewees consider the constitutional treaty as an opportunity to simplify the currently existing treaties rather than a vehicle of symbolism and community building. None of the interviewees raised the issue of creating a political community or single group.[23] Instead, the interviewees were more concerned about aspects of 'repackaging,' 'simplicity,' and 'public understanding.'[24]

> "[...] the outcome of the Convention will be a fairly nice and neat *repackaging* of what we already have, with some adjustments around the edges, but not changing the fundamental jelly, [...] a *simplification* exercise which also repackages all treaties and present them in a […] more approachable way."[25]
>
> "I think, it is first of all important, to make the entire apparatus *more understandable*. In more concrete terms this means that e.g. a clear distinction between the Council's role, *i.e.* does it act according to a legislative or an

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[20] See Bogdandy, A. v. (2004) The European Constitution and European Identity: Potentials and Dangers of the Draft Treaty Establishing a Constitution for Europe, *Altneuland*, at 9. [emphasis in text]

[21] The interviews are part of a larger research project which studies the commonality and diversity of core constitutional norms of supranational treaties and their change in relation to 'context' and 'practice'. The interviewees were selected according to their respective access to public discourse; the interviews are intended to compare German and British perceptions; they took place in London, Berlin and Brussels.

[22] By comparison, in Germany 83% of the people support a constitution. The survey was conducted between January 14 and 23 2004, it covered more than 25.000 people in 25 countries. *The Guardian*, 17 February 2004, http://politics.guardian.co.uk/print/0,3858,4860768-107988,00.html <assessed: 01/03/2004>

[23] See, however, Bogdandy's claim that "a majority of Union citizens will consider the use of the term 'constitution' as symbolic that there is a political community to which they belong." Bogdandy, note 1, ibid.

[24] All interviews are anonymous with full names and references on file with the author; they have been conducted by the author and Uwe Puetter.

[25] UK: Interview 'G' Brussels, 26 February 2002; emphasis added.

executive function? Well that, I believe, *must be made more evident to each individual*, how the balance of powers work on the European level. […] Nobody here, I would guess about 95% of the German citizens can not place the term EPP. They don't know that EPP stands for European People's Party, that this is the party in which Christian democrats are organised. That is entirely unknown here."[26]

"We need radical, far reaching reform in Brussels. […] it has failed miserably over the years *in explaining itself*. Being a sort of club, an exclusive club, institutionally aloof from the electorate, it has ever felt this need to explain itself because […] it's Byzantine, a monolith and incomprehensible to most people. […] Who needs a faraway place? It's bureaucratic, it's sort of international or supra-national, it seems to be becoming somewhere outside the international borders or whatever. But *it's an alien institution* that is not identified as British or national."[27]

"The constitutional lawyer in me or the constitutional designer favours a governance model, which would be *much simpler for the European citizens to understand*, which has stronger checks and balances incorporated within it."[28]

"I think it's good to have a constitutional document for two reasons, one is didactic *document that children can read in school and understand* for that it needs to be short; and *it needs to be clear*; and it needs to be ambitious; [….] The other reason for having a constitution is simply *to ensure people understand,* including me I'd like to understand exactly what the EU is trying to do, and I think this functional document rather than an existential document would be better."[29]

Part II: Approaches to Constitutionalism

Some hold that "[u]sually, talk about 'constitution' or 'the constitution' means the constitution of a *state* as the basic order and organization of *state*-political life."[30] This assessment of the constitutional role in political life highlights the underlying meaning

[26] D: Interview 'O' Berlin 15 October 01; emphasis added.
[27] UK: Interview 'D' London, 26 November 2002; emphasis added.
[28] UK: Interview 'H' London 9 May 2001; emphasis added.
[29] UK: Interview 'G' London 26th November 2002; emphasis added.
[30] See Boeckenfoerde, E.-W.. 1992 [2nd ed]. Geschichtliche Entwicklung und Bedeutungswandel der Verfassung. In *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht*, edited by E.-W. Boeckenfoerde. Frankfurt/Main: Suhrkamp, at 29. [German original text "[W]enn einfachhin von 'Verfassung' oder 'der Verfassung' die Rede ist, ist damit die Staatsverfassung als Grundordnung und -organisation des staatlich-politischen Lebens gemeint." [Translation from this and following German original texts by AW; emphasis added.]

associated with modern constitutionalism as opposed to e.g. ancient constitutionalism[31] which builds on the assumption of a "degree of stateness of the governmental structure."[32] Others define a constitution as "the whole system of government of a country, the collection of rules, written and unwritten, which regulate the government;"[33] thus leaving the reference to stateness to one side. The detachment from modern stateness is most clearly expressed by Tully's statement that

> "[C]onstitutions are not fixed and unchangeable agreements reached at some foundational moment, but chains of continual intercultural negotiations and agreements in accord with, and violation of the conventions of mutual recognition, continuity and consent."[34]

For a political organisation to succeed, constitutions need to be accepted and understood by those to whom its rules, norms and principles apply. That is, the core norms must be considered as valid by the designated norm followers *i.e.* the member state governments, societal groups, and the individual citizens to whom the DCT refers directly. Empirically, the degree of validity depends on basic assumptions about how to define legitimacy. To assess the validity of a constitution, it is helpful to compare three distinctive approaches from the social science literature. They include first, the Weberian concept of "domination by virtue of legality,"[35] second and in critical reference to the first, the Habermasian understanding of legitimacy as resulting from the interplay between

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[31] For the distinction between ancient and modern constitutionalism and the new concept of 'contemporary constitutionalism, see Tully, note 1, at 36.

[32] On the degree of stateness see Tilly borrowing from Nettl's work, defining it as "the degree to which the instruments of government are differentiated from other organizations, centralized, autonomous, and formally coordinated with each other." See NETTL, P. (1968) The State as a Conceptual Variable, *World Politics*, 20:559-592. This degree of stateness defines *governmental organization* next to the *population* and the *routinized relations* between the two as the three elements of state-making in Europe according to Tilly. See TILLY, C. 1975. On the History of State-Making, in Tilly, C. (ed) *The Formation of National States in Western Europe*. Princeton: Princeton UP, at 32.

[33] EVANS, M. (2001) Studying the New Constitutionalism: bringing political science back in. *British Journal of International Studies* **3**:413-426 at 422; c.f. RIDLEY, F. (1988) There is no British Constitution: A Dangerous Case of the Emperor's Clothes. *Parliamentary Affairs* **41**:340-361, at 317.

[34] TULLY note 1, at 183-4.

[35] According to Weber "there is a general obedience by 'virtue of "legality", by virtue of belief in the validity of legal statute and functional "competence" based on rationally created rules'" See WEBER, M. (1972; [1946]) Politics as a vocation, In H.H. Gerth and C.W. Mills (eds) From *Max Weber*, New York: OUP, at 79.

culturally and universally derived value perceptions,[36] and third, with critical reference to the second, James Tully's concept of cultural validity based on the institutions that facilitate ongoing dialogue. [37] The major distinction between the first two conceptions of legitimacy as opposed to the latter one lies in the appreciation of universality. Thus, different from Weber and Habermas, Tully strongly contests a universalistic approach to constitutionalism, arguing that

> "[U]niversality is a misleading representation of the aims of constitutional dialogue because, as we have repeatedly seen, the world of constitutionalism is not a universe, but a multiverse: it cannot be represented in universal principles or its citizens in universal institutions."[38]

Crucially, the shared reference frame for all three approaches is the bounded community of the modern state. They differ, substantially and profoundly, however, in the role they assign to the organisation of the state and the elements which influence the legitimacy of the rules and norms that organise governance in this conflict. While to Weber, the modern state's "*monopoly of the legitimate use of physical force* within a given territory"[39] is the centre point of legitimate governance, both Habermas and Tully bring in an interactive dimension, focusing on "communicative action" and "dialogue", respectively. While Habermas and Weber work with modern nation-states as their community of reference, Tully criticises the *modern* influence on constitutionalism and proposes to replace it with a contemporary version of constitutionalism. To this end, he activates insights from *ancient* constitutionalism to reconstruct the emergence of cultural diversity as a process of becoming. The following elaborates more in detail on Tully's approach.

Tully points out that the social dimension that expressed the 'customary' in ancient

[36] As Habermas notes "Weber hat nicht hinreichend zwischen den partikularen Wertinhalten kultureller Ueberlieferungen und jenen universellen Wertmasstaeben unterschieden, unter denen sich die kognitiven, normativen und expressiven Bestandteile der Kultur zu Wertsphaeren verselbstaendigen und eigensinnige Rationalitaetskomplexe bilden." HABERMAS, J. (1988) *Theorie des kommunikativen Handelns* (Band 1), Frankfurt/M.: Suhrkamp, at 340.
[37] Tully note 1, especially Chapter 4.
[38] Tully note 1, at 131.
[39] WEBER, note 34, at 78; emphasis in text.

constitutions has been eliminated with arguable success from modern constitutions.[40] "[T]he Greek term for constitutional law, *nomos*, means both what is agreed to by the people and what is customary." It comprises "the fundamental laws that are established or laid down by the mythical lawgiver and the fitting or appropriate arrangement in accord with the preceding customary ways of the people." [41] Constitutional law, then, entails two sets of practices. The first type of practice entails the process of reaching an agreement about the definition of the core principles, norms and procedures which guide and regulate behaviour in the public realm of a polity. The second type of practice refers to day-to-day interaction in multiple spaces of a community, or, in the absence of boundaries of that community, cultural fields. Both types of practices are interactive and by definition social, as such they are constitutive for the "fundamental laws, institutions and customs" recognized by a community.[42] While the concept of ancient constitutionalism entailed the social constitution of the *nomo*s, modern constitutionalism with its focus on the core concept of the state has increasingly detached the constitution from its socio-cultural environment. In an effort to recover the 'contemporary' dimension of constitutionalism, Tully reconstructs constitutional discourses over time. He therefore proposes to reconstruct multicultural dialogues by "looking back to an already constituted order under one aspect and looking forward to an imposed order under the other".[43] In other words, to understand diversity the customary dimension needs to be brought back in. With a view to highlighting the impact of the societal underpinning of evolving constitutional law beyond the state, the paper builds Tully's insights and, indeed, shares the now increasingly familiar view that "the problems of the European Constitution are simply reflections of the limits of national constitutionalism."[44] It differs, however, from Tully's focus on accommodating cultural diversity within the constitutional framework of *one state* (Canada), by addressing recognition in a constitutional framework *beyond the state* (European Union). While Tully employed a *retrospective* method of analysis beginning with some particular historical condition (inequality before the constitution according to cultural identity) and searching

[40] See C.H. McIlwain, *Constitutionalism: ancient and modern*, 1947, 3 c.f. Tully note 1, at 59.
[41] Tully, note 1, at 60.
[42] Tully, note 1, ibid.
[43] Tully note 1, 60-61.
[44] POIARES MADURO, M. (2003) Europe and the constitution: what if this is as good as it gets? in: Weiler, J.H.H. and Wind, M (eds) European Constitutionalism Beyond the State, Cambridge: CUP, at 75.

back for its causes; I propose to work with *prospective* analysis beginning with a particular historical condition (conflictive interpretations of constitutional meanings) and searching forward to the alternative outcomes of that condition with a specification of the paths leading to each of the outcomes.[45] That is, in addition to Tully's reconstruction of constitutional dialogues working with the perception of two sets of practices that contributed to construct the meaning of constitutional norms over time (ancient type of constitution), a dimension of comparing various arenas is required to take account of diversity among communities (see **Table 1**).

Table 1: Diversity and Communit/ies

Constitutionalism: Diversity and Community/ies

International One civilized community	**Beyond-the-State** Diversity among communities
Domestic One homogenous state community	**Contemporary** Diversity within one state

Once constitutional norms are dealt with outside their sociocultural context of origin, a potentially conflictive situation emerges. The conflict is based on de-linking the two sets of social practices that form the agreed political and the evolving customary aspect of a constitution. The potential for conflict caused by moving constitutional norms *outside the bounded territory of states* (*i.e.* outside the domestic polity and away from the inevitable

[45] For the distinction between retrospective and prospective methods of analysis see Tilly, Ch. 1975. On the History of European State-Making, in: Tilly, Ch. (ed) 1975. *The Formation of National States in Western Europe*, Princeton N.J.: Princeton UP, at 14.

link with methodological nationalism) lies in the decoupling of the customary from the organizational. It is through this transfer between contexts, that the meaning of norms becomes contested as differently socialized actors e.g. politicians, civil servants, parliamentarians or lawyers trained in different legal traditions seek to interpret them. In other words, while in supranational contexts actors might well agree on the importance of a particular norm, say e.g. human rights matter, the agreement about a type of norm (facticity) does not allow for conclusions about the meaning of norms. As in different domestic contexts that meaning is likely to differ according to experience with "norm-use," it is important to recover the crucial interrelation between the social practices that generate meaning, on the one hand, and public performance that interprets the norm for political and legal use, on the other.[46] Both aspects of norms – organizational and customary – contribute to the interpretation of meanings that are entailed in constitutional norms.

The main analytical challenge for constitutionalism beyond the state lies in both theorizing the contested meanings of constitutional norms, on the one hand, and offering methodological tools to assess their potentially conflictive interpretations in different domestic arenas, and their often overlooked influence on political negotiations among actors who come from different socio-cultural backgrounds, on the other. To scrutinize the assumption that the mere fact of signing up to common constitutional principles (language) on a supranational level causes common constitutional practices (discourse) within the domestic national context, case studies would need to verify the diversity and commonality of meaning of core constitutional norms both horizontally e.g. comparing member states and vertically e.g. comparing domestic and supranational arenas. Such a comparative perspective develops from a reflexive approach to constitutionalism that cautions against assuming a causal relation between norms and state behaviour. It suggests, instead, that the interpretation of a norm's meaning depends not only on social facticity (agreed reference to one particular norm) and legal validity (implementation of that norm in domestic legal systems) but also on cultural validity (associative connotations with a norm).

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[46] KRATOCHWIL, F. (1989) *Rules, Norms, and Decisions. On the conditions of practical and legal reasoning in international relations and domestic affairs*, 18; see also DWORKIN, R (2002 [1977]) *Taking Rights Seriously*, London: Duckworth.

The central argument advanced by the reflexive approach to constitutionalism expects that in the absence of a constitutional compromise on the supranational level which can build on and mobilize 'thick' constitutional norms, shared norm validation and shared norm meanings, the projective force of norms undermines the degree of acceptance and political success of the constitutional process in the EU. In a nutshell, cultural experience and expectation will contribute to diversify the interpretation of types of norms. In other words, cultural diversity matters.

Research Propositions

While being aware of differences in tradition, culture and type of constitutional practice across domestic contexts, students of constitutionalism have, so far, been less concerned with exploring varying interpretations of the meaning of constitutional norms in the transnational realm. Yet, detailed supranational agreements on common constitutional principles shed light on the puzzle of varying interpretations of the meaning of these principles back in the domestic contexts of norm implementation. The core question which stands to be addressed by scholarly work both in legal studies and political science is whether and if so how the *language* of constitutional norms and common principles, on the one hand, and the *discourse* about them, on the other, overlap.[47] The overlap is an indicator of shared interpretations of meanings which are a crucial factor in the proceedings of transnational politics. The expectation of overlap between language and discourse is misleading since it overlooks the potential political consequences of conflicting interpretations of meanings. As long as these remain unidentified, the risk that invisible yet in principle conflictive meanings may work as potential 'spanner-in-the-works' in politics prevails. So far, the strict conceptual distinction between constitutional law and its exclusive reference to nationally bounded polities, on the one hand, and international law with its reference to interactions among sovereign states in the supranational realm, on the other, endorsed dealing with constitutional norms in exclusively domestic contexts.

[47] This methodological comparison of language and discourse follows my earlier work that confronted "the *language* of citizenship (as in theory) with the new developing *discourse* on citizenship (as in practice) in the EC/EU." WIENER, A. (1997) Making Sense of the New Geography of Citizenship - Fragmented Citizenship in the European Union. *Theory and Society* **26**:529-560, at 533.

In an attempt to blur the analytical boundaries between domestic and international communities the proposed reflexive approach to constitutionalism turns to historical semantics and sociological approaches to norms. A focus on the categories of 'experience' and 'expectations' as historically contingent cultural practices allows to account for Tully's customary dimension of the nomos and hence to establish a link between constitutional rules, norms and principles on the one hand, and day-to-day cultural practices on the other. The link between both, I argue, bears crucial information for analysing conflictive interpretations of the meaning of constitutional norms.

While constitutional tradition or type may be shared among states, both do not offer sufficient information to explain the likelihood of norm resonance in different contexts. For example, the shared respect for human rights as a supranational[48] as well as a core constitutional norm in all liberal democracies does not allow for generalizations regarding the interpretation of this norm in particular societal contexts. While human rights studies have identified the power of human rights within the international society of 'civilized' states by way of pressuring outsiders that aspire to belong to that society into implementing human rights norms in their respective domestic legal systems, this norm following behaviour does not necessarily sustain the assumption that domestically developed strategies to implement the norm would generate the same practices in all members of the community of civilized states. In addition, even long-standing members of the society of civilized states which is considered as a particular type of social system according to the liberal community hypothesis[49] differ over practices despite common principles. The key reference categories identified by constitutionalist approaches, e.g. constitutional tradition, culture or type, thus do not entail sufficiently specific information to allow for deductive conclusions about how to interpret the *meaning* of constitutional norms. Yet, the increasing importance of political negotiations beyond and across state boundaries requires a clear understanding of precisely that meaning for two reasons.

[48] See the *Universal Declaration of Human Rights* adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, details at: http://www.un.org/Overview/rights.html .

[49] For the liberal community hypothesis see e.g. SCHIMMELFENNIG, F. (2001) The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union. *International Organization* **55**:47-80.

First, core constitutional norms such as e.g. human rights and citizenship are increasingly transferred into the supranational realm. They are thus subject to validation among international negotiating parties and, in addition, between different contexts including the supranational context often provided by an international organization or a regime, on the one hand, and the domestic or local context of norm implementation, on the other. According to the compliance literature, the question of whether or not the legal validity is shared depends on the "internalization" of these norms into "domestic legal systems."[50] Secondly, the meaning of constitutional norms plays a role in international negotiations, e.g. in situations where norms are not directly negotiated but work as a reference frame for legal, political or policy decisions. Norms influence negotiators' ethical, normative and/or moral disposition in international negotiations e.g. influencing political interest, policy choice or legal reasoning. To bring this latter intangible role of norms to the fore, inductive empirical work is required.

The reflexive approach matters in two ways for the analysis of the political impact of constitutional norms. First, the cultural validity of norms depends on their context of emergence and implementation. Second, in order to include the notion of social construction and the contingency of cultural change, constitutions need to provide a mechanism to safeguard the principle of contestedness so that equal access to participation in norm contestation and adaptation – and hence their construction - can be facilitated and regulated. A reflexive approach presupposes that meanings – while stable over long periods of time and within particular contexts – are always in principle contested.[51] The analytical assessment of conflictive potential leads beyond a mere assessment of procedures and norms as causes for behaviour that tends to leave actors the role of 'cultural dupes' with little impact on social change.[52] Social practices in context are therefore conceptualized as key

[50] See KOH, H. H. (1997) Why do Nations Obey International Law? Review Essay. *The Yale Law Journals* 106:2599-2659, at 2645.

[51] A turn towards reflexive sociology has, for example, been suggested by studies of "law in context," e.g. SNYDER, F. (1990) *New Directions in European Community Law*. 1990; and constructivist approaches to international relations to assess how "cultural context shapes strategic actions" and is shaped by them, BARNETT, M. (1999) Culture, Strategy and Foreign Policy Change: Israel's Road to Oslo', *European Journal of International Relations* 5 (1): 8; GUZZINI, S. (2000) A Reconstruction of Constructivism in International Relations. *European Journal of International Relations* **6**:147-182; PAYNE, R. A. (2001) Persuasion, Frames and Norm Construction. *European Journal of International Relations* 7 (1):37-61.

[52] Barnett, see note 50, at 7.

factors for the assessment of social change. Cultural contexts are expected to produce shared interpretations of meaning and, therefore, high social legitimacy of rules. The analytical focus on social practices draws on critical observations about the structural inflexibility of the logic of arguing which, it is held, facilitates more information about the role of different types of norms than about the impact of variation in the meaning of one single type of norm. Most importantly for that enterprise is an understanding of the role of '*social context* within which identities and interests of both actor and acting observer are formed'[53] in sum, the argument borrows from reflexive sociology.[54] The reflexive approach builds on the central assumption about the dual quality of structures as constituted by and changed through social practices, which has been developed by Anthony Giddens, Pierre Bourdieu and Charles Taylor. Two research propositions follow from the link between the oughtness of legal texts and societal conditions that facilitate understanding and realization of constitutional rules and norms.

Proposition #1:

The likelihood of converging interpretations of the meaning of constitutional norms increases with the degree of interrelation between core constitutional norms and the cultural dimension within a particular social arena.

Proposition #2:

The likelihood of converging interpretations of the meaning of constitutional norms across different social arenas increases with the interaction among these communities.

If the EU constitution is to accommodate diversity, two options are available according to the literature. The first option involves a Habermasian approach to deliberation based on agreement according to ultimately universal values. The policy relevant action is to warrant access to participation in contestation of the norms and procedures which govern politics, *i.e.* the core constitutional norms. The second option focuses on establishing an agreement about institutions which allow a peaceful coexistence according to the three conventions of mutual recognition, continuity and consent as promoted by Tully. While

[53] Guzzini, see note 50, 149.

[54] As Guzzini observes correctly, "[R]eflexivity is then perhaps the central component of constructivism, a component too often overlooked." See note 50, 150.

both approaches stress interaction as a core element of legitimate constitutional rule, they differ significantly in their universal vs. particularistic approach to philosophy. Both address the validity of constitutional norms and values in different ways. The universal approach works with the assumption of general values which are to be identified through communicative interaction (Habermas 1981). Appropriate institutions towards this end are procedures which facilitate space for deliberation, and – access to participation to this process. In turn, the particularistic approach seeks to accommodate institutions which allow for dialogical establishment of mutual recognition. While the first approach works with the principal assumption of establishing one rationally agreed 'best' constitutional setting with validity for all signatories of the constitutional text, the second approach works with the principal assumption that there is always a diversity of preferred constitutional settings to be considered. The goal of the latter approach is therefore the accommodation of diversity; in turn, the goal of the former is to overcome it.

Part III: Mapping Cultural Diversity

According to the constitutional literature, it is familiar to distinguish among three dimensions of constitutionalist analysis. They involve first constitutional *traditions* such as power-creating or judicialising existing constitutional powers, second, constitutional *culture* such as republican or liberal cultures and third, different *types* of constitutionalism such as ancient, modern and contemporary constitutionalism.[55] Each dimension is distinguished according to a particular style of constitutional architecture, specific constitutional principles, or, normative concepts such as for example the 'equality of persons,' 'the rule of law,' 'respect for human rights and fundamental freedoms,' 'mutual recognition' and so forth that are inferred from one particular domestic politico-legal environment (*i.e.* constitutional tradition, or, type). As processes of constitutionalisation in supranational arenas demonstrate, however, some of these constitutional norms have been transposed into

[55] See the summary of these approaches in Tully note 1, at 36; see, however, different interpretations on the definition of constitutional 'tradition' in the literature. Thus, Richard Bellamy defines constitutional tradition according to nationally derived 'models' to which constitutional practices adhere. Subsequently Bellamy suggests the distinction between the republican tradition in France, the Kelsenian tradition to Germany and the 'common-law' tradition in the United Kingdom. See Bellamy, Richard, 2003, Jurist Series 'Thinking outside the box, Paper 4/2003, 1-2/5, www.fd.unl.pt/je/edit_pap2003-04.htm

transnational contexts by way of supranational treaties. For example, the Treaty of European Union (TEU) states in Article 6 that "[T]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states." These principles are common, insofar as they are all recognised within the respective domestic constitutional realm of each signing member state of the EU. Yet, can we therefore conclude that all member states share a common interpretation of meaning beyond the domestic politico-legal contexts in which they are applied on a day-to-day basis? Does the cultural validity of norms, in addition to the shared legal validity and the social facticity, facilitate a sufficiently common interpretation of meaning so as to prevent conflict? On what grounds then, can we assume that the language of these common principles (theory) generates common practice (discourse) as well?

While distinctions according to tradition, culture and type of constitutionalism are helpful for legal frameworks of constitutionalism, they are less helpful in assessing the diversity and commonality of the meaning of core constitutional norms in different arenas. To explain the conflictive interpretations of constitutional norms in the EU, it is therefore necessary to elaborate a more specific analytical framework that allows a methodological assessment of 'meaning'. For that, I draw on reflexive sociology and historical semantics which stress the categories of 'meaning' and 'experience.'[56]Such an approach distinguishes between experiences and expectations as interventions on the normative structure of meaning-in-use that develop *in relation with* core constitutional norms, rather than deriving behaviour *from* these types of norms. It is argued that, once understood as part of an unfolding process of European integration, the contested nature of the constitutional text comes as no surprise. On the contrary, it is expected because constitutional experiences and expectations differ significantly among all participating European states including both member states and candidate countries. Following the concern about how to 'blur' boundaries between international and domestic arenas of constitutional politics, the paper is less interested in debating normative questions and constitutional values, or, in improving constitutional

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[56] See ESSER, R. (2000) "Historische Semantik." In *Kompaß der Geschichtswissenschaft*, edited by Lottes, G. and J. Eibach, pp. 281-292, Göttingen: Vandenhook & Ruprecht, at 283.

styles and principles. Instead, it asks *how constitutional principles and norms work once transposed from domestic into transnational contexts*. I assume that the cultural validity of norms works as a key variable for this assessment. The following elaborates on the methodological consequences drawn from this insight.

While political and legal approaches to constitutionalism in their majority stress the role of formal institutions of government and the principles, norms, and procedures that are stipulated within the constitutional framework, this reflexive approach begins from the assumption that the resonance of legal institutions depends on the quality of social institutions that facilitate the interpretation of meaning.[57] International relations theory has produced a considerable body of literature that deals with precisely the 'cultural' impact on norm resonance based on the analytical category of 'cultural match.'[58] This reference to culture conceives of the category of 'cultural match' as a social fact which informs behaviour. Accordingly, the compliance literature in international relations theory and international law works with neo-Durkheimian notions of "social facts" and "meaning" as well as with the legal validity measured according to the "compliance pull" of supranational norms.[59] I propose to add the dimension of cultural validity and unpack the category of culture. To that end, following Giddens, I apply a reflexive rather than a structural functionalist sociological perspective on politics, arguing that cultural validity is sustained by the meaning ascribed to norms through *social practices*.

In world politics different normative structures interrelate, stemming from the social practices in different political arenas and across the boundaries of these arenas. By shifting the focus from the role and function of norms, *i.e.* as causal for state behaviour, towards the emergence and meaning of norms as constructive for the normative structure of politics, the paper works with a neo-Giddensian understanding of a dual quality of norms as

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[57] CURTIN, D. and I. DEKKER (1999) The EU as a 'Layered' International Organization: Institutional Unity in Disguise. In *The Evolution of EU Law*, ed. P. Craig and G. d. Burca. Oxford: Oxford University Press; Kratochwil 1989 note 45; Snyder 1990, see note 50.

[58] See e.g. CHECKEL, J. T. (2001) International Institutions and Socialization in the New Europe. *ARENA Working Papers WP 01/11* with reference to others.

[59] See RUGGIE, J. G. (1998) What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge. *International Organization* 52 (4):855-885 for the former; and FRANCK, T. (1990) *The Power of Legitimacy*. Oxford: OUP for the latter.

structuring and constructed which argues that the "[t]he structural properties of social systems are both the medium and the outcome of the practices that constitute those systems."[60] Norms have a constructed quality and are hence subject to change despite potentially extended periods of stability, as well as a structuring quality. The additional focus on the constructed quality of norms brings two aspects to the fore. First, the contested meaning of norms suggests that they cannot be assumed as analytically stable or ontologically primitive units but must be conceptualized as flexible factors which change in relation to context and social practices. Empirically, this aspect allows for the assessment of potential political backlash after norm-implementation. Second, as flexible analytical units, norms are re/produced through social practices, that is, their constitutive quality changes in relation to context and action. Empirically, this aspect stresses the institution-building perspective. Both aspects represent insights into the procedure and quality of governance in proto-constitutional settings. The research proposition following from this approach reads as follows. The more overlap between the respective structures of meaning-in-use in different contexts, the more likely is the potential of norm resonance among the negotiating parties with roots in each context.

Reflexive approaches stress the dual – constructive and structuring – quality of rules. Drawing on Bourdieu's concept of 'habitus' as well as on Wittgenstein's philosophical discussion of rule-following Taylor notes that "the practice not only fulfils the rule, but also gives it concrete shape in particular situations. Practice is [...] a continual 'interpretation' and reinterpretation of what the rule really means."[61] According to this understanding of social reality and meaning, "the 'rule' lies essentially *in* the practice."[62] To assess the meaning of a rule therefore implies going back to the practices that contributed to its creation. Empirical research helpfully focuses on discursive interventions, e.g. in official documents, policy documents, political debates, and media contributions, that contribute to establish a

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[60] See GIDDENS, A. (1979) *Central Problems in Social Theory*. Berkeley and Los Angeles: University of California Press, at 69; see also BOURDIEU, P. (1982 [1977]) *Outline of a Theory of Practice*. Cambridge: CUP; BOURDIEU, P. (1993) *The Field of Cultural Production. Essays on Art and Literature*. Edited by R. Johnson. New York: Columbia University Press. Tully, 1995 note 1.

[61] TAYLOR, C. (1993) "To Follow a Rule ..." In *Bourdieu: Critical Perspectives*, edited by Calhoun, C., E. LiPuma and M. Postone, pp. 45-60. Cambridge: Polity Press, at 57; citing Bourdieu 1977, 1990; Wittgenstein 1973.

[62] Taylor, note 60, at 58; emphasis in text.

particular structure of meaning-in-use which works as a cognitive map that facilitates the interpretation of constitutional norms according to specific experiences in relation to context and time. Norms are then not defined as mere social facts that exert structural impact on behaviour.[63] Instead they are understood as embedded in a socio-cultural context that entails information about putting the norm to "work",[64] *i.e.* how to interpret a norm's meaning in context. In order to 'get at' that meaning we need to turn to approaches generated outside the disciplinary boundaries of political science and law. Historical semantics and relational sociology offer crucial insights for tackling the flexible embeddedness of norms. Given that governance processes beyond the state have led to constitutionalisation of supranational arenas, that meaning and its underestimated potential for conflict in international politics require further elaboration. One missing dimension of constitutionalism, I contend, is the contingent impact of 'culture' within a comparative perspective. Thus, thinking about the 'constitution' inspires different associative connotations which are informed by culture. That is, these connotations are based on the socially transmitted knowledge and behaviour shared by a particular group of people over time.

The interesting aspect for students of constitutionalism beyond the state lies in the discrepancy between a commonly shared interest in the general concept of a constitution which entails the interpretation of core constitutional norms within a community of liberal states, *i.e.* 25 EU member state representatives, on the one hand; and the diversity of individually experienced interpretations of the meaning of these norms carried by these representatives, on the other. Given the nature of consecutive supranational bargaining based on intergovernmental conferences (IGCs),[65] it could be argued that *type of norm* trumps over the *meaning* that is attached to norms. That is, once agreement over the type

[63] See critically KRATOCHWIL, F. (1984) The force of prescription. *International Organization* 38 (4):685-708; KRATOCHWIL, F. and J. G. RUGGIE (1986) International Organization: A State of the Art on an Art of the State. *International Organization* 40 (4):753-775; RATNER, S.R. 2000. Does International Law Matter in Preventing Ethnic Conflict? *International Law and Politics* 32 (59):591-698, at 651 ff.
[64] See Kratochwil, note 45.
[65] See for intergovernmental bargaining and preference formation in particular the liberal intergovernmentalist approach in European integration studies, e.g. MORAVCSIK, A. (1993) Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach. *Journal of Common Market Studies* **31**:473-524; MORAVCSIK, A. (1998) *The Choice for Europe.* Ithaca: Cornell University Press; reviews by SCHIMMELFENNIG, F. (2003) Liberal Intergovernmentalism In *European Integration Theory*, edited by Wiener, A. and T. Diez, Oxford: Oxford University Press; CINI, M. (2003) "Intergovernmentalism" In *European Union Politics*, edited by Cini, M., pp. 93-108. Oxford: OUP.

of norm, say in the field of core constitutional norms democracy, human rights, citizenship, and the rule of law is achieved in transnational negotiations, the contestation of a norm's *meaning*, say between norm setter and norm follower, between different groups of norm followers, or over time, is not expected. In the EU context, negotiations over norm types are carried out among policy makers in various supranational settings. As a result core constitutional norms are stipulated and identified in the Treaties. For example, the Treaty of European Union (TEU) states in Article 6 that "[T]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, *principles which are common to the member states*." [emphasis added, AW][66] Furthermore, the Treaty establishing the European Community (TEC) stipulates Union citizenship in Articles 17-22.[67] Both treaties have been signed by the EU member states' government representatives. However, despite the common language that stipulates types of norms in the Treaties, e.g. in the *citizenship* legislation, or, indeed the dramatically diverging practical conclusions drawn from the principle of the *rule of law*,[68] the meaning which is attached to these constitutional norms is derived from experiences in the domestic contexts of the member states. For example, asked about what they thought of the Schengen Agreement to abolish internal borders in the EU, British interviewees replied with reference to civil rights issues (e.g. the treatment of refugees; the practice of spot checks; the use of identity cards) and fundamental freedoms (movement); whereas German interviewees' first associative connotations focused on security issues (e.g. policing; border controls; cross-border cooperation) and fundamental rights (e.g. data protection) as well as the larger project of European integration (considered as a 'good thing').[69] The diversity in associative connotations regarding core constitutional norms (i.e. mobilizing different norms)

[66] [Article I-2 DCT]
[67] [Article I-8 (1-3) DCT]
[68] MAYER, F. C. (2003) Angriffskrieg und Europaeisches Verfassungsrecht. Zu den rechtlichen Bindungen von Aussenpolitik in Europa. AVR (Archiv des Voelkerrechts) **41**(3): 394-418. On different interpretations on the rule of law, based on the practice of the law, see for example Preuss who defines the principle of rule of law thus "es bedeutet nicht rechtliche Bindung des Souveraens, d.h. Herrschaft abstrakter Rechtsprinzipien ueber den Souveraen, sondern Ausuebung der Souveraenitaet in der Form des Rechts. Souveraenitaet des Parlaments und 'rule of law' sind nicht Gegensaetze, sondern ergaenzen einander. Das Parlament kann nur durch das Gesetz herrschen." See PREUSS, U.K. (1994) Der Begriff der Verfassung, in Preuss, U.K. (ed) *Zum Begriff der Verfassung. Die Ordnung des Politischen*, at 14 stresses, in particular, the British experience.
[69] See WIENER, A. The Invisible Constitution. Ch. 7, Manuscript, Belfast, in preparation.

demonstrates a lack of convergence in interpreting the meaning of core constitutional norms. While "treaty language" [70] is central to international law by providing a flexible margin to establish the specific meaning of a norm type in negotiations, it is much less useful for application in the EU context. The paper discusses an analytical framework that seeks to flesh out some venues towards the assessment of multiple cultural trajectories. Such a framework should be able to identify and explain the role of culture in shaping expectations about constitutional norms.[71] In addition it is expected to improve our understanding of the construction of meaning based on contingent practices.

One way of exploring both research propositions is by focusing on case studies which involve the construction of meanings within particular "cultural fields." [72] Cultural fields are defined as composite policy areas which have evolved through policy making over prolonged periods of time and which have interlocked various traditional policy sectors. The evolving policy fields are constructed through transnational and/or international processes. Expressed more generally, cross-cutting policy processes involving more than one traditional policy field, and more than one political arena have led to cultural fields of policy making which stretch beyond the state. Traditional policy dimensions of national states would involve welfare policy, foreign and defence policy, justice and home affairs, tax policy, environmental policy, agricultural policy, judicial policy. Typically, political arenas in world politics are defined as domestic political arenas (usually defined in terms of nation-state communities) and supranational political arenas (such as international organizations; or, international communities).

Case studies that apply this framework would involve a selection of *constitutional principles* (e.g. citizenship, human and fundamental rights, democracy/rule of law) and different *cultural fields* (e.g. Schengen, Enlargement, Constitution). Empirical work will seek to identify the *associative connotations* as elements of the discourse which emerges

[70] On the crucial role of relatively broadly applied 'treaty language' so as to make agreement amongst a diverse group of signatories more likely, see e.g. CHAYES, A. and A. HANDLER CHAYES (1993) On Compliance. *International Organization* 47 (2):175-205.
[71] For a critical assessment of lacking institutional convergence in the European polity despite European integration, see OLSEN, J. P. (2002) The Many Faces of Europeanization, ARENA Working Papers WP 01/2.
[72] Bourdieu, note 59.

through social practices that interact with the *structure of meaning-in-use*. The empirical analysis traces the evolving meaning of these selected constitutional norms during the process in which social practices such as discourse, debate, public discussion, contribute to their definition as constitutional norms in different socio-cultural contexts. Following the dual *quality* of norms assumption, case studies need to demonstrate the impact of the flexible quality of norms, *i.e.* the potential contestedness of norm validity, empirically. It is argued that despite norm validation in the supranational Brussels arena, *i.e.* agreement on a type and style, even contents of a document with a certain degree of constitutional quality, the cultural validity of the norm is likely to be contested in the domestic arenas of the EU member states (and candidate countries). According to the flexibility assumption, not only norms are contested (which norm is valid?) but also their meanings (which meaning of a norm is valid?). Solving norm contestation by way of agreeing on shared constitutional principles does not offer a sound indication about which meaning of the norm is shared. Furthermore, *norm validation* does not exclusively take place in supra- or transnational *contexts*, but in domestic contexts as well. It follows that the transfer of norm validation between political arenas poses an additional challenge to norm resonance which is not addressed by the compliance literature. Finally, norms entail varying *degrees of prescriptive force*. While 'thick' norms entail, albeit contestable, yet clearly defined prescriptive normative force, 'thin' norms lack such force and hence do not attain the power of standardized rules. They remain open towards various meanings, as undefined signifiers they entail meanings that are open to projection. Supranationally constructed thin norms hence raise the yardstick of norm resonance in domestic contexts considerably. They cause political reaction with the degree of reaction and resonance depending on the particular socio-cultural trajectories that contribute to the projective potential in a particular context. It is expected that in the absence of a constitutional compromise on the supranational level that is able to draw on and mobilize 'thick' constitutional norms according to the precision condition identified by Abbott et al.,[73] or alternatively, identifiable shared interpretations of meanings, the projective force of norms undermines the degree of acceptance and political success of the constitutional

[73] As Abbott et al. note "*[P]recision* means that rules unambiguously define the conduct they require, authorize, or proscribe. ABBOTT, K.W., R.O. Keohane, Andrew Moravcsik, A.-M. Slaughter and D. Snidal. (2000) The Concept of Legalization. *International Organization* 54 (3):401-419, at 401.

process in the EU. To be able to understand and calculate the projective potential of norms, the case studies therefore elaborate on the respective trajectories of the common principles that lie at the core of a constitutionally defined polity as well as, now, the transnational Europolity.

The cultural validity of norms adds an intangible and hence 'invisible' dimension to constitutionalism. While Searle points out that "[O]ne reason we can bear the burden [of the day-to-day metaphysics which govern human activities, AW] is that the complex structure of social reality is, so to speak, weightless and invisible"[74]; the point I am trying to make here, is the opposite. The absence of knowledge about the 'invisible constitution' of politics is much less blissful than Searle would lead us to believe. On the contrary, I argue, that while remaining hidden and unregulated, it can spark conflictive discussion at best and major political conflict at worst. The better we get at identifying conflictive interpretations, the more likely we are to design a pattern for conflict resolution. The core normative argument following this line would elaborate on the necessity for ongoing conflictive discussion as an institutional means to regulate and fruitfully exploit conflictive interpretations for policy decisions.[75] To demonstrate the impact of the 'invisible constitution' on the organisation of politics, case studies would seek to identify these associative connotations, and reconstruct the emergence of structures of meaning-in-use in different contexts. Once constitutional norms are used as reference frames in transnational negotiations, not only the agreed but also the customary dimension of the *nomos* plays a significant role. This customary dimension establishes the cultural validity of constitutional norms.

It could be argued from the constitutional lawyer's perspective, that constitutional norms will take precedence over the procedures and rules that are applied to control and regulate

[74] SEARLE, J. (1995) *The Construction of Social Reality*. New York: Free Press, at 4.

[75] Elaborating on this issue would lead beyond this paper. See, however, TULLY, J. (2002) The Unfreedom of the Moderns in Comparison to their Ideals of Constitutionalism and Democracy. *Modern Law Review* 65 (2):204-228 for a discussion of 'mutual recognition'; MAIR, P. (2004) Popular Democracy and the Construction of the European Union Political System. Paper read at ECPR Joint Sessions, at Uppsala, April 2004 for a discussion of legitimacy in the absence of a demos, among others; as well as SHAW, J. (2003) Process, Responsibility and Inclusion in EU Constitutionalism. *European Law Journal* 9 (3):45-68 for a normative discussion of the principle of responsibility.

politics. As long as the core role of a constitution is respected then, it could be argued that, the meaning is always subordinate to the type of a constitutional norm. From political scientists' work on the impact of rules and norms in world politics, we know that there is a strong social dimension to rule following. Socialization into a community, it has been argued, enhances the diffusion of norms, values and rules of that community towards all members.[76] However, as Tully has pointed out, "[*A*] *constitution* can seek to impose one cultural practice, one way of rule following, or it can recognise a diversity of cultural ways of being a citizen, but *it cannot eliminate, overcome or transcend this cultural dimension of politics*."[77] Culture is hence a dimension in constitutional politics that does have an impact on constitutional politics in one way or another. The challenge lies in the question of how to bring culture into constitutionalism; where to locate the cultural dimension analytically and how to study it empirically. It is crucial for constitutional analysis to identify indicators for diversity and commonality of meaning of constitutional norms at a level of desegregation that allows for the empirical assessment of meaning. Approaches which focus on *types* of norms rather than on their respective *meanings*, cannot account for information regarding potential conflict and its resolution, nor can this offer an assessment of changes in the normative structure which guides politics at all times, be it within or beyond state boundaries. Jim Tully's work looks at precisely this issue regarding cultural diversity within the one state community (Canada). I argue that his argument comes closest to offering an access point for developing an approach to constitutionalism beyond the state as well. Empirically, this approach advances a methodological focus on the *relation* between the 'customary' *i.e.* socio-cultural contexts and the 'agreed' aspect of the *nomos, i.e.* constitutional norms. Accordingly, resonance of constitutional norms is not exclusively assessed with reference to the substantial core of norms, but also with reference to the meaning of norms in context.

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[76] See SCHIMMELFENNIG, F. (2000) International Socialization in the New Europe: Rational Action in an Institutional Environment. European Journal of International Relations **6**(1): 109-139, at p.

[77] Tully note 1, at 6; emphasis added.

Conclusion

The EU presents a case that most clearly demonstrates the impact of factors that remain less visible within the familiar context of stateness, namely, the central role of process, practices and becoming in constitutional politics. Provided the EU's case of constitutionalism beyond the state is not considered as *sui generis*,[78] analysing constitutional politics requires an analytical link between different constitutional *arenas*. A theory of constitutionalism would need to draw on both international law/international relations theory on the one hand, and constitutional law/comparative government theory, on the other. The yardstick for such an approach would be its capacity to overcome the academic practice of dichotomising the domestic/constitutional, on the one hand, and the international, on the other, and seek to achieve the "blurring" of the respective analytical boundaries instead.[79] If the interpretation of constitutional norms is at stake, a revision of analytical focus and ontological preferences is required, debating the relation between the system level (e.g. community, polity, demos, ethnos) and the parts of the system (e.g. practices, norms, rules, beliefs, procedures). With this perspective in mind, this paper argues that a major analytical challenge for students of constitutionalism beyond the state lies in assessing the potential for converging interpretation of the meaning of norms in transnational contexts. It is here, where a lack of commonality in the interpretation of core constitutional norms is likely to lead to misunderstandings with potentially wide ranging political consequences, especially in the areas of foreign and defence policy and justice and home affairs policy. While Tully examines speech acts as the text material produced by dialogue in constitutional negotiations; this paper focused on ways of mapping cultural differences in the particular case of the EU to demonstrate the need for such dialogical approaches to constitutionalism. By mapping cultural differences, the paper made the case for constitutional dialogue in order to avoid political conflict triggered by unintended consequences of institution building. I argued that as long as

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[78] Work on emerging processes of constitutionalisation beyond the state regarding major international institutions such as, e.g. the International Criminal Court, the United Nations, the North American Free Trade Agreement, the World Trade Organization, and even Mercosur would sustain this observation.

[79] As Weiler and Haltern argue for example, "the blurring of this dichotomy is precisely one of the special features of the Community legal order and other transnational regimes." See WEILER, J.H.H. and U.R. HALTERN (1996) 'The Autonomy of the Community Legal Order – Through the Looking Glass' Harvard Jean Monnet Working Paper 96/10, at 1.

cultural differences remain invisible to the analytical eye of the academic community, cultural differences will function as a spanner in the works thus causing conflict. To address cultural differences as a source of conflict and, subsequently, allow for an assessment of potential solutions to such conflicts, future research will need to identify and compare associative connotations with reference to core constitutional norms in all EU member states, and, as it were, in Brussels itself.