Constitutionalism Beyond the State - Towards A Critical Research Agenda

Antje Wiener, University of Bath
Rainer Schmalz-Bruns, Leibniz University of Hanover

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¹ This paper is to be further developed in conversation among the authors; at this stage it draws predominantly on Wiener (2008).
1 Introduction

There “appears to be no accepted definition of constitutionalism but, in the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights. […] However, the relationship between constitution and constitutionalism and the very boundaries of the concept of constitutionalism tend to become increasingly blurred” (Rosenfeld 1994: 3). When speaking of a constitution, we mean a set of norms, principles and provisions and the mandate to organise the political. In distinction from other agreements such as conventions or treaties, constitutions are expected to offer a “civilised” and “embedded” approach to settling conflicts while respecting the constituents’ wishes and ways of life. Constitutions relate to a set of cultural and social conditions within specific contexts, and, they represent an agreement (written or not) among representatives of the governed within a community to make sure that the governors proceed according to the wishes of the former. While this type of agreement has had a long-standing role in domestic politics in Europe starting with the Greek city-states, a similar constitutional quality has emerged only much more recently in international politics. Thus, the creation of international organisations that attempt to move ahead with arrangements of an increasingly binding constitutional quality such as the UN, the European Union (and its predecessors), Mercosur, the Association of South East Asian Nations (ASEAN) and the African Union (AU), dates back to the past century only.

While communities that are part of quasi-constitutional arrangements such as the EU by means of its various treaties, or the UN by means of its Charter, are much less defined by the boundaries of a Hegelian state than by international agreements negotiated among government representatives, the language of ‘civilisation,’ ‘constitutionalisation,’ or ‘the rule of law’ did create an over-arching framework of reference for practicing international law as well as global politics. The addressees of this framework are the “civilised nations” that had signed the UN Charter (Article 2 See Snyder 1990; Preuss 1994; Rosenfeld 1994.

38(1)c ICJ) and/or the Treaty of the European Union (Article 6 TEU, Article 11 TEU), respectively. In sum, and despite their formal differences, both types of institutions – regional and international – share the issue of contested constitutional quality. The norms, principles and rules that guide politics within these contexts provide the substance of this quality. It is their input, i.e. the way they “work,” which establishes the “invisible constitution of politics.”\(^4\) To map constitutional quality beyond the state, it stands to be examined empirically.

Given the necessity of social recognition for the interpretation of any kind of legal document, this invisible constitution of politics is crucial for the interpretation of norms. While the understanding of a constitution and its assigned role as the guardian of the political process is commonly associated with modern constitutionalism and builds on institutionalised and mythical links with statehood that had been forged over centuries, it still merely reflects the contingent quality derived from the way constitutionalism has been working throughout a particular period of time and at a particular place. Nonetheless, this particular type of constitutionalism has been and continues to be powerful. This has significant implications for current theories and politics of constitutionalism. So much so, that students studying “contemporary” constitutionalism (Tully 1995) as a distinct type of constitutionalism, which unfolds beyond the boundaries of modern states, face the “problem of translation” of constitutional norms from statist to non-state contexts.\(^5\) This observation renders the fact that “[M]any would regard modern constitutionalism as the continuation, in the philosophy of the state, of the social contract” (Di Fabio 2001: 1) problematic. The following elaborates on approaches which distinguish between different types of constitutionalism by situating specific constitutional qualities in their respective contexts of emergence and practice.

Contested interpretations of norms are not necessarily due to a lack of agreement about a norm’s meaning. Instead, it may be due to a lack of understanding of that meaning (Taylor 1993: 47, 50). It follows that with declining homogeneity of social

\(^4\) See Kratochwil 1984; Wiener 2008.
environments the need for explanations increases. This observation suggests an enhanced role of individual social practice as a key contribution in the process of norm recognition. Two challenges for international relations theory and democratic constitutionalism follow. First, it is necessary to explore the variation of meaning with reference to specific norms in selected contexts. Differences are expected when the boundaries of interactive contexts are transgressed such as for example in different member states or in different transnational arenas. This research limits potential political contestation points based on cultural reference frames. Secondly, the observation about the key role of practice in processes of norm interpretation raises the normative question of how different expectations about constitutional substance ought to be integrated in constitutional debates, or in environments which produce constitutional quality. This latter aspect addresses the democratic legitimacy of constitutional substance on a more general level.

The first approach stresses a reasoned view of norms. It works with the principal assumption of establishing the preferred constitutional setting which had been agreed to by the negotiators and which is expected to entail validity for all signatories of the constitutional text and, by definition, the citizens linked to the respective heads of state. In turn, the second approach stresses a dialogical perspective on norms. It works with the principal assumption of an ongoing diversity of preferred constitutional settings that will always exist and therefore must be considered. While the former approach works only on the basis of a reasoned consensus that surpasses the stage of diversity, the second seeks to accommodate diversity. The distinction between the two approaches can therefore be pinpointed as one of keeping diversity at bay vs. maintaining and encouraging it. While both the reasoned and the dialogical approaches stress interaction as a core element of legitimate constitutional rule, they differ significantly in their respective universal and multiversal position. The dialogical approach offers more promise than the Kantian model which always ultimately depends on a stable reservoir of shared cultural glue in the end.

The remainder of this paper critically discusses the project of reconstituting democracy beyond the state (section 2). To that end it juxtaposes Kantian
reconstitution with dialogical contestation (section 3), and elaborates on the challenge of maintaining rather than accommodating diversity (section 4) before concluding with some general remarks on further research (section 5).

2 Reconstituting Democracy Beyond the State?

With regard to the discussion about the concept of constitutionalism, it is important to note that this study’s findings sustain the claim that a constitution ‘must be difference-aware or diversity-aware: that is, it must accord equal due recognition and respect, in some way, to the respectworthy cultural differences of all citizens’ (Tully 2002b: 350). The theoretical question which remains to be discussed is whether the dialectical tension between facts and norms can be meaningfully applied as a *Grundnorm* of democratic constitutionalism in the absence of fully reconstituted institutions of modern constitutionalism. Can it be a guarantor for democratic dialogue in contexts which do not conform with a Hegelian perspective on ‘state and society as one’ (Gordon 1999: 77)? A contextual perspective cannot but remain sceptical about the project of reconstituting democracy beyond the state. While not opposed to defending modern fundamental norms in practice, a critical perspective cautions against the universalism of modern constitutionalism (see chapter two).

Access to critical dialogue about the rules that govern a polity is rightly and importantly considered as the cornerstone of democratic politics – if and when it not only follows but also precedes constitution building. The timing, conditions and quality of such debate are critical. Following a recent case (Wiener 2008, Chs 5-7), it has been suggested that mapping the realm of international politics as a context in which differentiated bases of access to participation present a *general condition*. This finding should stand, especially when considering that it was derived from interviews with elites as that social group which is, according to the layer-cake assumption, most likely to interact internationally. Hence there is little reason to assume that by extending the empirical examination to other groups of European citizens (and residents) the access rate was to be improved. The general question derived from the
democratic literature then is that of who enjoys equal and full access to the organisational practices and cultural practices of the nomos. According to a bifocal (i.e. normative and empirical) approach two normative questions need to be addressed.

The more general question addresses the issue of how to deal with diversity. Is diversity a mere issue of conflict, or does this finding open a new perspective on democratic international politics (Cohen 2004)? The more specific question turns to the communication gap between formal validity and social recognition. As the case study has demonstrated, in the absence of a communicative link between the two dimensions of normative interpretation, cultural validation (identified by research on individually transported associative connotations) is likely to turn out as influential for international decisions taken in environments beyond modern contexts. Since this dimension is usually invisible to others, it will only come to the fore in situations of enhanced contestation. At issue is therefore whether and how, in light of the documented diversity, the gap could be addressed so that diversity can be dealt with prior to the moment of expected conflict. This question will be elaborated below by discussing the role of the principle of contestedness in democratic international politics. One promising comparative angle in this respect is Tully’s distinction between a ‘civil’ and a ‘civic tradition of citizenship’ (Tully 2007). The distinction is crucial because it allows for an analytical perspective on the otherwise invisible cultural practices. The following first addresses the issue of access to transnational cultural practices before the next section turns to the more general aspect of how to incorporate the principle of contestedness as a potential meta-norm of democratic constitutionalism beyond the state.

The working hypothesis derived from Wiener’s case study (2008) implies that in a partially transnationalised world the concept of membership in a community needs to be scrutinised so as to include the coexistence of different types of arenas in which norms emerge and/or where they are interpreted. Thus the concept of citizenship as a ‘developing institution’ which involves the gradual expansion of citizenship rights
towards ‘full membership in a community’\textsuperscript{6} stands to be revised, so as to reflect the new element of transnational spaces in addition to a multiplicity of communities. The basic assumption would remain, however, that the condition of access to participation in dialogue and contestation as proposed by democratic constitutionalism (Tully 2002a). If we take Marshall’s concept of citizenship as access to full membership in a community as a yardstick,\textsuperscript{7} and reformulate it according to the condition of access to contestation, ‘membership in a community’ is replaced with ‘access to transnational cultural practices’.

Modern constitutionalism’s main focus on organisational practices has resulted in reduced attention to cultural practices. By highlighting the impact of cultural validation as one out of three dimensions that matter with regard to the interpretation of normative meaning, this book set out to examine the invisible constitution of politics. The case study demonstrates that, even among elites, differentiated access to participation prevails. That is, access to transnational cultural practices applies exclusively to those who operate in transnational arenas on a day-to-day basis over an extended period of time. This reduces the group with access to the process of contesting the values, norms and rules that govern all Union citizens considerably.

While the number of citizens voting in European elections is increasing, the number of those who actually participate in the necessary process of contestation prior to voting appears to be declining.\textsuperscript{8} The logical conclusion of this research suggests that as long as exclusively organisational practices such as voting are transferred to the transnational realm while cultural practices are not transnationalised in equal measure, the voting procedure will not only be perceived as distant, it is actually lacking the democratic legitimation that would have been constituted through full access to contestation.

\textsuperscript{6} See Marshall (1950: 28, and 8, respectively) and Riesenberg (1992).
\textsuperscript{7} An increasing number of comparative policy analysts both in political science and law have been drawing on Marshall to scrutinise the political theory of citizenship; for many, see the work of Kostakopoulou (2005); Shaw (1997); and Jenson (2007).
3 Dealing with Diversity: Kantian Reconstitution or Dialogical Contestation?

In keeping with the return to the concern about how the invisible constitution of politics will fare with a view to the development of democratic legitimacy in international politics, the following probes two distinct perspectives for their respective approach to diversity. The background for this discussion is provided by a contextualised approach which builds on Brandom’s helpful juxtaposition of Kantian regulism and Wittgensteinian pragmatism (Brandom 1989). It will bring to bear Tully’s call for the equiprimordiality of the principle of constitutionalism and the principle of democracy (Tully 2002a). The two perspectives can be distinguished as being definite and based on universal principles in the first case, and, as taking a view of constitutional practices as indefinite and proceeding in an agonistic fashion which leaves room for a constitutional multiverse to unfold, in the second case. Each addresses ways of dealing with diversity within a constitutional framework. The first option has been elaborated by a growing number of scholars with an interest in theorising the reconstitution of democracy within a global context.9 These scholars propose to focus on Habermas’s theory of communicative action. The assumption is that deliberation generates legitimacy based on agreement about universal values. The policy relevant action is to warrant access to participation in such processes of deliberation so as to provide the procedural means to question norms and procedures that govern politics by all those affected by them. The second option focuses on establishing contingent agreements about institutions based on the condition of the constitution’s role allowing for peaceful coexistence.10 In the following, each approach is briefly recalled.

The Power of Deliberation?

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9 See, for example, the work of Fossum and Eriksen (2007) and Eriksen (2007) who draw on Habermas; for a summary, see also Habermas’s more recent work (2005).
10 Compare Foucault’s critical question: ‘[I]n what is given to us as universal, necessary, obligatory, what place is occupied by whatever is singular, contingent, and the product of arbitrary constraints?’ (Tully 2002b, 334-5; c.f. Foucault 1997: 124-5).
International Relations scholars who build on Habermas’s communicative action theory are aware of the dilemmatic interrelation between the speech-act and the ‘unlimited community of interpretation’ to which the negotiated positions must appear reasonable in order to be justified, and in other words, acceptable’ (Habermas 1992: 35; emphasis added by author). As Habermas points out, while ‘the universality of the assumed rational acceptability pushes beyond all contexts’, it is ‘only the binding acceptance of validity in a particular situation which prepares the ground for smooth performance of everyday practice’ (ibid. 37; emphasis added by author). This everyday practice is embedded in the sociocultural context of the predominantly domestic arena of the life-world; the lack of this life-world presents a problematic absence in beyond-the-state contexts (Müller 2001, 2004; Deitelhoff 2007).

Since the integrative function of the law between individuals and systems (Habermas 1992, 2004) cuts too short in beyond-the-state contexts, the additional focus on the socially derived means of interpreting the law offers a crucial access point in addressing the gaps in compliance with norms in contexts which exceed the environment of in modern western societies.\(^\text{11}\) After all, in contexts beyond the modern state no full-blown constitutionalised setting supports and sustains the interpretation of the law. Nonetheless, norms do assume a role within these proto-constitutional settings. These contexts are governed by a set of less stable and more contested norms than fully constitutionalised modern nation-states. They lack the possibility to refer to a set of social institutions for recognition and appropriateness of legal institutions.\(^\text{12}\) The importance of these factors varies according to the type of negotiation context, \textit{i.e.} its degree of institutionalisation or constitutionalisation.

Comparing transnational and domestic social practices offers an opportunity to elaborate on the conceptual dilemma inherent in the Habermасian approach, \textit{i.e.} the validity of legal norms cannot exclusively be deduced from the social acceptance of norms by the involved elites. Instead, formal validity requires inductive demonstration through discursive procedures that alone can establish legitimacy.

\(^{11}\) See Habermas (1992: 15); see critically Schluchter (2003: 548) and Beck and Grande (2005).
\(^{12}\) See Curtin and Dekker (1999); Finnemore and Toope (2001); and Brunnée and Toope (2002).
through communication (Habermas 1992: 47). Accepting the tension between facticity and validity as a *Grundnorm* then implies that deliberations about norms not be limited to identifying and validating one norm amongst a choice of others. Instead, it also includes assessing the meaning of a norm by taking into account sociocultural trajectories. That meaning is a necessary condition for identifying the norm’s perception by involved (individual) actors.

The facticity-validity tension offers a principled approach to the contested and constitutive role of norms. Yet, the question about the role of norms in the ‘postnational constellation’ (Habermas 1998: 494) in the absence of modern communities that provide the context for both life-world and system world remains on two grounds. First, the validity claims of norms are exclusively based on norm choices not norm meanings. Second, and following from the first observation, if norms are dealt with as ontologically primitive units, their contested substance – a precondition for legitimate norms – is not acknowledged. In other words, validity claims sustain the legitimacy of a norm within a specific context, say a negotiation situation; yet, they cannot account for the assessment of sustained norm legitimacy once norms are transferred into another context, or, once they are considered over an extended period of time. In turn, the societal perspective considers norm contestation as a condition for establishing the shared validity of norms. It conceptualises contestation ‘all the way down’ with a view to transcending (and possibly challenging) the meaning of norms between contexts. (Johnston 2001: 494) As Habermas points out,

‘[I]f contexts of interaction, as I assume with Durkheim and Parsons, cannot be transformed into stable orders on the basis of mutually interacting success-oriented actors, then society must be integrated through communicative interaction, *in the end*’ (Habermas 1992: 43; emphasis in original).

The literature that displays a notable enthusiasm for Habermas-inspired approaches to communication encourages deliberation, pointing to different types of conversation and dialogue which are, according to some observers, central to the
ongoing constitutionalisation in the European Union. Yet, the manifold dialogues which have been observed, for instance, ‘judicial conversations’ or ‘constitutional dialogues’ between the European Court of Justice and the national constitutional courts of the member states, ‘political conversations’ among Heads of State and Government which take place at Intergovernmental Conferences or, more broadly conceived as ‘constitutional conversations’ that include the input of a range of actors throughout some five decades of constitution-making in the European Union (Witte 2002: 40, c.f. Walker 2000: 21; Stone Sweet 1998: 305) must be scrutinised according to their openness and reflection of both organisational and cultural practices. For example, as Bruno de Witte observes quite correctly and importantly: ‘[T]his stretches the metaphorical capacity of the term ‘dialogue’ very far. The members of these courts hardly know each other, and certainly never sit together formally to examine a particular case or abstract question’ (Witte 2002: 40). Those who actually enter into dialogue in the European Union’s beyond-the-state context are more likely to be the elites involved in interactions interrelated with politics and policy-making on a day-to-day basis. By operating within the same context over extended periods of time they are therefore most likely to develop shared or, at least, significantly overlapping associative connotations than others. The lack of overlap and the absence of an interface will therefore continue to generate a new level of diversity which needs to be addressed; however, as the case study demonstrated, not even elites can be taken to enjoy equal access to the emerging transnational spaces.

The Need for Dialogue and Contestation

Dialogical approaches assume that, if and when conducted according to the meta-norm of democratic constitutionalism, politics and policy-making in any arena would need to be conducted following two principles or norms. These norms involve the ‘principle of constitutionalism (or the rule of law) and the principle of democracy (or popular sovereignty)’ respectively (Tully 2002a: 205). While the principle of

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13 Compare the newly established 6th Framework Programme’s integrated project RECON (Reconstituting Democracy in Europe) which is directed by Erik O. Eriksen at the University of Oslo, details at [http://www.reconproject.eu/](http://www.reconproject.eu/) <accessed 20 August 2007>. © The Authors
constitutionalism refers to a particular institutional context, that context may be defined in either a narrow sense including only fundamental norms, or in a broader sense including all three types of norms. In any case, it is assumed that the type of political arena where the rule of law applies is characterized by albeit varying degrees of constitutionalisation qualified by the interplay of its legal, social and cultural spheres. In turn, the principle of democracy or popular sovereignty requires the rules to be imposed on all addressees of these fundamental norms including the representatives of that very constitutional system. Efforts to make democratic constitutionalism and constitutional democracy co-equal thus face the challenge of conceptualising the condition of being constitutionally legitimate and democratically legitimate at the same time.

In order for a constitutional framework to be able to reflect both leading norms in equal measure, a constitutional order must be either ‘negotiated’ or continuously ‘conciliated’ (ibid.: 208). However, for these principles to be translated into an open dialogue, the additional principle of equal access to participation in the transnational arena must be entrenched in the constitutional order. Next to sovereignty and the rule of law as the two principles of democratic constitutionalism, equal access to contestation must be established for all citizens. Once these structural components for democratic constitutionalism are established and agreed among those affected by them, justification of day-to-day matters can proceed. Further to contextualising diversity this approach works with a concept of continuous yet contingent diversity which holds that, ‘[T]he entire exercise of democratic freedom in relation to the existing rule of law must be intersubjective and open-ended practical reasoning’ (Tully 2002a: 217).

Conflicting interpretations of norms or contested norm implementation are not necessarily due to a lack of agreement about a norm’s meaning. Instead, it may be due to a lack of understanding of that meaning (Taylor 1993: 47, 50). It follows that with declining homogeneity of social environments the need for explanations increases. This observation suggests an enhanced role of individual social practice as a key contribution in the process of norm recognition. Two challenges for
international relations theory and democratic constitutionalism follow. First, it is necessary to explore the validity and variation of normative meaning with reference to specific types of norms in selected contexts. Differences are expected when the boundaries of interactive contexts are transgressed such as for example in different member states or in different transnational arenas.\textsuperscript{14} This research limits potential political contestation points based on cultural reference frames. So far, this issue has mainly been tackled by comparative theoretical debates, for example, on the extension of transnational public spheres or on the Europeanisation of specific policy sectors (B. Peters 2005; Eder et al. 2000). Secondly, the observation about the key role of practice in processes of norm interpretation raises the normative question of how different expectations about constitutional substance ought to be integrated in constitutional debates, or in environments which produce constitutional quality.

This latter aspect addresses the democratic legitimacy of constitutional substance on a more general level. It has been discussed along two different dimensions. The first dominates in the European discussion. It is based on universal values which are rooted in the constitution and are guarded by it. This debate is marked by the discussion about European norms and values as a condition of a European community. By contrast, a second debate which has been formulated more distinctively if not exclusively outside Europe suggests that universality might be a misleading assumption considering that ‘the world of constitutionalism is not a universe, but a multiverse: it cannot be represented in universal principles or its citizens in universal institutions’ (Tully 1995: 131; emphasis added by author). This position would suggest that the accommodation of diversity be considered a value in itself. It would therefore be conceptualised as a goal rather than a problem of democratic constitutionalism. This perspective brings the institutional conditions for maintaining diversity as opposed to the substantial definition of particular ‘European’ values to the fore. It means that a constitutional framework must be able

\textsuperscript{14} For the coordination of research in this field, see, for example, the Network of Excellence Team working on Establishing Diversity (and Commonality) in Interpreting the Meaning of Democratic Principles and Procedures; http://www.mzes.uni-mannheim.de/projekte/typo3/site/index.php?id=64 <accessed 29 June 2006>.
to accommodate diversity without overcoming it, and reflect shared principles, norms and values in institutions that are recognised by those affected by them.

4 Maintaining Diversity

The first approach stresses a reasoned view of norms. It works with the principal assumption of establishing the preferred constitutional setting which had been agreed to by the negotiators and which is expected to entail validity for all signatories of the constitutional text and, by definition, the citizens linked to the respective heads of state. In turn, the second approach stresses a dialogical perspective on norms. It works with the principal assumption of an ongoing diversity of preferred constitutional settings that will always exist and therefore must be considered. While the former approach works only on the basis of a reasoned consensus that surpasses the stage of diversity, the second seeks to accommodate diversity. The distinction between the two approaches can therefore be pinpointed as one of keeping diversity at bay vs. maintaining and encouraging it.

While both the reasoned and the dialogical approaches stress interaction as a core element of legitimate constitutional rule, they differ significantly in their respective universal and multiversal position. Both address the validity of fundamental norms and values in different ways. For example, 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. In turn, an ‘agonistic’ approach seeks to accommodate institutions which allow for the establishment of the three conventions of mutual recognition, consent and cultural continuity in order to insure ongoing dialogue and infinite negotiation of fundamental norms and subordinate procedures (Tully 2002a; Bader 2007). The aim of this approach is ‘not to overturn but to amend the institutions of constitutional democracy, so they will express the cultural plurality of the sovereign people, or peoples, rather than impose the
dominant culture’s identity’ (Tully 2002b: 339). In light of the working hypothesis derived from the empirical findings of the case study, the dialogical approach offers more promise than the Kantian model which always ultimately depends on a stable reservoir of shared cultural ‘glue’ in the end. It can therefore be argued that the ‘contestable character of constitutional democracy should not be seen as a flaw that has to be overcome. The democratic freedom to disagree and enter into agonistic negotiations over the prevailing constitutional arrangements (or some subset of them) and the dominant theory of justice that justifies them […] is precisely the practice of thought and action that keeps them from becoming sedimented – either taken for granted or taken as the universal, necessary and obligatory arrangements’ (Tully 2002a: 218).

The implementation of the principle of contestedness is particularly crucial with a view to implementing international treaties and maintaining diversity in the global realm. In international contexts, the expectation of diversity based on social difference is reflected by the tradition of maintaining treaty language on a considerably general level. That is, while recognition of internationally negotiated norms is expected from all signatories, such treaties rarely entail detailed instructions as to the procedures of implementation (Chayes and Chayes 1993: 189). The interpretation of treaty substance is thus transferred into contexts of interaction which are subordinate to the international arena such as, for example, domestic political arenas. It is precisely this type of subordinated arena of implementation which bears potential for conflicting interpretations of norms which have been transposed from the international arena into the domestic, since normative meanings require continuous mechanisms for exploration and updating.

5 Conclusions

Governance beyond the state involves an understanding of norms as working outside of the familiar modern context. In practice, the interpretation of norms occurs in
distance from their respective root-contexts where they have been originated through interaction. That is, norm interpretation requires the additional and relatively new step of establishing a relationship between the formal validity of a norm according to treaty language, on the one hand, and the social recognition of a norm according to its appropriateness within a given community, on the other. To establish this link when social practices have moved outside modern contexts, each travelling individual will face the task of setting up the link by herself. To do so, she will mobilise her individual normative baggage as the cultural validation available to her on location. In the absence of interfaces between political arenas such as the London, Berlin and Brussels arenas examined by this book’s case study, norms are likely to be contested. To avoid misunderstandings based on such spontaneous conflict, and to achieve more legitimate understandings of norms, future research would want to focus on the potential of institutional and/or procedural innovation including, for example, additional space for interaction to generate the contestation.\(^\text{15}\) Such tools could offer the access point for normative and policy oriented proposals with a view to optimising contestation and minimising unwanted conflict.

Whilst the thrust of normative research in world politics has stressed the structuring quality of norms, the additional dimensions of context and time cast light on a more complex approach that appreciates the dual quality of norms as structuring and constructed through social interaction. As a new unit of analysis, transnational space provides a reference for comparative research across different spaces because it allows for an approach that captures not only the stable but also the flexible aspect of norms. For example, adding the comparison with elite groups operating in transnational arenas to that of domestic arenas provides distinct insights for both the empirical identification of conflictive interpretations of meaning as well as the normative discussion of mediating contested normative meanings. Working with this new unit of analysis involves an analytical move from systems and societies towards individual interaction and the cultural representations created therein.

\(^{15}\) For first steps into that direction, see, for example, Puetter (2006) and Puetter and Wiener (2007).
Since conflicting interpretation of norms occurring in the absence of transnationalised interaction patterns are expected in situations of norm transfer between different types of political arenas, we can expect an increasing diversity in the interpretation of normative meanings. In the absence of institutional innovations (possibly of constitutional quality) that would allow for the accommodation of increased diversity in the interpretation of norms, more – rather than less – political conflict is to be expected in the aftermath of international negotiations. As all individuals carry normative baggage, only those groups of individuals who engage in continuous day-to-day interactions within a transnational arena are likely to share a perception of formal validity, social recognition and cultural validation. This implies that actors who engage only temporarily in international interaction will display expectations that are informed by diverging cultural experiences. Hence, they enter international negotiations based on different patterns of recognition. It follows that even if the formal validity of constitutional texts is accepted and a social environment, such as in an international organisation, exists to provide reference frames for interpretation, cultural validation is likely to generate divergence. Subsequently, expectations of the role of any particular norm are likely to differ as long as transnationalisation remains exclusive and partial.
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