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the future of europe

DEMOCRACY, LEGITIMACY AND
JUSTICE AFTER THE EURO CRISIS

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SIX

A Hidden Asset in Times of Crisis

The EU's Unbound Constitutional Quality

Antje Wiener

Undoubtedly,¹ the European Union (EU) has had its share of the global financial crisis, and the impact is still being felt—in some member states more than in others. While the economic and political repercussions of the crisis will linger for some time, to be sure, I argue that all is not lost, for the EU is able to resort to a sustainable constitutional quality. This quality's sustainability rests on two factors: first, it is used as a reference frame by others who choose to copy bits and pieces of the EU's constitutional setting, and secondly, it represents a unique feature of nonstate polities on a world scale. Given this achievement, we should therefore specify *which* of the EU's policy areas are in crisis, and the effect this will have for the EU in the long run. The argument, which this chapter seeks to advance, is that as the world's leading "non-state polity" (Wiener 1998a), the EU has been generating a set of political institutions and constitutional norms over the past six decades. They form the substance of the EU's specific unbound constitutional quality, which is an underestimated European trademark. For, when situated within the larger global realm, the EU is the world's leading normative order to practice "unbound constitutionalism."²

In an increasingly pluralist global constitutional setting where international organizations constitutionalize their governance procedures by adding constitutional principles (De Búrca 2009), other regional organizations, such as, among others, the South African Development Community (SADC), the ASEAN Economic Community (AEC) or Mercosur,

have begun to copy some of the EU's constitutional quality. In the following, I argue that this interest in copying bits and pieces of the EU's institutional and constitutional setting has contributed to ascribing the function of a blueprint to the EU. Resulting from a series of interactive processes, the EU has become a reference for other regional organizations as a *bearer* of unbound constitutional quality. This outside referencing enhances the EU's own interventions in global constitutional politics (Isiksel 2010). Once approached from this global perspective, the EU's current crisis can also be read as part of the larger success story, namely that of building constitutional quality through unbound constitutionalization. Europeans, and especially those directly involved in running the European Union's day-to-day policies or, in fact, those studying European integration from their respective academic vantage points of law, political science, economics or sociology or other fields, have been predominantly engaged in close observation of the media's take on the "euro crisis" for the past five years. And rightly so, because as Eric Jones has successfully demonstrated, the tipping point of financial markets is in no small part fabricated by "perception" (Jones 2009).

However, while European politicians have been busy discussing the financial crisis at home, elsewhere the Arab Spring brought bread-and-butter issues of constitution making to the global stage. In the process, many of the core values of the EU's normative order have been addressed, albeit with quite different meanings attached to them. This has created some confusion among European and American commentators who were put on the spot to decide whether, for example, the events following the Egyptian referendum on 30 June 2013 were to be understood as a "military coup," as most Western media and politicians insist, quite in line with supporters of the Muslim Brotherhood as the party which was removed from power,³ or whether the democratic revolution was experiencing its "second wave," as held by liberal Egyptians who endorse a pluralist democratic setting rather than authoritarian rule.⁴

It is argued that, given the ongoing and pressing search for constitutional ground rules as protest movements demanding democracy, justice and equal rights have become active around the globe, the EU's specific type of unbound constitutionalism provides important cues for democratization in contexts of postconflict or postrevolutionary political change, public diplomacy and the globalization of political protest. The key for that attraction is to be found in the fact that European constitutional quality has developed unbound from the state. In addition to state-bound constitutionalism in its member states and elsewhere, the EU has thus contributed to establishing a novel constitutional pluralism (Walker 2000, Maduro 2003) and demonstrated that this model is not without political teeth, as not only the ECJ's judgment in the *Kadi* case demonstrates (De Búrca 2009, Isiksel 2010).

To demonstrate the potential political impact of this model, this chapter presents the practice of blueprinting as a bottom-up alternative to the norm diffusion approach of global governance theories (Alter et al. 2012) on the one hand, and the normative power approach (Manners 2002, 2006, and 2013; Nicolaïdis and Whitman 2013; Whitman 2013) on the other. It argues that notwithstanding the ongoing crisis talk that has been permeating European discourse in public and private households alike, European constitutionalism has developed into quite a success story that is largely unknown to most people. This chapter further argues that the political value-added of this story is less a result of the agency of European policy insiders than the decision of outsiders to pick and choose from the EU's normative order what they consider relevant for their specific purposes. This practice of picking parts of European constitutional and institutional settings, which comprises the European normative order, is defined as *blueprinting*. Thus, by returning to the sociology of knowledge and introducing the concept of blueprinting, this chapter adds an interactive take to "normative power Europe" literature (Manners 2002, 2006, 2013; Sjursen 2006; Nicolaïdis and Whitman 2013).

The following develops the argument in four steps: section 1 introduces and details the argument. It presents blueprinting as a practice-based alternative to political and legal norm diffusion of global governance theories, on the one hand, and the normative power approach, on the other. Section 2 introduces the concept of unbound constitutionalism. Section 3 presents the three distinct approaches to studying normative change in relation to the EU, that is, norm diffusion, normative power and critical norms research. Section 4 turns to explorative examples of regional organizations that refer explicitly to what they consider successful experiences with European constitutional and institutional settings from elsewhere with a view to building political communities outside Europe.

1. BLUEPRINTING NORMATIVE ORDER

The argument builds on the observation that the EU's political process of integration has established an institutional and constitutional setting, which now amounts to a blueprint of sorts for other regional and international organizations around the globe. The interesting aspect of the concept of blueprinting, which will be detailed below, is indeed the fact that it is an unfinished and ever-changing reference, which has therefore never been fully adopted elsewhere, despite a range of adaptations of bits and pieces of the European "constitutional architectonic" (Isiksel 2010; Curtin 1993). It, therefore, remains subject to translation. Importantly, and not at the forefront of the European community of researchers and politicians' respective preoccupation with challenges faced by the EU's

management of the financial crisis, other actors have been engaged in *copying* some of the EU's political and legal structures. By doing so, these *others* have contributed to bestowing a blueprint function of sorts to the EU's normative order.

The gerund, that is, blueprinting, is used to express the cognitive action of others and the referential role of the EU in this interaction. Blueprinting includes two distinctive activities: as a *political practice*, blueprinting involves a conscious choice to copy an institutional and/or constitutional detail. As a *social interaction*, it extends beyond that decision. Blueprinting comprises three steps: first, approaching the detail in the European context of origin from the outside; second, transferring it to another outside destination; and third, enacting it according to the normative structure of meaning-in-use of that other context. This complex interactive process pitches unbound constitutionalism as analytically distinct from the unilateral action of diffusing norms from Europe toward other political orders, for example, through "contagion" (Manners 2013, 215), by compliance mechanisms (Schimmelfennig and Sedelmeier 2005) or by "transplanting" them (Alter et al. 2012).

I contend that the complex interactions that are conducive to the ways in which norms, ideas and principles are incorporated from one context to another provide a vital access point for assessing the ultimate meaning that is attached to—and can therefore empirically be read off of—respective norms. As critical norms research indicates, norm interpretation depends critically on the cultural background experience of those who enact a norm. Thus, "binary opposition" analysis (Milliken 1999; Saco and Weldes 1996) has shown, for example, that even long-term EU member states, such as the United Kingdom and Germany, reveal different interpretations of core constitutional norms such as democracy, the rule of law and fundamental rights (Wiener 2008). Given these distinctions among Europeans with shared normative roots, norm transfer between contexts that have greater differences regarding their respective cultural repertoires than the Brits and the Germans is expected to impact the actual normative meaning that is generated quite decisively.

In a global context where constitutionalization is increasingly unbound from modern state institutions, for example, through the transfer of core constitutional principles to regional and international organizations, the interpretation of these norms is of increasing importance. It follows that the value-added of normative power Europe ultimately depends on how European norms and constitutional quality are perceived from the outside and enacted elsewhere. Especially critical legal research has addressed this problem in conjunction with the transnationalization of the law, which has raised issues of understanding in relation to cross-referencing and cross-fertilization. Here, the point has been made that a translation of legal meanings has become necessary (Slaughter 2003; Walker 2003). To understand this effect and the related challenges of

norm transfer, more detailed empirical research is required. The following elaborates this distinction in conceptual and empirical detail and presents the reflexive approach to unbound constitutionalism as part of a new research programme on global constitutionalism.⁵

2. UNBOUND CONSTITUTIONALISM

Why does unbound constitutionalization matter to others? Academics have studied constitutionalization both in the context of regional organizations such as the EU and global international organizations such as the United Nations (UN) for about two decades now (see, for example, Cohen 2012, Craig 2001, De Búrca and Scott 2000, De Búrca and Weiler 2012, Weiler and Wind 2003). However, our knowledge about the motives for constitutionalization is still not matched by deeper knowledge about the normative substance that is actually generated by constitutionalization. To get a better grasp of the latter, this chapter suggests examining social practices “on the ground.” In contradistinction to the literature that believes global constitutionalization will eventually lead to a global constitution (Habermas 2011), or have a functional effect on solving the legitimacy problems of global governance (Peters 2009), unbound constitutionalism addresses an alternative to rather than a replacement of state-bound constitutionalism. That is, once spilled over into the global realm, constitutional norms, principles and regulations help change or bring forth constitutional quality, which is indicated, first, by a constituent power and, second, by shared normative roots.

In principle, according to constitutional theory, a constitution serves to check societal actors in their interrelation, warrant access to protection, and entitle the governing institutions (the *pouvoir constitué*) to act on behalf of the community of citizens (the *pouvoir constituant*) (Möllers 2007; Loughlin and Walker 2007). A constitution keeps law and politics “in check” (Snyder 1990). The relations between the constitution and the community are guided by constitutional principles and norms. Given that a constitution’s substance is stable, and that its principles, norms and procedures remain valid over time, notwithstanding the changing group of citizens as members of this community, the reference to the citizenry as constituent power is a necessary condition for a text to be “of constitutional quality.” It is therefore the first indicator of constitutional quality. However, it is important to note that—whether written or unwritten—a constitution derives its authority from sources that are external to the constitutional text (or routine as in the UK context). That is, a constitution’s legitimation stems from normative foundations that are socially constructed (Reus-Smit 1997). This external source of authority is contingent on the larger historical context in which a political community is

constituted. This external source of authority is the second indicator of constitutional quality.

With the establishment of the international community through international conferences, conventions and treaties, and in parallel to the strengthened and growing political authority of modern nation-states (Tilly 1975), constitutionalized communities emerged as state-bound. That is, throughout the period of modern state building, constitutions were expected to refer to a specific population, a territory, and a government. Classical international law was grounded on state-bound constitutionalism and the exclusive role of states in forming international organizations. However, the paradigm of state-bound constitutionalization rests on two shortcomings: first, it involved drawing new political boundaries that did not overlap with social and territorial borders (especially in Africa), and second, it put constitution making that was not linked to the central institutions of the state to one side, as demonstrated for example with the Canadian First Nations, the Amazonian Yunamami, or the Mexican Indian nations. With the transfer of constitutional norms and principles from the domestic realm into the global realm, this process of state-bound constitutionalization has become conceptually unbound. This process involved, for example, attaching norms, principles and procedures to international organizations. While the relevant literature, mostly of international legal background, has dubbed this process "global constitutionalization" or "constitutionalization beyond the state" (Dunoff and Trachtman 2009b, Klabbers et al. 2009, Peters 2009, Weiler and Wind 2003), we have suggested working with the concept of constitutional spillover under conditions of unbound constitutionalism elsewhere. While the spillover is due to functional considerations, the result involves shifts of loyalty as well as changes of political community formation (Haas 1968; Schmitter 2003).

DEFINITIONS

Given the relative novelty of the emerging field of global constitutionalism, and especially taking into account this field's interdisciplinary nature, the following clarifications are necessary. In accordance with the leading literature in the field of European constitutionalism (Craig 2001; De Búrca and Scott 2000; De Búrca and Weiler 2012; Maduro 2003; Snyder 1990; Walker 2000; Weiler 1999; Weiler and Wind 2003), the term constitutionalism is defined as a theoretical framework (rather than a phenomenon) that guides research on constitutionalization. Given that theories reflect their context of emergence (contingency condition), it is necessary to distinguish among different cultures of constitutionalism such as, for example, ancient, modern, European, Confucian or late modern constitutional culture (Tully 1995; Wiener et al. 2012a). Accordingly, global con-

stitutionalism is defined as a framework approach to study constitutionalization in the global realm.

While the (predominantly legal) literature addressing this phenomenon is relatively recent, an emerging interdisciplinary field of global constitutionalism is noticeable nonetheless. It can be roughly distinguished according to three schools of functionalist, normative and pluralist constitutionalism (Wiener et al. 2012b). According to the first school, constitutionalization in the global realm is based on a functionalist rationale. It has been developed with reference to "taxonomic" rather than "normative" criteria (Dunoff and Trachtman 2009a) to enhance the legitimacy of global governance institutions (Buchanan and Keohane 2006; Slaughter 2003; critically, Cohen 2012). The second takes the opposite view, arguing that global constitutionalization is a necessary normative corrective, given that through the transfer of constitutional norms and principles, state-bound constitutionalization has lost normative quality (Habermas 2011; Peters 2009). While the first view can therefore be considered "positive-sum" constitutionalization, the second view is working with a concept of "zero sum" constitutionalization. The third school takes a pluralist view that expects and endorses the parallel existence of different types and degrees of constitutionalization (Maduro 2009; Halberstam 2010; Walker 2000). Its understanding of constitutionalization is neither that of a "positive-sum" nor that of a "zero-sum" game, for it takes a relational perspective on constitutionalization which considers the normative potential of constitutionalization to reflect the context conditions under which constitutional norms are enacted. In other words, it conceptualizes constitutional quality as socially constituted rather than metatheoretically given. By doing so, we expect to uncover heretofore unnoticed indicators of constitutional quality, akin to the "hidden" constitutional processes Tully located in Canada as well as "invisible" structures of normative meaning-in-use that generate both a shared reference to a selected few and a source of contestation for many others (Wiener 2008).

Against this background, unbound constitutionalization is defined as a process that either unbinds or is distinct from state-bound principles and norms and asks a question about constitutional quality: If constitutional quality is authoritative within state-bound contexts where constitutional norms, principles and procedures are relatively stable and enduring over time, does the transfer of constitutional norms beyond state borders change constitutional quality? The answer builds on a pluralist approach to global constitutionalism, which includes a potential global plurality of constituent powers and external sources of authority rather than working with the assumption of a bounded plurality of constitutional authority including internal and external constitutional pluralism pending on given "sites of power" (for the latter, see Maduro 2009). Following the law-in-context approach (Kratochwil 1989; Onuf 1994; Snyder 1990), constitutionalization is defined as a *practice category* and therefore a

phenomenon, which remains to be assessed through empirical observation. In turn, constitutionalism is understood as a *theoretical framework* including different cultural and temporal contexts, an academic “artefact” (Weiler 1999) that comprises the stipulation of constitutional norms, principles and procedures in other than state-bound environments. This practice-based approach is aware of the organic interaction of “process” and “thing” (Onuf 1994). It examines unbound constitutionalization from a comparative perspective that takes into account cultural diversity as a formative and distinctive dimension of constitutionalism. Rather than applying a “Westphalian discourse” of state-bound constitutional communities, the paper therefore encourages alternative visions of community because the processes of attaching norms, principles and procedures to international organizations reveal a change towards processes of constitutionalization, which are unbound from the state. These processes are also defined as unbound from the state in order to indicate that actors other than the state are involved. Unbound constitutionalization involves “state-plus” actorship, yet it is increasingly distinct from the group of citizens as the constituent power of nation-state communities.

3. EUROPEAN NORMATIVE ORDER

Following the “normative turn” that mainly focused on the quality of EU polity in the late 1990s (see for example Shaw 1999; Bellamy and Castiglione 2003; Jones 2009), there are three approaches in the current literature that address normative change: first, the *normative power approach* that was kicked off by Ian Manners a decade ago and has been thriving ever since as an alternative soft-power perspective to international relations theories’ neorealist perspectives (Manners 2002, 2006); second, the *norm diffusion approach* that was developed in conjunction with the prospect of massive enlargement to the east (see for example, Schimmelfennig and Sedelmeier 2005). The third approach is *critical norms research* that was developed with reference to the constitutional debates in the EU and beyond (Wiener 2008) as one of several precursors—next to democratic theory and international law—to the new interdisciplinary theory of global constitutionalism. The following discusses the distinct ways in which these three approaches address normative change according to their respective tools.

It is argued that the latter in particular matters for its focus on unbound—as opposed to state-bound—constitutionalization when it comes to choosing blueprinting bits and pieces of the European normative order. While still in the making, staking out an interface between law, political science and sociology, research on unbound constitutionalism is opening new analytical perspectives for a reflexive perspective on political change, especially in its pluralist variant (De Búrca 2009; Maduro

2009; De Búrca and Weiler 2012; Wiener et al. 2012b). This builds on a claim from an observer from Egypt who noted that “global constitutionalism is the answer” to postrevolutionary political settlements.

This section offers a brief recollection of a sociology of knowledge approach that laid the theoretical framework for constructivist theories of European integration. To understand how normative structures of meaning-in-use are enacted and why this matters to blueprinting, it stresses the social construction of normative order as a complex social process. The reconstruction of this emergence of normative order distinguishes among the construction of three types of norms: fundamental norms on the macro level, organizing principles on the meso level and standardized procedures at the micro level (Wiener 2008). As will be shown, the meso level norms are the so-called “ground rules” that matter most at a time when new political orders are on the brink of being set up in contexts that are unbound from the state.

The Social Construction of Europe

By engaging constructivist approaches to integration, this section demonstrates that while constructivists were engaged in “seizing the middle-ground” between positivists’ rational choice approaches on the one hand and reflexive sociology of knowledge approaches on the other, in the end, the “limits of closing the gap” between the two sides prevailed. As a result, the common constructivist research focus on norms was established by a thriving norm diffusion research culture that focused mainly on compliance with the Copenhagen criteria prior to and following massive eastern enlargement in 2004 (Schimmelfennig and Sedelmeier 2005). In the 1990s, constructivist theories of European integration brought the ontological stress on ideas, identities, norms and language to the by then rather stale theoretical repertoire of grand theories to the table. This move followed the key argument of Berger and Luckmann’s sociology of knowledge that all knowledge is socially constructed, and that therefore, interactive practices in context mattered for our understanding of European integration. In the beginning, the key role of constructivist thought lay in providing a metatheoretical move away from a baseline between realist and poststructuralist perceptions of the EU that had remained largely incommunicado. Constructivists then had an enabling function with regard to academic exchanges about the leading questions, main concepts and methodological approaches that mattered for European integration theories. This communicative turn had a hugely informative impact on the entire discipline of European integration, for it made the discipline attractive to students and serious academic debate. Based on this toolkit, middle-ground focused constructivists soon generated an impressive number of case studies.

The Social Construction of Normative Order

Friedrich Kratochwil's erstwhile query about the way norms "work" (1984) was approached from increasingly different perspectives that resulted in three distinct constructivist strands. Conventional constructivists were interested in pursuing the question of how norms influence state behaviour; consistent constructivists studied the way new rules were set through speech acts, thus concentrating less on social practices than on discursive and strategic interventions to change the rules of the political game; and critical constructivists questioned the shared meaning of norms that remained invisible to behavioural and strategic studies, and therefore suggested making invisible meanings of norms accountable with reference to enacting normative structures of meaning in use and cultural repertoires (Wiener 2008).

Instead of engaging with the development of these three constructivist strands—that ultimately mattered more for the development of international relations theories than European integration studies—this section points to the widening gap between positivist and normative approaches. For it is this quite noticeable gap in the literature that matters most for understanding the EU's impact on the global normative order, and hence for addressing the question raised by this chapter. On the one hand, the EU is portrayed as a norm entrepreneur with long-term experience in diffusing norms to candidate countries, and subsequently the power to facilitate norm diffusion to postconflict areas so as to improve "governance in limited statehood." This literature builds on compliance, cooperation and governance literatures, respectively. On the other hand, the EU has been conceptualized as a "normative power," a rather more elusive civilizational force of sorts in the global realm (Manners 2002, 2013; Whitman 2013). At first glance, both approaches do have their merits, especially for European foreign offices that demand manuals for operations in postconflict areas. Thus, the former diffusion approach offers relatively straightforward fixes that take their central persuasive force from compliance literature (Schimmelfennig and Sedelmeier 2005), while the latter normative power approach paints a picture of the EU's soft power as a civilized counterpart to the United States and other hard powers (Whitman 2013). Especially the latter approach has taken pains to develop a more sophisticated critical view of the transfer of norms, ideas and values from the EU to the global realm (Manners 2013, and contributions in Whitman and Nicolaidis 2013). Thus, Whitman notes that "By distinguishing the concept of normative power from the previous discussions on military power and civilian power, Manners placed the identity and nature of the Union into a different framework in which he aimed at replacing 'the state as the centre of concern' and refocusing on the ideas and power of norms as the substantive basics of the EU studies" (Whitman 2013, 172). While Whitman is right in stressing the importance

of the shift in focus, this chapter contends that the potential of this normative perspective remains unexplored. This is largely due to setting to one side the sociology of knowledge approach that lay at the centre of the erstwhile constructivist turn in European integration theories. That is, like the norm diffusion approach, the normative power approach ultimately operates according to the neo-Kantian regulative ideal of political organization that is common to western European nation-states and which rests on the underlying belief in the universality of western European norms, ideas and values and their presumptive value added elsewhere (see Habermas 2011; and critically Tully 2008). By contrast, this chapter seeks to elaborate on the underresearched potential of “interaction” as a dynamic concept, which had been introduced by early international relations constructivism (Wendt 1987) that built on Giddens’s structuration theory as a further development of sociology of knowledge approaches to societal development (Giddens 1979). This dimension is crucial with regard to studying the way norms work. For it is always ultimately and necessarily an empirical focus which is able to reveal how norms work in practice and thereby bring the constructive force of norms to the fore in any context. Drawing on critical norms research, I therefore work with a bifocal approach, which explores normative questions with reference to empirical research.

Two Conceptions of Normative Power: Description (NPE) or Strategy (NPA)

Manners describes the normative power approach thus:

The *contagion diffusion* [sic] of norms takes place through the diffusion of ideas between the EU and other global actors. An example of *pouvoir normatif* in action through contagion can be found in the ways in which ideas and means of regional integration have diffused between continents. Hence ideas such as the creation of a “common high authority,” “four freedoms” and even “single currency” are seen in other regions of the world as being *worthy of imitation* (Manners 2013, 315, emphasis added).

How “imitation” works, remains however to be elaborated in some more detail, so as to enable empirical research to establish whether or not, and if so to what effect, “contagion diffusion” happens. It appears that among many of the authors who refer—often critically—to Manners’s “normative power” concept, two perceptions dominate: The first refers to “Normative Power Europe” (NPE) as a concept that conceives the EU as appreciatively referred to from abroad, upon which ground it is considered as constitutive for a perception of the EU as a civilian as opposed to a military power (see for example Nicolaïdis and Whitman 2013; as well as Manners 2002). The second is Manners’s own further development of the concept towards the “normative power approach” (NPA), which, in his

more recent work, stresses the active role of the EU in the process of spreading European normative values and ideas (see also Sjørusen 2006). The strategic normative power approach is summarized by an understanding of “others,” such as for example ASEAN, the AU and Mercosur, who behave like copycats. As Manners writes,

Contagion diffusion relies on a number of mechanisms of imitation, emulation and mimicry/*mimétisme* including the persuasive attraction of ideas, as well as the prestige and status associated with regional integration organizations (Manners 2013, 315).

While NPA therefore does rely on a range of “mechanisms” facilitating the actual incorporation of normative ideas elsewhere, its power results from a vector that is directed *away* from Europe. Its value-added is thus mainly defined as a means towards the end of strategic power, keeping with E. H. Carr’s concept of power over opinion as “power-over” others (Carr 1939). In turn, the concept of blueprinting sheds light on the European normative order as having empowering potential.

Similarly to the strategic normative power approach, Alter holds that European institutions are “emulated” or “transplanted” legal institutional settings from the EU to other non-European social contexts, which is demonstrated by accounting for “copies” of the European Court of Justice (ECJ) around the globe (Alter et al. 2012). The main rationale underlying this kind of copying is the attraction of the possibility of the coexistence of supranational institutions and domestic institutions that is demonstrated by the EU’s example.⁶ As research about “the consequences of copying a European supranational judicial institution” (Alter et al. 2012, 632) reveals, the notion of coexisting institutions—rather than the meanings attached to them—does not reveal the related change of normative meanings attached to these institutions when transferred to a different social environment. For this meaning is expected to be enmeshed with local cultural repertoires and therefore it is expected to change as institutions become established and used by other actors elsewhere. This is confirmed by two findings: “that copying the ECJ is selective rather than wholesale, which suggests that adapting a court to local legal and political contexts may be necessary for successful transplantation,” and “that importing a supranational judicial institution does not necessarily copy the institution’s politics” (Alter et al. 2012, 633). The normative change of meaning-in-use that is triggered by copying institutions remains to be examined, for “the success of a transplant will depend on its ability to graft onto existing legal norms and practices” (Alter et al. 2012, 634). Even though conscious of and careful with distinguishing the process from colonialist strategies, the approach ultimately advances an interest in transplanting judicial institutions. Its focus on the “effectiveness of the imported legal order” (Alter et al. 2012, 635) puts its utilitarian motive on a par with Manners’s normative power approach.⁷

To summarize, normative order has been studied predominantly with a focus on changing institutional and/or constitutional settings *inside* the European Union,⁸ on the one hand, or alternatively, change initiated *by* the EU vis-à-vis others, so as to make others comply with the EU's normative settings. The latter is well demonstrated by enlargement literature's focus on accession candidates as well as normative foreign policy literature. Both have laid the grounds for the norm diffusion approach and the normative order approach, respectively. In turn, the proposed reflexive perspective on interactive contestations about norms and their impact on the global normative order approaches norm transfer from a different perspective: following the basic sociology of knowledge assumption that norms are socially constructed, on the one hand, and the normative theoretical claim that in principle, norms must always be contestable by their addressees, on the other, the reflexive constructivist literature questioned the normative potential of norm diffusion. Based on studies of "contested compliance," for example, with regard to the EU's eastern enlargement process (Lerch and Schweltnus 2006; Brosig 2012) it linked the way normative meaning-in-use was reenacted in this process with changes of the global normative order (Wiener 2004; Puetter and Wiener 2009).

4. BLUEPRINTING

Transplanting and blueprinting share an interest in developing a more concise understanding of how transferring (soft) institutional parts of normative from one polity to another functions. Quite like transplanting, blueprinting begins from noting a reference to the EU's institutional as well as constitutional settings. However, different from the functional or utilitarian approaches of transplanting or diffusing norms, blueprinting involves a multiplicity of different actor constellations and therefore equally multidirectional power vectors. Rather than diffusing ideas—however useful they may seem to the receiver—blueprinting is conceptualized as an interactive practice. It implies that the normative meaning generated through it depends on the context in which the normative meaning-in-use is enacted. The result is to be "read off" at the receiving end.

That is, by reversing direction, rather than assuming the EU has an interest in diffusing its legal order to others, it focuses on the interest in turning towards the EU for inspiration revealed in the utterances of others. Research on blueprinting is distinct because it is interested, first, in identifying the motivation of others to turn toward Europe, and second, in understanding how social practices that reenact "normative structures of meaning-in-use" (Milliken 1999, 132, Wiener 2009) change the latter through adaptation. Because normative structures of meaning are both

used in the process (i.e., applied, copied, implemented or transferred) and changed (i.e., bestowed with meaning derived from experience and expectation). The resulting normative structures of the respective normative orders elsewhere therefore reflect the interaction between the diverse repertoire of cultural experiences in the root contexts in which erstwhile EU norms are embedded, on the one hand, and that of the external context to which they have been incorporated, on the other. Both contexts consist of complex normative structures of meaning-in-use that derive their meanings through a web of binary oppositions that are brought to bear through the practice of enacting *within* their respective contexts and *across* these contexts.⁹

The interactive process of norm transfer is an essential component of the social construction of constitutional quality, which stands to be more explicitly addressed by both the normative power approach and the norm diffusion approach. Until this point, both approaches build on an outgoing direction of strategic norm diffusion. The reflexive approach to global constitutionalism turns that logic on its head by attributing an active part of the "interaction" to those looking into the EU's normative order from the outside. Accordingly, the outcome, that is, the normative structure of meaning-in-use, would have to be *read off* the practice at the other end outside Europe. It follows that while the interest in "imitating" aspects of the European normative order does confirm the appeal of that order to others, the practice of blueprinting reveals its empowering effect.

To assess the latter, more detailed empirical research is required; it cannot be predicted based on normative theory. To conduct this research, it is helpful to distinguish two types of interactions as part of the practice of blueprinting. The *first type* includes a range of other regional organizations, such as, for example, Mercosur, the African Union, the BRICS, ASEAN or NAFTA, that seek to establish organizational settings, which are similar to the EU. These regional actors compare their *institutional settings* to the European Union's institutions and then decide to copy the EU's formal institutions, such as, for example, political bodies—the parliament, the council, the commission or the courts. The *second type* refers to international organizations such as the World Trade Organization (WTO), the United Nations (UN) or NATO that have adopted some of the core constitutional principles and norms which are central to the EU's *constitutional setting* or vice versa. This perspective has generated research by scholars who compared the role *courts* play in the EU with other regional bodies (Alter 2009; Loughlin and Walker 2007; Isiksel 2010; De Búrca and Weiler 2012) or how the neo-Kantian *regulatory ideal* could be made to work in other organizational contexts (Habermas 2011; Eriksen and Fossum 2006; Fossum and Menéndez 2011).

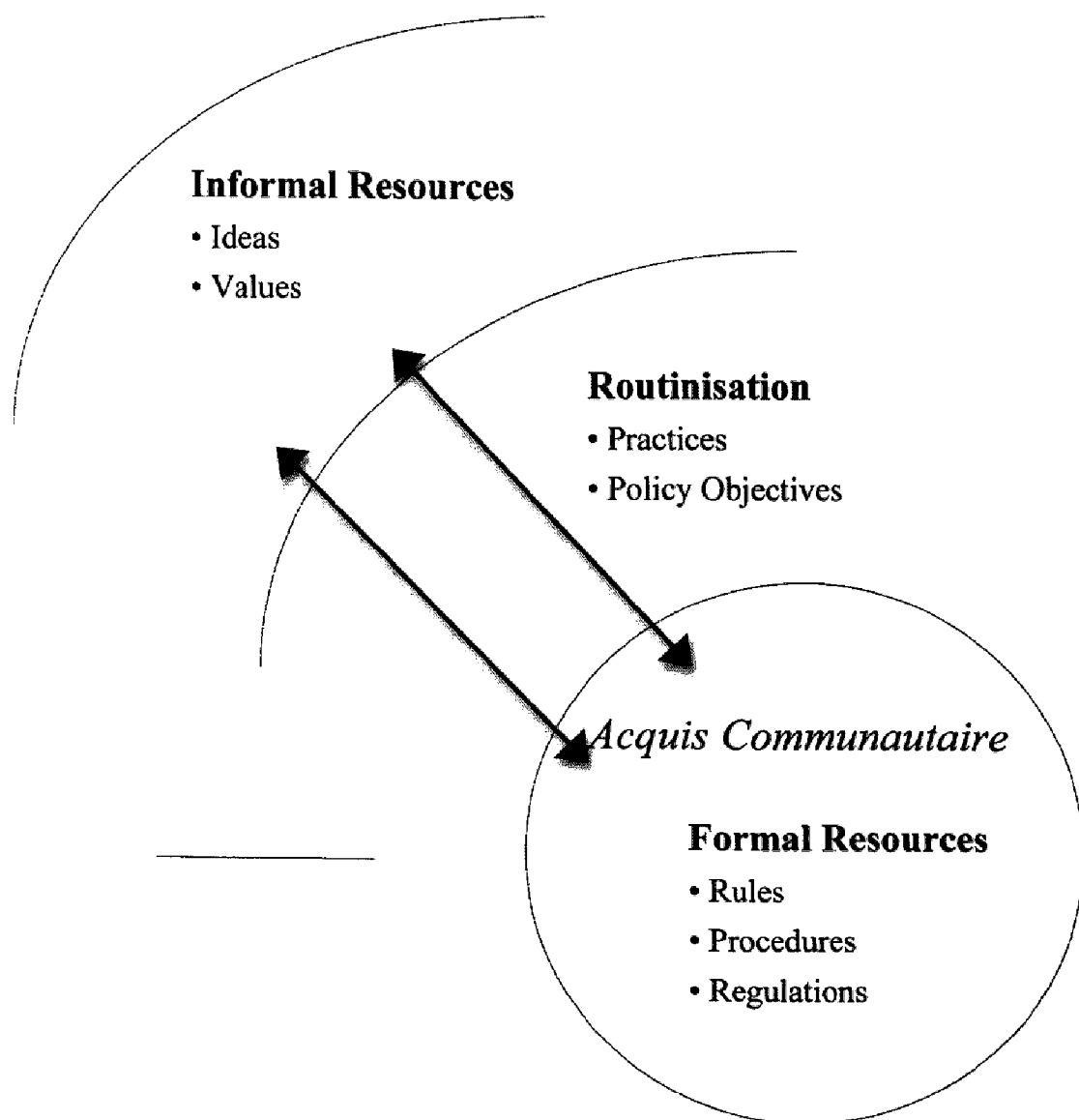


Figure 6.1. The Embedded *Acquis Communautaire* Source: Wiener, Antje. 1998. The Embedded *Acquis Communautaire*, *European Law Journal* 4/3 (1998): 302.

BLUEPRINTING "ON THE GROUND": SELECTED CASES

This second step of this chapter's argument consists of presenting the different types of blueprinting which have been distinguished above and which differ according to the purpose of blueprinting as either adding an institutional detail to an existing regional organization or incorporating a constitutional norm or principle into a constitutional project. A selection of empirical studies of regional organizations stand to address the research objective of blueprinting and the two questions of *first*, what was the motivation to turn to the European Union's normative order, and *second*, how did the transfer of parts of that order play out with regard to the local structures of normative meaning-in-use? Given the proposed

research project's interest in blueprinting constitutional settings and the emerging and/or changing constitutional quality for non-European contexts, in particular, processes of constitution building in postrevolutionary settings, the focus will be on constitutional norms. The assumption is that the attraction of the EU's constitutional setting stems from its unbound constitutionalism, that is, the development of constitutional quality that is not state-bound. The following exploratory choice of examples highlights the range of different locations from which an interest in the EU's normative order has been voiced with reference to regional organizations outside the EU. Given the programmatic interest in discussing the EU's unbound constitutionalism as a process of social construction, and the limited scope of this contribution, the following focuses on regional organizations only.

Regional Organizations: Towards Community Formation

While there are plenty of other regional organizations, the following represent recent examples of reference to the European normative order, just prior to, during and despite the situation of "crisis" in the EU.¹⁰ In all selected cases, a move towards creating a *community* rather than a mere treaty organization or conference is notable.

The ASEAN Economic Community (AEC) is to be founded in 2015. It builds on the ten former ASEAN member states in order to develop an economic community based on the principle of free movement, which represents the founding principle of the European Economic Community (EEC) as the precursor of the EU. Yet, while the prospect of a common market based on the principle of the free movement of workers, goods and capital is the principal first step, Najib Razak, the Malaysian prime minister, already envisions democracy and peace to follow. As he notes

Common markets require common rules and independent decision-making bodies, which contribute to the improvement of governance. Similarly to the European project's support for smaller member states' development towards mature democracies, the AEC will be able to strengthen institutions and support good governance in our region.¹¹

At the time of the EU's struggle with countering the financial crisis, the envisioned progressive integration from economic to political union and the promise of democracy and peace must be taken with a grain of salt: for while the perception of the sequence of integrative steps persists, the threat of the problems currently experienced in Europe invites careful reassessment. In that sense, the prospective AEC will be able to benefit from the European experience, making careful choices of which integrative steps to copy and how. This is where the concept of blueprinting allows for a reflexive approach to norm transfer.

The new Asian institution builds on its forerunner ASEAN—and “blueprints’ from them to begin with. As the AEC website states, “The ASEAN Leaders adopted the ASEAN Economic Blueprint at the 13th ASEAN Summit on 20 November 2007 in Singapore to serve as a coherent master plan guiding the establishment of the ASEAN Economic Community 2015.”¹² Yet, the decision in favour of further integration, which led to the founding of AEC, does build on the European experience and the promise of growth, wealth and democracy that it transports. As Razak notes

these may be familiar waters, but ASEAN will chart its own course. Properly designed, the AEC can build on the successes of the European project, whilst learning from its failings. My hope is that over the coming decades the people of South East Asia enjoy the democracy, prosperity and peace that greater economic co-operation can bring.

In 1992, the Southern African Development Community (SADC) was founded through the transformation of the Southern African Development Co-ordination Conference (SADCC) as its forerunner.¹³ According to Schöman, regional organization in South Africa was politically motivated (Schöman, no year).¹⁴ “The SADCC or the conference, was formed with four principal objectives, namely: (1) to reduce Member States dependence, particularly, but not only, on apartheid South Africa; (2) to implement programmes and projects with national and regional impact; (3) to mobilise Member States’ resources, in the quest for collective self-reliance; and (4) to secure international understanding and support” (ibid.). SADC and its member States are expected to act according to the following principles:

- sovereign equality of all member states;
- solidarity, peace and security;
- human rights, democracy and the rule of law;
- equity, balance and mutual benefit; and
- peaceful settlement of disputes.

Notably, a number of “unbound” constitutional practices of the EU such as the institution of “summit” meetings (Peterson 2001), as well as the introduction of the practice of sharing governance responsibility based on a “troika” (that is, applying a model that builds on collective experience), demonstrate a notable similarity with EU experience. Thus, the principal institutions of SADC include a summit—“made up of Heads of State and/or Government, the Summit is the ultimate policy-making institution of SADC,”¹⁵ and the “troika—the extra-ordinary Summit decided to formalise the practice of a Troika system consisting of the chair, incoming chair and the outgoing chair of SADC.”¹⁶

The more recent literature on European and global constitutionalism sustains this link between contested fundamental norms, a changing Eu-

ropean constitutional “architecture” and change of the global normative order based on the interplay between European courts, the UN Security Council and individual litigants (see Isiksel 2010). While still an emerging academic field with no real policy area to relate to, global constitutionalism literature has been rapidly growing. In the process, it has generated a multiplicity of approaches, which can be roughly summarized as three—normative, functionalist and pluralist—schools (for overviews, see De Búrca and Weiler 2012, Krisch 2010, Armington and Peters 2009, Schwöbel 2011, Wiener 2012a). Much of this literature has emerged from the background of the constitutionalization of international organizations, especially the World Trade Organization (WTO), as well as the increasing involvement of regional and specialized courts in transnational litigation (De Búrca 2009). The transfer of constitutional practices, rules and principles has been dubbed “global constitutionalization.” However, unlike the more recent international organizational centre of global constitutionalization, a different perspective on constitutionalization within the global realm has come to the fore through political revolutions and social protest. Thus, we observe social movements and a range of political interest groups to establish constitutional ground rules in postrevolutionary contexts around the globe. The latter groups struggle with identifying appropriate constitutional ground rules that would allow for sustainable democratic practices. While these contexts are invariably reflecting the changing normative global order, the struggle of these groups has yet to find recognition in the emerging field of global constitutionalism.

CONCLUSION: REFLEXIVE GLOBAL CONSTITUTIONALISM

So, what should global constitutionalism offer as a theoretical framework and policy guidance, if the observation that “global constitutionalism is the answer” were to hold? To address this question, this chapter proposes taking a practice-oriented perspective, which considers the social construction of constitutional quality as central. This approach is positioned in critical reflection of Europe-focused policies of norm diffusion (Schimmelfennig and Sedelmeier 2005), normative contagion (Manners 2002, 2006; Sjursen 2007) or proposals of uploading European federalism to the global “level” (Habermas 2011, Cohen 2012). While keeping with the leading constitutional principles of democracy, human rights and the rule of law that are inscribed in the global normative order through countless treaties, conventions and constitutions around the globe, the project seeks to engage the context of emergence, in which normative structures of meaning-in-use are reenacted by diverse actors, as its starting point. From this practice-based empirical focus, it seeks to establish the meanings that are attached to the leading fundamental norms and that differ according to the context in which they are generated as the

"cultural repertoires" generated in different and distinct ways by each social group.

In doing so, reflexive global constitutionalism works with two indicators of constitutional quality: first, the *pouvoir constituant* as the social group to which a constitutional script belongs and by which the norms, rules, regulations or principles manifested by it are recognized; and second, the shared normative roots (the cultural repertoire) that exist prior to this script and which establish its crucial external authority. While global constitutionalization literature focuses predominantly on international organizations and, therefore, on the question of whether and when a social norm is *legal*, the proposed project asks whether and when we can speak of a *constitutional* norm. This sheds light on the legitimating reference to constituent power.

RENEGOTIATING AND REENACTING NORMATIVE ORDER

What does European constitutional quality offer despite the ongoing and lingering crisis talk? This chapter argued that as a socially constructed normative order, the EU's constitutional quality is quite robust, and more importantly, as a normative order that is unbound from the state, it offers a valuable reference frame for today's most pressing questions about political reorientation in postconflict and/or postrevolutionary contexts. The challenge of regional integration worldwide and the leading question of what might be socially recognized and culturally validated "ground rules" that could function as a common reference for political parties that stand to be integrated in postrevolutionary (or postcrisis) contexts, lies in *agreeing* on basic rules of procedure. This agreement should not be underestimated, for it must live up to functional conditions such as being practical and readily understandable to the diverse set of parties involved.

The lead question is therefore: What are common meso level principles that set the ground rules for political cooperation? Regional integration takes place for purposes that lead beyond the logic of cooperation in international regimes (international relations theories) as well as that of constitutionalization in the context of national states (comparative government/constitutional theory). It therefore requires new institutional and constitutional settings. While the formal setting may be exported, the way norms "travel" can never be predicted (see Wiener 2008). Subsequently, constitutional quality will always depend on what the respective constituent power makes of it. That is, the interaction with the institutional and constitutional settings, even if these are blueprinted from elsewhere, will depend on the way they are enacted. In the process of this interaction, the normative structure of meaning-in-use will be reconstructed. The more interaction between regions as well as between the

various constituent powers occurs on a global scale, the more change in normative global order can be expected. It follows that the normative global order's social recognition and political legitimacy is likely to rise with interactions between plural constitutional orders worldwide.

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NOTES

1. This chapter has benefited from discussions within the framework of the *Constitutionalism Unbound* project at the University of Hamburg (<http://www.wiso.uni-hamburg.de/professuren/global-governance/forschung/fertiggestellte-projekte/constitutionalism-unbound/>, accessed 4 April 2014), and especially conversations with Ezzedine Choukri-Fishere following his lecture on "The Arab Spring—Egypt's New

Majority" on 19 June 2013 (http://www.wiso.uni-hamburg.de/professuren/global-governance/forschung/global-constitutionalism/single-view/meldung/bericht-zu-e-choukri-fisher-vortrag-arab-spring-egypts-new-majority/?no_cache=1, accessed 4 April 2014). Earlier versions of the chapter have been presented. I thank the participants for their comments. For research assistance at the University of Hamburg, I am thankful to Anke Obendiek. The chapter is exclusively the responsibility of the author.

2. We use the term "unbound constitutionalization" to indicate processes of constitutionalization that are not state-bound (Wiener et al. 2012a).

3. The German weekly *DIE ZEIT* used the heading "Military Coup" while reporting on what the Egyptians call their "second revolution" in its online version on 4 July 2013, <http://www.zeit.de/politik/ausland/2013-07/aegypten-militaer-putsch> (accessed 4 April 2014).

4. Consider manifold comments, including former diplomat, political science professor and novelist Ezzedine Choukri-Fisher's comments in the *Financial Times*, 5 July 2013 and 20 July 2013; see also *DIE ZEIT* 36, 13, 29 August 2013.

5. The collaborative research project *Constitutionalism Unbound: Developing Triangulation for International Relations* was funded by the Science Foundation of the Hamburg Senate and conducted in collaboration with researchers at various German universities from 2011 to 2013.

6. As Alter notes, "Europe also showed the world that robust international legal oversight can co-exist with important national values such as democracy, dealing with security threats, and respecting heterogeneous national values."

7. This is particularly emphasized when noting that "The legal transplants literature thus hones in on a key challenge that derailed Haas' neofunctionalist theory: how to create local demand for transplanted institutions and laws" (Alter et al. 2012, 639).

8. See citizenship and constitutionalism literatures on integration respectively, Weiler 1999; Shaw 1999; Bellamy and Castiglione 2003; Weiler and Wind 2003; Bellamy 2007.

9. For work on cross-referencing, cross-fertilization and "translation" in the process of international law, see for example Slaughter 2003; Walker 2003; as well as Wiener et al. 2012b.

10. Among them, the Mercosur, founded in 1994 by four countries (Uruguay, Argentina, Brazil and Paraguay) by the Treaty of Asuncion—the main goal of this union was to enhance economic progress and to improve social justice (see Tratado 1994, 1)—as well as the Andean Tribunal of Justice founded in 1984. Its design was "explicitly" modelled "on the ECJ" (Alter et al. 2012, 631).

11. See "Europe as an Example for Asia". *DIE ZEIT*, 5 November 2012, 258.

12. See the AEC's website: <http://www.asean.org/communities/asean-economic-community> (accessed 4 April 2014).

13. The SADCC was established in April 1980 by governments of the nine southern African countries of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

14. See http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar_fromsadccctosadc.pdf (accessed 4 April 2014).

15. The summit is responsible for the overall policy direction and control of functions of the Community. It usually meets once a year around August/September in a member state, at which meeting a new chairperson and deputy are elected. Under the new structure, it is recommended that summit meets twice a year. The current chairperson of SADC is President Sam Nujoma of Namibia and the deputy chairperson is President Bakili Muluzi of Malawi. More functions of the summit are enumerated under article 10 of the SADC Treaty.

16. This system was established in August 1999. It states that "other member States may be co-opted into the Troika as and when necessary. This system has enabled the Organisation to execute tasks and implement decisions expeditiously as well as provide policy direction to SADC Institutions in between regular SADC meetings. The

Troika system will operate at the level of the Summit, the Organ on Politics, Defence and Security, Council and Standing Committee of Senior Officials" (article 10 of the SADC Treaty).