Conflictive Meanings: Constitutional Norms in Three Political Arenas

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Introduction

By organizing the political, constitutions have a central role for communities. Any additional specification, say, defining the constitution as neutral, rule generating or community creating remains contested since the role of a constitution is “historically and culturally contingent.” It follows that across the boundaries of political arenas of deliberation that are embedded in different cultural contexts, constitutional function cannot be expected to converge. It hence remains to be established empirically based on data generated with regard to particular political communities. Such research will have to juxtapose the familiar universal definitions with particularistic expectations generated by experience in a set of given political arenas. Drafting a constitutional treaty in the European Union (EU) attached new political weight to the controversy about the meaning of constitutional norms. Both academic and public debates suggest that the Draft Constitutional Treaty (DCT) raised diverging expectations about the role of a European constitution. To some the DCT is to provide the framework for a rigorous ‘tidying-up’ exercise to keep the creeping process of ever closer integration at bay. Others see it as the founding document to substantiate politics over a long period of further European integration. Such diverging expectations sustain the cliché of the British opposing deepening and the Germans being in favour. With the ratification procedure for a European constitutional text pending and

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1 The chapter builds on previous versions of the argument that have been presented as a key-note speech at the workshop ‘The Constitution of the European Union’ at the Centre for European Legal Studies and the Centre for European Studies, University of Exeter, 29 October 2004; as well as at a joint conference of the Hauser Global Law School & the Jean Monnet Center at New York University School of Law and the Woodrow Wilson School of Public and International Affairs, Princeton University April 28-30, 2004; the Hanse Institute for Advanced Study, Delmenhorst, Germany, 2-3 April 2004, and the Department of Political Science at Carleton University, Canada, 16 March 2004. I would like to thank participants at all events for helpful comments. The responsibility for this version is mine. Financial support provided by two British Academy Small Research Grants # SG-34628 and # SG-31867, a Social and Legal Studies Association Small Research Grant and a Fellowship at the Hanse Institute for Advanced Study in 2003 is gratefully acknowledged.


5 For the most recent text of the Draft Constitutional Treaty (DCT) and comments on the pending ratification procedure see the website composed by Carlos Closa within the framework of the European 5th Framework’s CIDEI project: http://www.unizar.es/euroconstitucion/library/constitutional_treaty.pdf.


7 The ratification of the European Constitution will involve a greater recourse to citizen opinion by open referendum than ever before. Ten countries have already committed to holding a referendum over the EU Constitution and more may follow.
the signing of the DCT on 29 October 2004,\(^8\) it is important to understand whether such clichés are likely to hold, or whether there is any indicator that they might change, and if so, under what conditions. Political science analyses offer rather differing ways of addressing this query pending on their respective perspective.

Hypotheses generated by political scientists would expect either a prolonged distinction among, say, the British and German perception of the DCT’s role (comparative politics), or, the development of shared expectations enhanced by institutional learning and mediation into EU member state’s political arenas (international relations). It is important to note that both hypotheses are developed from the underlying assumption of distinctive domestic and supranational political arenas. Even though the perception of and compliance with supranational norms is assessed as an *interactive* process by predominantly constructivist analyses, that interaction remains firmly situated within an international society of sovereign states.\(^9\) Normative standards are considered as stable social facts which enable or constrain behaviour. The leading question is therefore, how are supranational norms adopted in domestic contexts? This chapter critically scrutinizes the cliché based on empirical research in three different political arenas including London, Berlin and Brussels. To that end, it applies Giddens’ reflexive approach that stresses the dual quality of norms. Accordingly, the meaning of norms is socially constructed and instructive at the same time. It evolves through the interactive relation between context and social practice. The meaning of norms thus depends on context and social practice; it is empirically assessable by tracing discursive interventions. This conceptualisation of norms does not depend on the concept of a bounded political arena such as the domestic sovereign state or the international society of sovereign states. Instead, the focus on social practices – as discursive interventions – enables empirical research to understand the normative structure in arenas which are not limited by sovereign boundaries e.g. transnational arenas as well.\(^10\) “If the practice changes so will the meaning of the norm. Social practices are central to the construction of meaning as a social outcome of the process.”\(^11\) To reverse the bracketing of social practices, I turn to a reflexive approach. The leading question is then, how does cultural experience influence expectations towards supranational norms?

The remainder is organised in three parts. First, it makes the case for constitutional pluralism in Europe as developing in a “multiverse”\(^12\) 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

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\(^8\) The DCT’s 13 October 2004 version was approved at the European Council in Brussels on 18 June 2004; it is to be signed in Rome on 29 October 2004 by the 25 Member States of the EU as well as Romania, Bulgaria and Turkey; it has to be ratified by all 25 Member States.


of mapping cultural diversity as a core indicator for institutions that can accommodate and maintain constitutional multiversity (Part III).

**Part 1: Making the Case for Multiversity**

Comparative government research suggests that the framework of political parties, national government and domestic media provides an unwavering context of stable political cultures within the larger EU context. The assumption of stable “national-identity options” and “polity ideas” over time leads to the expectation of the British against and the Germans in favour of deepening. The main research issue both in academic research and in European Commission opinion polls seeks to establish whether or not a particular ‘European’ impact on political behaviour can be discerned. In turn, international relations research on supranational institutions suggests that elite learning in supranational institutional contexts such as the EU and the subsequent mediation of norms, values and beliefs enhances their domestic adaptation. While socialisation into a supranational community and adopting its guiding norms, values and principles depends on the particularities of the respective adaptation process in each domestic context, this research would expect the eventual development of and compliance with shared ‘European’ norms. As the following series of qualitative interview excerpts demonstrates more in detail, a variation in interpreting the meaning of the DCT when comparing elite perceptions in three different political arenas including London, Berlin and Brussels with the latter being divided into German and British ‘Brusselites’.17

According to qualitative interviews, the majority of German and British interviewees consider the constitutional treaty less as the step towards forming a ‘single group’ than as an opportunity to either simplify the currently existing treaties or, indeed, attach some symbolic meaning to the Treaties. None of the interviewees raised the issue of creating a political community or single group. Instead, the interviewees were more concerned about aspects of ‘repackaging,’ ‘simplicity,’ and ‘public understanding’ and/or ‘symbolic meaning.’19

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14 The use of inverted commas for the term ‘European’ is applied when the term is used to refer exclusively to EU matters rather than to the wider Europe.


16 See Checkel’s findings on the role of political institutional structures in four differently structured domestic political contexts, Checkel FN 6.

17 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. The interviewees were selected according to their role as full members of a political community, i.e. enjoying full access to and participation in public discourse. The project compares German and British interpretations of the meaning of core constitutional norms. The political arenas studied involve London, Berlin and Brussels. See Wiener, Antje: The Invisible Constitution, Ms Belfast (in preparation).

18 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, FN 20.

19 All interviews are anonymous with full names and references on file with the author; they have been carried out in London, Berlin and Brussels by the author and Uwe Puetter; translations from German original interview transcriptions into English by the author.
Londoners: Simplicity and Clarity

“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’s an alien institution that is not identified as British or national.”20

“I think we should have a written constitution. I think there should be more attempts to make the whole thing open up and make it more democratic. But I don’t think it is easy.”21

According to “opinion polls in Britain it […] turned out that it was quite popular this idea of a new constitution. […] it was something like 60 or 70 percent in favour of this idea […], it has some potential advantages for Britain in term of saying this is what the EU does, this is what it doesn’t do […]. You know this is an institution with a series of rules. […] Here it is: we have no more such creeping humiliation of powers. […] this creeping […] is finished, and we have such rules and what we do is so clear, it is not a question of ever closer integration.”22

“I don’t think the British would be up there shouting, saying ‘we need a constitution.’ But we do think there are advantages to it and they are to do with accessibility and clarity; and simplicity; and efficiency.”23

“[c]onstitutions are […] very inflexible things – so that would be part of our reservation, I’m sure that we think constitutions are more permanent.”24

“[i]he idea of a constitution is, I think, a good one because I think it is impotent for people to be able to see in a way that is a lot clearer than the existing Treaties, you know, where some of the boundaries are and broadly what the European Union stands for and what it stands on. […] And you really do need something like a Constitution to do that I think.”25

Berliners: Symbolic Function

“What I would wish and what should be the plan is the consolidation of the treaties into one and not two instruments, a text that would resemble a little more what is considered as a constitution.”26

“A[n impressive deal must be put on its way – since previous constitution making (Verfassunggebung) based on intergovernmental conferences has failed, and so far, agreement has always been based on the smallest common denominator.”27

“If we recall particular declarations such as the human rights declaration and so forth, then these are identity creating signifiers and, I think, one should consider these, so that Europe is not exclusively based on the understanding of being an economic community but first and foremost,
we are, of course in everyway a community of values. And that must be demonstrated more strongly to the outside. A short and poignant paper supports such a step, to be sure. Whether we call it basic treaty, constitutional treaty, constitution or whatever, is not the main issue."

“I think the Charter of Fundamental Rights is fundamental. It is first and foremost a moment of identity for the European citizens, perhaps sometime in the future there will be the opportunity for individual fundamental rights cases brought to the ECJ. A system of values for the EU, which has now been agreed upon as binding and what differs clearly from US models of values and which therefore creates a factor of recognition is surely equipped to be the first part of what we will hopefully be able to call the European constitution.”

“[t]he simplification of the treaties as well as the limitation of competences, both must be included, and that indicates a kind of constitutional process after all. Basic rights, the simplification of the treaties, the inclusion of the Charter of Rights and the role of national parliaments, these are the four Nice points, all with a view to creating more democracy and transparency. That is, in the end, what you could call a constitution. [...] These elements do exist there.”

“[You] cannot change an anti-democratic structure with a civil society icing on the cake, can you? You can paper over the cracks somewhat, but not change. And the question is whether or not our energy lasts, isn’t it? In this entire debate about the finality of the European constitution and the European institutions, well, to establish democratic control or not. And it is not decided yet, that is an open process. I consider this entirely open, whether that will be successful or not.”

British Brusselites: A Simple Basic Text with Symbolic Meaning

“[h]aving a very simple basic text and then more powers delegated to the institutions, [...] I think that is a strong idea behind the push in Germany for the constitution. [...] you ought to see what this is. And you certainly get this in the candidate countries, I mean; people have a right to know what they are joining.”

“It [the Convention, AW] has achieved already quite a lot relative to the rather low standards of Nice and Amsterdam: single legal personality, single treaty structure, get rid of the pillars, Charta or Rights, simplification of laws. [...] all this is terribly important.”

“[t]he one advantage of the Constitution of course is to suggest something permanent. A treaty is something temporary, which may be a subject to change [...]. On the other hand, constitutional is a holy word, I know, it has got an emotional context...”

“My constituents will probably not ask very much about the constitution, yet it is very important to have a constitution, but a trimmed down one which focuses on the major issues of the European Union specifying on a few areas of the acquis communautaire. [...] I would love to use a hatchet to change the acquis communautaire, to cut it down, to revise it towards its necessity today.”

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28 Interviewee D J, 24 June 02; emphasis added.
29 Interviewee D S, 10 July 01; emphasis added.
30 Interviewee D A, 17 July 2001; emphasis added.
31 Interviewee D B, 31 August 01; emphasis added.
32 Interviewee Brux/UK A, 22 May 2001; emphases added.
33 Interviewee Brux/UK B, 27 February 2003; emphases added.
34 Interviewee Brux/UK C, 26 February 2002; emphases added.
35 Interviewee Brux/UK D, 28 August 2001; emphases added.
German Brusselites: Simplicity and Symbolic Meaning

“Yes, I deem a constitution important. It has, of course, an enormous symbolic meaning, but I consider that as positive, by all means.”

“I prefer to call what we now have framework treaties. That is not a constitution yet. For that you would need something like the convention. That symbolic meaning is crucially important indeed. I myself have written an article in which I call it our new basic law for Europe.”

“How you call it afterwards constitutional treaty, or treaty constitution, or somehow structure and constitution, right, that does not matter to me at all. What matters in the end, is, how the power questions are addressed. And the power question, that is a bit more complicated than commonly viewed, since this relates very very centrally to the question of which goal we have as Europeans. And that is, which goals do we leave within national frameworks. [...] who does what, [...] that is part of the power question, and who is entitled to do what, that is the second part of the power question, and how both questions then, are going to be answered, that is, according to all the political texts one has come across during the past 2000 years, a factual constitution. How you label that thing afterwards does not matter at all.”

“Well, I mean, we do not need to reinvent the wheel. That must be said. We do have, if you wish, a constitution with the treaties.”

“By now we do have something akin to a [constitution, AW], surely, even if it has the form of an international treaty. Of course, whether you need a constitution in Europe is an open question, in the light of the fact that there is one member state and not even a small one, that has been coping pretty well without a written constitution of this type; and it is even considered as a prime example for democracy, still [...] Well, the treaty does, of course, have the character of a basic law. And therefore we do have a written [...] stipulation of basic principles and goals of the community which has been ratified by all. [...] Things are in flux, whether you want to stretch the term ‘constitution’ or not, de facto, there is something like it, isn’t there? That is, a stipulation of basic rules.”

The most influential elite group in the UK domestic political arena, represented by the London sample understands the DCT as a text with a mission to provide simplicity and clarity and put an end to further deepening. In turn, the questioned elites from the German domestic political arena in Berlin expect the DCT to bring together an identifiable community of values and see it as the beginning of a process of further deepening; finally, according to interviews with elites in the Brussels transnational political arena suggest that both the German and the British Brusselites see the DCT as a text with a mission to provide a simple framework however not without symbolic meaning. While the research sample is not representative, it is interesting to compare the differences amongst the four elite groups questioned. This sample’s findings suggest an ongoing divergence among the UK and the German domestic political arenas (London and Berlin samples), on the one hand, while, at the same time identifying convergent perceptions of norms in the transnational political arena in Brussels (British and German Brusselites, respectively).

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36 Interviewee Brux/D A, 26 February 2003; emphases added.
37 Interviewee Brux/D A, 26 February 2003; emphasis added.
38 Interviewee Brux/D B, [date tba; 2003]; emphasis added.
39 Interviewee Brux/D C, 30 July 02; emphasis added.
40 Interviewee Brux/D D, 29 August 01; emphasis added.
I argue that associative connotations about the form and substance of the DCT do matter and that for political scientists, the issue is pressing, as misunderstanding triggers conflict and facilitates manipulation of public opinion. If conflict is defined as “the incompatibility of subject positions”, and if a conflictive situation can escalate from conflict episodes over issue conflicts and identity conflicts towards conflicts of subordination, then the variation in interpreting the meaning of the DCT can potentially turn into situations of more substantive political conflict at a later stage. It follows that what appear to be trivial differences over expectations of the constitutional function as having neutral and rule generating (simplicity) or community creating (symbolic) meaning, may potentially trigger political conflict on the long run. The argument is based on the observation of a considerable variation in the meaning of core constitutional norms – not least, the term ‘constitution’ itself pending on the cultural context the interpreting individual is situated in at the time. 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.” In turn, polls as well as a series of qualitative interviews conducted with elites in London, Berlin and Brussels between 2001 and 2003 suggest otherwise. The perceptions differ according across the boundaries of political arenas. 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.” In turn, Germany shows a rather high acceptance rate of 83% support for the European constitution.

Like a decade earlier, when the concept of citizenship was formally included in the *acquis communautaire* in 1993 and questions about “citizenship in a non-state” were raised, now bringing the term ‘constitution’ into the *acquis* raises similar questions. Both innovations reflect the strategic move of European policy makers establish or strengthen EU identity. Whether or not this move also contributes to enhance the legitimacy of the EU polity are questions which remain to be established empirically. In the media, both ‘citizenship’ and the ‘constitution’ have been promoted as practical (‘tidying up’) or substantial (‘more democratic’ and ‘legitimate’) improvements to the public. Yet, paradoxically, we can contend with the benefit of hindsight e.g. on the citizenship case, that symbolic politics borrowed from modern nation-state experience are

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44 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](http://politics.guardian.co.uk/print/0,3858,4860768-107988,00.html) <assessed: 01/03/2004>

45 Ibid.

46 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.
more likely to trigger conflict over the interpretation of meaning of central constitutional norms than achieve papering over the cracks of contested meanings. Here, the lacking convergence in experience and, subsequently, expectations of symbolic meaning among culturally different communities offers a key access point to understand conflict. The chapter demonstrates that while, like citizenship, constitution building appears as a desirable policy tool to bring the EU closer to its citizens, as an institution it is likely to create unintended consequences. I argue that the transfer of norms that have been central to nation-state building from national towards transnational or supranational contexts creates a breach between national and supranational structures of “meaning-in-use”. Based on past experience in modern constitutional settings such as in each of the 25 EU member states, the expectations towards a supranational 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. To demonstrate the point, the chapter’s primary intention is to engage with analytically descriptive dimension work more than with critical justification of particular constitutional norms, rules and procedures that are to guide European governance. This said the consecutive and related point does however involve the discussion about the logical link between empirical findings and the normative discussion about the constitutional capacity to accommodate and maintain diversity. In a nutshell, the twofold argument of the chapter therefore runs as follows, if empirical research establishes the perseverance of pluralist constitutional expectations across political arenas, then as an “academic artefact” European constitutionalism needs to address the normative question of how to accommodate diversity. In the light of pluralist positions premature constitutional closure would forego the opportunity to build institutions that are equipped to incorporate diversity.

Part II: Approaches to Constitutionalism

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

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51 As Weiler defines, e.g. “constitutionalism is, [...] but a prism through which one can observe a landscape in a certain way, an academic artefact with which one can organize the milestones and landmarks within the landscape [...], an intellectual construct by which one can assign meaning to, or even constitute, that which is observed.” See 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, 223.
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,”52 second and in critical reference to the first, the Habermasian understanding of legitimacy as resulting from the interplay between culturally and universally derived value perceptions,53 and third, with critical reference to the second, James Tully’s concept of cultural validity based on the institutions that facilitate ongoing dialogue.54 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.”55

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.”56

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”57 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 section then discusses ways of adapting Tully’s approach to a non-state policy.

Tully points out that the social dimension that expressed the ‘customary’ in ancient constitutions has been eliminated with arguable success from modern constitutions.58 “[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

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54 TULLY FN 16, especially Ch 4.
55 TULLY FN 16, 183-4.
56 TULLY FN 16, 131.
57 WEBER, FN 46, 78; emphasis in text.
fitting or appropriate arrangement in accord with the preceding customary ways of the people.”

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. While the concept of ancient constitutionalism entailed the social constitution of the nomos, 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”. 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.” 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 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. 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

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59 TULLY, FN 16, 60.
60 TULLY, FN 16, ibid.
61 TULLY FN 16, 60-61.
# Constitutionalism: Diversity and Community/ies

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<th>International</th>
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To summarize, 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 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. 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

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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). 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.

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 both approaches stress interaction as a core element of legitimate constitutional rule, they differ significantly in their perception of constitutionalism as either universal or multiversal. 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 so as to accommodate and maintain diversity. The goal of the latter approach is therefore the accommodation of diversity and to maintain it; in turn, the goal of the former is to overcome it.

Part III: Mapping Cultural Diversity

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.65 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.’66 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

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as with the legal validity measured according to the “compliance pull” of supranational norms.\(^7\) 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, \textit{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 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.”\(^8\) 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.”\(^9\) According to this understanding of social reality and meaning, “the ‘rule’ lies essentially \textit{in} the practice.”\(^10\) 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 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


\(^{70}\) TAYLOR, FN 63, 58; emphasis in text.
exert structural impact on behaviour.\textsuperscript{71} Instead they are understood as embedded in a socio-cultural context that entails information about putting the norm to "work",\textsuperscript{72} \textit{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 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"\textsuperscript{73}; 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.\textsuperscript{74} 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 \textit{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 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


\textsuperscript{72} See Kratochwil, FN 58.


norms, values and rules of that community towards all members. 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.” 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.

Conclusion

This chapter addressed two issues with regard to the European constitutional process. First, it compared the strategic move of bringing a new institution into the acquis communautaire with case of European citizenship practice in the 1990s, arguing that both are likely cases of unintended consequences of institution building. Secondly, it addressed the normative issue of diversity as a central constitutional norm which stands to be accommodated by a European constitution. Here, the chapter has pointed out two opposing options of either excluding diversity by overcoming it following the Habermasian approach, or the option of maintaining diversity by establishing access to participation in ongoing constitutional debates following the approach suggested by Tully.

At issue were approaches to constitutionalism and their respective awareness of diversity and commonality in the meaning of core constitutional norms. From a political science background I argued that focussing on the issue of diversity (and commonality) helps tackling two major political 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. The second

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55 SCHIMMELFENNIG, FN 6
56 TULLY, FN 16, 6; emphasis added.
problem is addressed by a normative assessment of different approaches to constitutionalism and their respective capacity to address cultural diversity in the constitution. In conclusion it can be summarized that constitutionalism in Europe is confronted not only with the “problem of translation” of constitutional norms from statist to non-state contexts\(^7\), in addition, it is to address the issue of diverging interpretation of supranational constitutional treaty norms in domestic contexts. Analysing constitutional politics requires an analytical link between different constitutional arenas. 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 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.

\(^7\) Weiler, FN 20; Walker FN 15, 322.